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Balancing Interests under Bilateral Investment Treaties of Ethiopia: Focusing on State Regulatory Rights

Desalegn Deresso Disassa[♣]

Abstract

Well-regulated foreign investment is an engine of economic growth. Hence, despite its negligible impact, investment treaties have been used as a tool for foreign investment attraction and protection. This resulted in one-sided regimes that protect investors at the expense of state legitimate regulatory rights. Following this, balancing the regulatory power of the state and the rights of investors is the central issue in the recent development of investment treaties. In Ethiopia, the impact of BITs on domestic regulatory space is under-researched. In this context, this article qualitatively assesses the status of Ethiopian BITs in balancing host state regulatory rights and investor rights. As the finding has revealed, despite the new global move toward a balanced approach, almost all BITs of Ethiopia are devoid of balancing the interest of states and investors because of its broadly crafted standard of protections, and definition of investment and investor as well as no or limited recognition for regulatory rights of the state. This has a huge practical impact on regulatory space and public interest thereof. Therefore, the author has called for reconsideration of investment treaties to widen the regulatory space of the state and to protect and promote public interests.

Keywords: Bilateral Investment Treaties, Investor, Foreign Investment, Ethiopaia

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1. Introduction

Nowadays, all countries seek foreign investment to advance their development process.[1] Foreign investment is the lifeblood of economic growth by creating a flow of capital, technology, skill, and employment.[2]In this era of economic globalization, countries seek foreign investment to advance their development process and hence compete over its attraction.[3]In deciding where to invest, among others, foreign investors consider the regulatory environment in the potential host state. Following this, to attract foreign investment, the countries try to create a protective legal environment.[4]Domestic investment laws reform and investment treaties conclusion are part of foreign investments attraction campaign through the creation of enabling and protective environments. In this sense, Bilateral Investment Treaties (*hereafter* BITs) are initially developed as a device for foreign investment protection and attraction with no or little consideration for the interest of public represented government regulatory power.[5]

The capital-exporting countries have also a strong desire to protect their investment abroad.[6]In this context, BITs give a broader set of rights without reciprocal obligations.[7]On the contrary, it subjects states to an array of obligations unaccompanied by rights.[8]In this sense, one-sidedness or investor bias is the main defining feature of most BITs, specifically the old generation ones. Such treaties limit the regulatory power of the state and place matters of national interest at risk.[9]Prevailing arbitral tribunal practices favor investors

[1]United Nation Conference on Trade and Development, *Bilateral Investment Treaties*,(UNCTAD/ITE/IIA/2, 2000)
[2]LyubaZarsky, 'Introduction: Balancing Rights and Rewards in Investment Rules' in LyubaZarsky (eds) *International Investment For Sustainable Development Balancing Rights and Rewards*,1 (2005)
[3]United Nation Conference on Trade and Development, *Bilateral Investment Treaties*, (UNCTAD/ITE/IIA/2, 2000)
[4]Mmiselo Freedom Qumba, 'Balancing the Protection of Foreign Direct Investment and the Right to Regulate For Public Benefit in South Africa'
[5]T Broude and Y Haftel, *Report on the Global Investment Regime and State Regulatory Space: Assessing the Governance Role of the European Union and Its Member States*, (2020), 8
[6]K Singh and B Ilge, 'Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices', 2
[7]Qumba (n 4) 2
[8] J Webb Yackee, "*Investment Treaties and Investor Corruption: An Emerging Defence for Host States* ?" (2012) 52 Virginia Journal of International Law 723; MavludaSattorova, *The Impact of Investment Treaty Law on Host States Enabling Good Governance?*, (Hart Publishing, 2018), 6
[9]S Hindelang and M Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, (2022) 216

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whereas bias against the state's regulatory rights aggravates the problem. In recent years, concerns have been rising over the asymmetric nature of BITs and arbitral tribunal bias. Following this, regaining the regulatory space of the state is at the nucleus of BITs negotiation.[10]Many countries with strong bargaining power have taken a big step to recover their regulatory rights.[11]

Up to date, Ethiopia has signed over 35 BITs (of which 21 are effective) with countries at different levels of development.[12]The impact of BITs on state regulatory space concerning particular aspects like dispute settlement and environment were the subject of scholars' writings.[13] Despite this, none of them examined the issue of balancing interests under bilateral investment treaties in a holistic term using the lenses of new development in the field. In this context, this paper aims to holistically explore the status of Ethiopian BITs in balancing host state regulatory rights and investor rights, and recommend the possible way forward to widen the regulatory power of the state and advance public interest without prejudice to the legitimate interest of the investor. In this sense, it is not the aim of this article to deeply securitize every issue as each title account for an independent article. To attain the objective, a qualitative documentary analysis approach was utilized to examine relevant BITs, case laws, and literature concerning identified matters which have an impact on

[10]Joerg Weber, *Balancing Private and Public Interests in International Investment IAs*, (2007), 2

[11] B Kingsbury and Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights With State Regulatory Actions in the Public Interest-The Concept of Proportionality*, (Oxford University Press, 2010) 76&77

[12]UNCTAD International Investment Agreements Navigator Ethiopia, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> (2022)

[13]Ayalew Abate, *Ethiopia's Bilateral Investment Treaties and Environmental Protection; The Need of Re-Negotiation for Corporate Responsibility*, De Gruyter, (2021), available at, https://doi.org/10.1515/gj-2020-0067 (last accessed on July 7, 2022);Martha B Hailu and TilahunE Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration*,Mizan Law Review, Vol. 8, No.1(2015), https://www.ajol.info/index.php/mlr/article/view/111737 , (last accessed on July 7, 2022);Wakgari KDjigsa, *The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to the Bottom*, Haramaya Law Review, Vol 6 No 1 (2017), available at, https://www.haramayajournals.org/index.php/hulr/article/view/615, (last accessed on July 7, 2022)

balancing divergent interests. The analysis was made with the assumption that Ethiopia is a capital-importing country interested to use foreign investment as a tool for sustainable development.

This article has four main sections. The first section is an introductory one that discusses the conceptual underpinning and historical development of state regulatory space under bilateral investment treaties. The second section examines the state of Ethiopian BITs in balancing the interest of investors and the host state. To this end, it examines the impact of the definition of investor and investment, the standard of protection, and other matters under BITs on state regulatory space. The third section discusses the new development under-investment regime in balancing the interests of investors and the state to show the possible way forward for the policy maker. The final section provides a concluding remark on the issue under scrutiny.

2. Balancing Interests in Historical Context

Generally, the degree of the state's regulatory space over foreign investment has taken different shapes through the course of different historical periods: the pre-colonial era, the colonial era, the post-colonial era, and, the new era.[14]During the pre-colonial era, the host state has full regulatory autonomy in regulating men and thing including foreign investment within its territory. As a result, the domestic host state regulatory power is not constrained except by concession and diplomatic pressure. During the colonial period, the host state lacks regulatory autonomy over foreign investment within its boundaries as it is deemed as the property of the home state i.e., colonizing state, and falls within its jurisdiction.[15] The protection of foreign investment was subject to colonial power gunboat diplomacy, and not investment agreements.[16]The protection of foreign investment was not a concern in BITs; rather the principal source of norms for the protection of foreign investment was customary international law, which obligated host states to treat investment per an international

[14] Kenneth J. Vandevelde, 'ABrief History of International Investment Agreements', University of California, Davis, Vol. 12 (2005), 157

[15] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 19&20

[16] Jeffry A. Frieden, 'International investment and colonial control: a new interpretation', International Organization Vol. 48, No. 4 (Autumn, 1994),559-593, https://www.jstor.org/stable/2706896

minimum standard.[17] Customary international law, however, offered an inadequate mechanism for the protection of foreign investment because of confusion over its content, opposition from proponents of national standards or the Calvo Doctrine, and a lack of strong enforcement frameworks.[18]

During the post-colonial period, the need for the protection of foreign investments under international law gets first attention following a massive nationalization project undertaken by a newly independent state as part of regaining economic sovereignty and/or prevailing state ideology.[19]The postcolonial need for legal tools for protection resulted in a proliferation of over 6000 investment treaties.[20]These BITs protect foreign investments against expropriation, discrimination, and unfair treatment.[21] In doing so, it restricts the regulatory power of the state over foreign investment through a standard of protection and rights it avails for foreign investors.[22]Asymmetric nature is the defining feature of old generation BITs signed following the postcolonial nationalization project.[23]BITs impose obligations on

[17] Jeffry A. Frieden, 'International investment and colonial control: a new interpretation', International Organization Vol. 48, No. 4 (Autumn, 1994),559-593, https://www.jstor.org/stable/2706896

[18]James Crawford, 'Brownlie's Principles of Public International Law' (9th edn), (2019)

[19] Elizabeth Whitsitt and Nigel Bankes, ' Evolution of International Investment Law and Its Application to the Energy Sector', Alberta Law Review, (2013), 208 and 209; David R. Adair, Investors' Rights: The Evolutionary Process of Investment Treaties, 6 Tulsa J. Comp. & Int'l L. 195 (1998); Sornarajah, (n 15), 19&20; Francisco O. Vicuña, 'Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', 5 Int'l L.F. D. Int'l 188, 3 (2003);MeskeremMenamo, "Impact of Foreign Direct Investment on Economic growth of Ethiopia-A Time Series Empirical Analysis 1974-2011*"*, 6&7 (2014).

[20]Sornarajah, (n 15), 20&21; ViacheslavSemenko, "Duties of Investors in International Investment Law: Analysis of Model BITs of the Latest Generation", 7 (2018); International Investment Agreements Navigator Portal, Available at, https://investmentpolicy.unctad.org/international-investment-agreements (last accessed on May 2022)

[21]Semenko, (n 20), 7.

[22] Howard Mann, The Right of States to Regulate and International Investment Law 2 (2002) (n 23); David Gaukrodger, *The Balance Between Investor Protection and the Right to Regulate in Investment Treaties*: *A Scoping Paper*, (OECD Working Papers on Int'l Inv, 2017); Sornarajah, (n 13), 22.

[23] ibid

host states and limit their regulatory space, without matching investors' rights with obligations.[24]This goes against the grand principle of inseparability of rights and duties.

The state's right to regulate was not a point of focus during the early period of foreign investment law development.[25]The asymmetric nature of BITs is associated with unequal positions of capital-exporting and capital-importing countries. Besides, the capital importing countries were highly interested in attracting foreign investment through BITs that provide a higher level of protection against the risk of nationalization, discrimination, and expropriation. For many years, there was no strong movement to incorporate the obligations of investors and the regulatory rights of the host state under the BITs.[26]The investors' bias under the BITs is aggravated by arbitral practices that have imposed great restrictions on regulatory powers of the state by broader interpretation of investor rights and state duties, and narrow interpretation of investor duties and state rights.[27] The one-sidedness of BITs has caused a misconception that international investment law is a system designed only for the protection of foreign investors without concern for the public interest represented by the state. Besides, it creates the misperception that the regulatory power of the host state is an exception, while the right of an investor to be protected is a principle. The need to comply with the domestic laws of the host state was recognized long ago as the sovereign power of the state but the overprotection of investors under BITs ultimately shadowed the sovereign rights of host states to regulate.[28]

The race to protect investors at the expense of state regulatory power has created an imbalance.[29]The imbalance in the regime convinced me to rename international investment law as *international investor law* or *international foreign property law*. The negative impact of BITs on public interest is worsened by a vague standard of protection and the broader interpretation adopted by an arbitral tribunal. The arbitral tribunals usually give too little weight to the justification of regulatory measures undertaken by the state to protect the public

[24] ibid
[25]Semenko, (n 20), 7
[26] ibid
[27]Kingsbury and Schill, (n 11), 76
[28]Semenko (n 20), 7
[29]Semenko (n 20), 7

interest.[30]Consequently, the power of host states to take legitimate regulatory measures was questioned.[31]It was at this moment that the issue of regaining domestic regulatory space was triggered and resulted in a new era in the development of BITs. Since then, the concern regarding the host state's right to regulate has been increasing and stakeholders are rethinking the future development of the law of foreign investment.[32]Among others, states are terminating BITs and replacing them with one i.e., new generation BITs that widen domestic regulatory space. Scholars are also working on developing concepts like proportionality as a tool for balancing the interests of investors and the host state during the arbitration.

3. Balancing Host State Regulatory Power and Investor's Interests

The law of foreign investment including arbitral tribunal decisions is often criticized for investor bias and neglecting state or public interest or limiting state regulatory space.[33]The asymmetric investment treaties accompanied by biased interpretation of arbitral tribunals not only limit the regulatory right of the host state but also put the public interest at risk. With this assumption, the impacts of BITs on the regulatory space of Ethiopia during different stages of foreign investment are examined as follows.

3.1. Entry Stage

The state has the unlimited sovereign power to regulate the entry of foreign investment.[34]This may conflict liberalist idea of a free flow of foreign investment.[35] The entry of any foreign investment can be excluded and subjected to conditions by a state but a sovereign entity may surrender such right by treaty. All BITs left untouched the sovereign

[30]Kingsbury and Schill, (n 11), 76
[31]Semenko (n 20), 8
[32] Singh and Ilge, (n 6), 10-15
[33] Jürgen Kurtz, *Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex, and Vital Search for State Purpose*, Yearbook on International Investment Law and Policy (2015), 251
[34]Sornarajah, (n 15), 88&89
[35]Sornarajah, (n 15), 90

power of Ethiopia to regulate the entry of foreign investment under its domestic law.[36] In doing so, it gives priority to state sovereign regulatory rights. Some of the BITs have even made clear that the standard of treatment and protection are applicable only after admission. Neither the investor nor the home state raises compensation against the host state based on violation standards of treatment concerning pre-admission matters.

The areas of investment to be open for foreign investors and incentives granted to foreign investors are left to domestic investment law.[37]Accordingly, foreign investors are entitled to engage only in the area open to them. For example, foreign investors (except of Ethiopian origin) may not claim to engage in insurance and banking business.[38]Such prohibition neither amounts to discrimination nor violation of fair and equitable treatment. In this context, it is possible to say the entry stage is a stage of state regulatory autonomy. Investment treaties recognize the absolute sovereignty of the state at the admission stage as there is no investment to be protected at this stage. The prevailing stand of BITs is clear and appreciated, but this does not guarantee freedom of the host state from diplomatic and other pressures of the home state and international economic organizations to open the door for foreign investors in the era of economic globalization where power is highly decentralized. The impact of such pressures on the regulatory power of the host state during the entry stage requires further study.

Globally, in recent years, a new trend has been emerging as some BITsgrant the right to entry to the nationals of contracting states.[39]Pre-establishment rights can be incorporated in

[36] Ethiopia-Brazil BIT,Art.3 (4)&4(1); Ethiopia-Qatar BIT,Art.3(1); Ethiopia-United Arab Emirate BIT, Art. 2(1); Ethiopia-United Kingdom BIT, Art.2(1); Ethiopia-Spain BIT, Art.2(1); Ethiopia-South Africa BIT, Art.2(1), Ethiopia-Egypt BIT, Art.2(1); Ethiopia-Germany BIT, Art.2(1); Ethiopia-Sweden BIT, Art.2(1); Ethiopia-Austria BIT, Art.2(1), Ethiopia-Libya BIT, Art.2(1); Ethiopia- Israel BIT, Art.2(1); Ethiopia-Iran BIT, Art.3(1); Ethiopia-France BIT, Art.2; Ethiopia-Netherlands BIT, Art.2; and Ethiopia-Algeria BIT, Art.3(1)

[37]Investment Proclamation No.1180/2020, Art 6

[38]Banking (Amendment) Proclamation No 1159/2019; Insurance Business (Amendment) Proclamation No.1163/2019

[39] Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, art. II.1, Jul. 2, 1997; Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, art. II.3, Apr. 26, 1995; North American Free Trade Agreement between the United States, Canada and Mexico, Dec. 17, 1992, art. 1139; Agreement between the United States of America, the United Mexican States, and Canada, art. 14.4, Nov. 30, 2018;Association Agreement between the European Union

BITs in various ways including an express embodiment in the national treatment clause or inferred from the definitions of 'investor' and 'investment'.[40]The best example is North American Free Trade Agreement (NAFTA) and European Union (EU) BITs.[41]The pre-establishment rights limit the regulatory power of the host state.[42]Some treaties guarantee against expropriation without compensation and guarantee the settlement of disputes by a neutral tribunal at the entry-level.[43]There is also a scenario in which the state may unilaterally guarantee such treatments by its domestic law. However, as a matter of strict law, such a unilateral guarantee has no international effect unless backed up by a treaty commitment.[44] Moreover, states have the right to change such guarantees and requirements at any time unless prohibited by treaties.

3.2. Operation Stage

The unqualified regulatory right to exclude the alien before entry becomes somewhat modified after entry. At this stage, there is an investment that is worth protecting, unlike the entry stage. The definition of investment and investor, non-discrimination, fair and equitable treatment, expropriation, and dispute settlement clauses that are articulated or crafted under treaties have an impact on the regulatory space of the host state and the interests of investors.

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and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, art.79, June 27, 2014; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, art. 205, June 27, 2014; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, art. 88, June 27, 2014; Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union (and its member states) of the other part, Oct. 30, 2016; Agreement between the European Union and Japan for an Economic Partnership, July 17, 2018

[40]VrindaVinayak, The Pre-Establishment National Treatment Obligation: How Common Is It?, (2019)

[41]North American Free Trade Agreement between the United States, Canada and Mexico;Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, the Republic of Moldova, and Ukraine on the other part; Comprehensive Economic and Trade Agreement between Canada, and the European Union (and its member states); Agreement between the European Union and Japan for an Economic Partnership

[42]Sornarajah, (n 15), 88

[43]Sornarajah, (n 15), 99-115

[44]Sornarajah, (n 15), 99&101

Based on this assumption, the manner those clauses are crafted under BITs of Ethiopia and their impact on the regulatory space during the operation stage is briefly and critically examined as follows.

3.2.1. Definition of Investment and Investor

The definition of investor and investment are keys in determining the scope of rights and obligations under BITs.[45]Usually, the nationality of investors who are natural persons is based exclusively on the law of the state of claimed nationality. However, BITs of Ethiopia signed with Brazil, Israel, and Sudan introduced permanent residence as an alternative criterion in defining investors.[46]The issues concerning the nationality of investors who are legal persons are more complicated. BITs may adopt the test of incorporation, seat, domicile, main or effective business, and/or control to determine nationality.[47]Under BIT signed by Ethiopia with Sweden and Netherlands, the investor who is a legal person is ambiguously and broadly defined to include "any legal person" without any connecting factors. Such broader meaning may affect the host state when the claim is made concerning an investment made person who was neither incorporated nor controlled by the home state nor made a substantial investment within the host state.

Investment agreements usually define investment broadly to refer to every kind of asset followed by an illustrative list of assets. This is good from the evolving nature of the investment but it has a huge negative impact on the interest of the host state. Under Ethiopia BITs, investment is defined as broadly as possible to cover *any or every asset, property, interest, or right of the investor* in an illustrative fashion.[48]Investment is every asset of an

[45]Catherine Yannaca 'Definition of Investor and Investment in International Investment Agreements' in OECD
International Investment Law: Understanding Concepts and Tracking Innovations, 7&8 (2008)

[46] Brazil-Ethiopia Investment Agreement, Art.1 (1.4); Ethiopia -South Africa Investment Agreement, AdArt.6; ; -Israel Investment Agreement, Art.1 (5)

[47] Ethiopia-Brazil BIT, Art.1.4; Ethiopia-Qatar BIT,Art.1(5); Ethiopia-United Arab Emirate BIT,Art.1;Ethiopia-South Africa BIT, Art.(1), Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.(1) Ethiopia-Sweden BIT,Art.1(2), Ethiopia-Austria BIT,Art.1(1), Ethiopia-Germany BIT, Art.(1), Ethiopia-France BIT,Art.1(3), and Ethiopia-Netherlands BIT,Art.1(b))

[48]Ethiopia-Brazil BIT, Art.1.3; Ethiopia-Qatar BIT, Art.1 (1); Ethiopia-United Arab Emirate BIT, Art.1; Ethiopia-UK BIT, Art.1 (1); Ethiopia-Spain, Art. 1(1); Ethiopia-South Africa BIT, Art.(1); Ethiopia-India BIT, Art.1; Ethiopia-Belgian-Luxembourg Economic Union, Art.1(2); Ethiopia-Egypt BIT, Art.1; Ethiopia-Finland BIT, Art.1(1); Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.(1) Ethiopia-Sweden BIT, Art.1(1), Ethiopia-Austria BIT, Art.1(2); Ethiopia-Libya BIT,Art.1(1);

investor whether it is invested in an enterprise or not. For instance, the BIT signed between Ethiopia and the United Kingdom defines investment as *every kind of asset and in particular, though not exclusively*….Such a broader definition of an investment may subject the host state to an obligation to accord privileges, concessions, and protections even in a case the assets of the investor contribute nothing to its economy. As defined under Art.1.3 of Brazil-Ethiopia BIT, the investment includes even *concessions, licenses, or authorizations granted by the host state (law or contract) to the foreign investor*. Concessions, licenses, and authorizations are the result of state regulatory action and reflection of state autonomy. In this sense, revoking concessions, licenses, or authorizations granted to the investor may constitute a legitimate ground for claiming compensation against the host state before an international tribunal and impose fear on the state. The inclusion of concessions, licenses, or authorizations within the meaning of investment severely limits the regulatory power of Ethiopia. The investor spends no capital except efforts, limited transaction costs, and times to acquire licenses. The states also benefit nothing from granting concessions or licenses except a negligible amount of charges. Despite this, the revocation of license, concession, or authorization may trigger a claim based on expropriation, which is unfair.

The other important issue here is the absence or presence of "benefit denial clauses" and the manner it is crafted under the Ethiopian BITs. Since its first appearance, denial of benefits clauses have proliferated became more sophisticated, and evolved significantly.[49] Initially, denials of the denial of benefit of clauses in investment treaties were designed to empower the Host State to limit treaty protection to genuine investors of the other Party. Denial-of-benefits clauses are generally designed to exclude from treaty protections nationals of third

Ethiopia-Germany BIT, Art.1(1); Ethiopia-Israel BIT-Art.1(1); Ethiopia-Iran BIT, Art.1(1); Ethiopia-France BIT,Art.1(1); Ethiopia-Netherlands BIT, Art.1(a)); Ethiopia-Algeria BIT, Art.1(1)

[49]Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, ICSID Review - Foreign Investment Law Journal, Volume 30, Issue 1, Winter 2015, Pages 78–97, https://doi.org/10.1093/icsidreview/siu030; Mistelis, Loukas A. and Baltag, Crina, '*Denial of Benefits' Clause in Investment Treaty Arbitratio*n (December 13, 2018). Queen Mary School of Law Legal Studies Research Paper No. 293/2018, Available at SSRN: https://ssrn.com/abstract=3300618

States which, through mailbox or shell companies, seek to benefit from provisions that the State parties to the treaty did not intend to grant them. In doing so, it neutralizes the aggressive treaty shopping or abuse of rights by the investors. In this sense, it permits the Host State to exclude from treaty protection companies that formally have the nationality of the other Party, but are controlled or owned by nationals of a third State.

Traditionally, despite the controversies over the notions of "control" and "ownership", only the absence of ownership and control serve as a ground for exclusion of investors from treaty protection. In recent years, investment treaties have been extending the scope of denial of benefits clauses to cover the situations of corporate restructuring to access treaty protection. Some investment treaties require control or ownership by nationals of third States in cumulative with other situations such as (a) absence of diplomatic relations with the third State,[50] (b) absence of normal economic relations with the third State, (c) existence of unilateral and collective actions against the investor or third state because of serious deterioration of the political situation, (d) existence of measures that prohibit transactions with the enterprise, or would be circumvented in case of application of the treaty to such enterprise (e) enterprises lack substantial business in the host state, or (d) existence of measures against the third state related to the maintenance of peace and security.[51]Treaty like Cambodian model BIT further extended the denial benefit clause.[52]

Accordingly, the host state may invoke the clause when the enterprise is controlled or owned by nationals of a third State and shareholders submit a treaty claim without the written authorization of the enterprise and this is designed to prevent parallel proceedings. In addition, the host state is entitled to deprive the investor of treaty protection where the investor has (a) committed serious human rights violations, (b) sponsored internationally-listed terrorist organizations or persons sentenced for serious violations of human rights (c)

[50] Agreement Between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment, available at, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5849/download, last accessed on July 21, 2022)

[51]TarcisoGazzini, Francesco Seatzu, *The Strange Case of Denial of Benefits Clauses: The Italian and Colombian Model BITs,* (2021)

[52] Colombian Model Bilateral Investment Treaty, available at, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download, last accessed on July 21, 2022

caused serious environmental damage, (d) committed serious tax fraud, (e) committed corruption, (f) caused grave violations of labour laws, or (g) engaged in money laundering. Such extension makes the denial of benefits clause makes it more of a political and vague measure which opens the clause for unnecessary litigation and abuse.

The practices of the tribunal substantiate the same. A review of recent investment cases reveals that tribunals have reached significantly diverging decisions as to when, how, and with what effect these clauses can and should be invoked.[53]The tribunals have not been entirely coherent in dealing with denial of benefits clauses, often due to their different or vague wording. Tribunals have treated denial of benefits clauses as a matter of jurisdiction or merits.[54] There is also divergence over whether the clause can be exercised at any time or only before arbitral proceedings.[55] Generally, the presence or absence, the wording or crafting, and as well as the interpretation of denial benefit clauses have a huge impact on balancing the interest of the host state and investor in general and the regulatory space of the state in particular. Against this backdrop, as the examination reveals all Ethiopian BITs lack a denial of benefits clause and thereby open the room treaty shopping and abuse of rights by

[53]Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, ICSID Review - Foreign Investment Law Journal, Volume 30, Issue 1, Winter 2015, Pages 78–97, https://doi.org/10.1093/icsidreview/siu030

[54]*Ulysseas v. Ecuador*, available at, https://www.italaw.com/sites/default/files/case-documents/ita1045.pdf, last accessed on July 21, 2022; *Guarachi v. Bolivia*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf, last accessed on July 21, 2022; *Yukos v. Russian Federation*, available at, https://www.italaw.com/sites/default/files/case-documents/ita0910.pdf, last accessed on July 21, 2022; *Ascom v. Kazakhstan*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf, last accessed on July 21, 2022; Bridgestone v. Panama, available at, https://www.italaw.com/sites/default/files/case-documents/italaw9453.pdf, last accessed on July 21, 2022

[55]*Ulysseas v. Ecuador*, available at, https://www.italaw.com/sites/default/files/case-documents/ita1045.pdf, last accessed on July 21, 2022; *Guarachi v. Bolivia*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf, last accessed on July 21, 2022; *Plama v. Bulgaria*, available at, https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf, last accessed on July 21, 2022; *Ascom v. Kazakhstan*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf, last accessed on July 21, 2022

an investor.[56]To address this gap, the recent development to amend the existing investment treaties should consider this issue and widen the regulatory space of the state. In this regard, it is good to consult the Colombian Model BIT which adopted the wider approach in crafting the denial of benefits clauses.

3.2.2. Non-Discrimination- Leveller Clauses

One policy justification for BITs is "levelling the playing field" between investors.[57]Non-discrimination clauses under investment treaties protect foreign investors and investments against discrimination and ensure equal treatment.[58]It is composed of national and most-favored-nation (MFN) treatments and constitutes the bedrock of BITs.[59]How Leveller clauses are crafted has an impact on the interests of the state and investors. Usually, these principles are applied in cases in similar or like circumstances. The non-discrimination doctrine neither imposes an obligation on the state to give positive discrimination nor entitle an investor to claim a favor or positive discrimination. Rather, it prohibits the host state, not to treat investors less favorably than national and other foreign investors.[60] It protects the foreign investor against less favorable treatment, but the state has the discretion to give more favorable than the established standard and this can in return be applied to others under the same doctrine of the equalizer. Specifically, national treatment requires the state to treat foreign investors in the manner it treats or is not less favorable than domestic investors in like circumstances.[61]In this way, it seeks to ensure a degree of competitive equality between

[56] UK-Ethiopia BIT, Turkey-Ethiopia BIT, Tunisia-Ethiopia, Sweden-Ethiopia BIT,Sudan, Spain, Malaysia, Russia,Neitherland, Libya, Kuwait, Israel, Iran, Germany, France, Finland, Denmark, China, Belgium

[57]Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the evidence*, (The International Institute for Sustainable Development, 2017)

[58]Konrad von Moltke, *Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues, (*OECD Global Forum on International Investment Conference on Foreign Direct Investment and the Environment, 2002); Federico Ortino, *Non-Discriminatory Treatment in Investment Disputes, Human Rights in International Investment Law and Arbitration*, (2009)

[59] Nicholas DiMascio and JoostPauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?',American J. of Int'l Law , Vol. 102, No. 1, 48-89 (Jan., 2008)

[60] OECD (2004), *Most-Favoured-Nation Treatment in International Investment Law*,2 (OECD Working Papers on
International Investment, 2004/02)

[61] United Nations Conference on Trade and Development, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV), (1990)

national and foreign investors. Most favored nation treatment entitles foreign investors and investment to get the favourable treatment that the host state accord to the investments or returns of nationals or companies of any third state.

Concerning the requirement of "like circumstance" to claim for or give MFN and national treatment (NT), the investment treaties signed by Ethiopia are highly problematic. As the scrutiny of the general MFN and NT clause reveals, with exception of four,[62]all BITs signed by Ethiopia lack like circumstance requirements.[63]In the former case, the existence of like circumstance between competing investors is not required to give or claim national and most-favored-nation treatment. This is an unconditional and blinded non-discrimination doctrine. The absence of likeness requirement not only dents regulatory power and affects public interest but also causes unnecessary future litigation in which investors claim for treatment given to an investor in a different circumstance. Even treaties like Turkey-Ethiopia BIT which set "similar situations or like circumstances" requirements to apply and claim for national and most favored nation treatments are silent as to what constitutes a similar situation. Such ambiguous wording may pose similar problems and trigger liberal interpretation of arbitral tribunal. To fill the gaps, the relevant WTO's jurisprudence and precedent set by an arbitral tribunal that adopted a broader interpretation to protect investors may *mutatis mutandis* applies in the prejudice of host state interests.[64]Besides, an investor and home state whose agreement with Ethiopia provide likeness as a prerequisite may claim favorable treatment under treaties that do not set likeness requirement based on the MFN clause.

[62]Ethiopia-Brazil BIT, Art.3; Ethiopia-Qatar BIT, Art.3; Ethiopia-United Arab Emirate BIT, Art.3; Ethiopia-Spain BIT, Art. 3

[63]Ethiopia-UK BIT, Art.3; Ethiopia-South Africa BIT, Art.3; Ethiopia-India BIT, Art.4; Ethiopia-Belgian-Luxembourg Economic Union, Art.4; Ethiopia-Egypt BIT, Art.3; Ethiopia-Finland BIT, Art.3; Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.3; Ethiopia-Sweden BIT, Art.3; Ethiopia-Austria BIT, Art.3; Ethiopia-Libya BIT, Art.3; Ethiopia-Germany BIT, Art.3; Ethiopia-Israel BIT, Art.3; Ethiopia-Iran BIT, Art.4; Ethiopia-France BIT, Art.4; Ethiopia-Netherlands BIT, Art.3; Ethiopia-Algeria BIT, Art.4

[64]DiMascio and Pauwelyn, (n 59), 60-66

The wording of MFN clauses varies across BITs. Despite this, the MFN clauses under most Ethiopian BITs are crafted in broader terms, and this has an impact on limiting state regulatory space. The applicability of the MFN clause to the substantive right is clear. However, the applicability of the MFN clause to procedural matters including dispute settlement is less clear. In recent years, investment case law has dealt with the question of whether the MFN standard should apply to dispute settlement procedures.[65] There are various case laws regarding the importation of more favorable dispute resolution provisions from a comparator BITs to the basic treaty based on the MFN clause. For example, in *Maffezini versus Spain,* an Argentinean investor in Spain was allowed to use a more beneficial time requirement in the arbitration process found in the Chile-Spain BIT as opposed to the basic BIT under which the claim was filed.[66] In doing so, the arbitral tribunal has utilized the MFN clause to select the preferable arbitral procedure that avoids procedural hurdles like a longer period of consultation, period of limitation, and exhaustion of domestic remedies. In this sense, the MFN clause may multilateralize investment arbitration and expand the subject-matter scope of the arbitral clause. As a review of Ethiopian BITs reveal, in almost all of the BITs, the MFN clause is phrased in general terms which opens the room for competing interpretations and creates a state obligation to offer most-favored-nation treatment concerning the dispute settlement issues.[67]

The subjection of the non-discrimination to exceptions like security exception, economic integration exception, public health and morality exception, and environment, and labor exception is common practice under investment treaties. Such an exception widens the regulatory space of the host state and promotes the public interest. On the opposite, the absence of limitations may subject the host state to unpredictable risks. Some of these

[65] Martha B Hailu and TilahunE Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration,*Mizan Law Review, Vol. 8, No.1(2015), https://www.ajol.info/index.php/mlr/article/view/111737 , (last accessed on July 7, 2022);UNCTAD (2007), Investor-State Dispute Settlement and Impact on Investment Rule Making, (United Nations Publication, Geneva).

[66]Emilio AgustínMaffezini v.The Kingdom of Spain, ICSID Case No.ARB/97/7, available at, https://www.italaw.com/cases/64, last accessed on July 22, 2022

[67] Martha B Hailu and TilahunE Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration,*Mizan Law Review, Vol. 8, No.1(2015), https://www.ajol.info/index.php/mlr/article/view/111737 , (last accessed on July 7, 2022)

exceptions are existing or future customs unions, regional economic organizations or similar international agreements, and taxation. However, whether this provision by itself would be removed by invoking the MFN clause or not is less clear. In contrast, some BITs like Turkey-Ethiopia BIT have not even recognized MFN exceptions.

3.2.3. Fair and Equitable Treatment and Full Protection and Security

The fair and equitable treatment (FET) and full protection and security of foreign investment have been alarmingly dominating the realm of international investment regimes.[68]It is an absolute, non-contingent standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the relative standards embodied in national treatment and most favoured nation principles which define the required treatment by reference to the treatment accorded to other investment.[69] Despite this, the precise scope and content of FET and full protection and security are unknown. In recent years, FET has been the most grounds for investor claims.[70] Most of the BITs signed by Ethiopia have recognized the right of foreign investment and investors to receive fair and equitable treatment and full protection and security.[71]Beyond, the BITs are silent about the scope and content of FET

[68]OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, (OECD Working Papers on International Investment, 2004/03)

[69] UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, (1998); A. A. Fatouros, *Government Guarantees to Foreign Investors*, (Columbia University Press, 1962) 135-141, 214- 215; OECD, International Investment Law: A Changing Landscape a Companion Volume to International Investment Perspectives, (2005),74

[70] Ian A. Laird, and et.al, *International Investment Law and Arbitration: 2013 In Review*, 100

[71]Ethiopia-UK BIT, Art.2 (2); Ethiopia-Spain BIT, Art. 3; Ethiopia-South Africa BIT, Art.Art.3(1); Ethiopia-India BIT-Art.3(2); Ethiopia-Belgian-Luxembourg Economic Union, Art.3(1 &2); Ethiopia-Egypt BIT-Art.2(2); Ethiopia-Finland BIT-Art.2(1)& 4(1); Ethiopia-Luxembourg, Belgium, & Finland BIT, Art. 2(2) & 3(1&2) Ethiopia-Sweden BIT, Art2(3&4), Ethiopia-Austria BIT, Art.3(1); Ethiopia-Libya BIT, Art.3(1); Ethiopia-Germany BIT, Art.2(2)& 2(4); Ethiopia-Israel BIT, Art.2(2); Ethiopia-Iran BIT, Art.4(1); Ethiopia-France BIT, Art.3 & 5, and Ethiopia-Netherlands BIT, Art.1(a)); Ethiopia-Algeria BIT, Art.3(1) &5(1)

and full protection and security. Some investment treaties are silent concerning the fair and equitable treatment and full protection and security.[72]

Unlike consistent use of fair and equitable treatment, different phrases like "full", "full and complete", "full and constant", "continuous", "enduring", and "adequate" are used to indicate the degree of protection and security provided by the host state for foreign investor and investment. The use of different terms has an impact on narrowing and widening the interest of the host state and investors. Moreover, the ambiguity of the term FET and full protection and security has a huge negative impact on the host state. This problem becomes acute when it is accompanied by broader interpretation techniques adopted by the arbitral award. The tribunal acknowledges breach of FET and full protection and security (FPS) standard even in the absence of bad faith.[73]As a previous study has revealed, most investors' claims instituted based on FET are usually decided in favor of the investor.[74]The thresholds for the conduct of the state to breach the FET and FPS standards are subjective and subject to abuse. The vagueness of the terms permits the investor to institute a claim against legitimate regulatory measures of the host state invoking violation. In doing so, it discourages the state from taking regulatory measures.

3.2.4. Expropriation

BITs do not prohibit expropriation per se, although it does expand the scope of indirect, creeping, or consequential expropriations and subject nationalization to stringent conditions.[75]Under Ethiopian BITs, the expropriation and nationalization clause, oblige the host states not to nationalize, expropriate, or subject foreign investment to measures having an effect equivalent to nationalization or expropriation unless legitimate conditions are fulfilled. The way expropriation is defined has a huge impact on the host state's domestic regulatory space. Despite this, there is no one-size-fits-all way of defining it to strike the balance between the interests of foreign investors and the host state. Currently, almost all investment treaties define expropriation in a border way to include indirect expropriation or

[72] Ethiopia-Brazil BIT; Ethiopia-Qatar BIT; Ethiopia-United Arab Emirate BIT
[73] Laird, and et.al, (n 70), 103
[74]Laird, and et.al, (n 70), 102
[75]Surya P Subedi, *International Investment Law Reconciling Policy and Principle*, 100 (Hart Publishing, 2008).

measures which have an effect equivalent to nationalization or expropriation.[76] The scope, content, and threshold of indirect expropriation are undefined. This is an acute problem in the period the broader approach of interpretation is adopted by the arbitral tribunal that reduces a threshold of measures to constitute indirect expropriation. Concerning the meaning of indirect expropriation, the arbitral award has investor bias degrading state regulatory rights.[77]In doing so, it discourages the state from exercising legitimate regulatory measures.

The second issue addressed by BITs is conditions of lawful expropriation. Usually, expropriation is legitimate where it is (1) taken for-public purposes, (2) non-discriminatory, (3) carried out under due process of law, and (4) accompanied by *prompt*, *adequate*, and *effective* compensation.[78]These requirements are recognized under customary law too. Fulfilling all these stringent requirements is difficult and limits the regulatory rights of the state and the public interest thereof.

At the beginning of this millennium, another direction of interpretation emerged regarding the relationship between indirect expropriation and regulation. Some tribunals openly acknowledged the host states' right to undertake ordinary regulations.[79]In doing so, *bonafide* regulations are *perse* excluded from the definition of expropriation. For instance, in *Feldman*

[76]Ethiopia-Brazil BIT, Art.7; Ethiopia-Qatar BIT, Art.9; Ethiopia-United Arab Emirate BIT, Art.6; Ethiopia-UK BIT, Art.5; Ethiopia-Spain, Art. 5; Ethiopia-South Africa BIT, Art.5; Ethiopia-India BIT, Art.5; Ethiopia-Egypt BIT, Art.5; Ethiopia-Finland BIT,Art.5; Ethiopia-Sweden BIT, Art.4; Ethiopia-Austria BIT, Art.5; Ethiopia-Libya BIT, Art.4; Ethiopia-Germany BIT, Art.4; Ethiopia-Israel BIT, Art.5; Ethiopia-Iran BIT, Art.7; Ethiopia-France BIT, Art.5; Ethiopia-Netherlands BIT, Art.6; Ethiopia-Algeria BIT, Art.5

[77] University of Oslo Faculty of Law, *Striking a fair balance between foreign investor protection and host states' right to regulate: A review of the international investment law awards of 2016 through the lens of the principle of proportionality*, 33 (2017)

[78]Ethiopia-Brazil BIT- Art.7; Ethiopia-Qatar BIT-Art.9; Ethiopia-United Arab Emirate BIT-Art.6; Ethiopia-UK BIT-Art.5; Ethiopia-Spain-Art. 5; Ethiopia-South Africa BIT-Art.5; Ethiopia-India BIT-Art.5; Ethiopia-Egypt BIT-Art.5; Ethiopia-Finland BIT-Art.5; Ethiopia-Sweden BIT-Art.4, Ethiopia-Austria BIT-Art.5; Ethiopia-Libya BIT-Art.4; Ethiopia-Germany BIT Art.4; Ethiopia-Israel BIT-Art.5; Ethiopia-Iran BIT-Art.7; Ethiopia-France BIT-Art.5; Ethiopia-Netherlands BIT-Art.6; Ethiopia-Algeria BIT-Art.5; Art 3 of Turkey-Ethiopia BIT

[79]Saluka v. Czeck Republic § 260, Pope & Talbot v. Canada § 99, and Feldman v. Mexico §§ 105-106.

v. Mexico,[80]*Chemtura v Canada,*[81]*Methanex v the United States,*[82]*Saluka v Czech Republic,*[83] *and El Paso v Argentina*[84]*cases,* the tribunals have given wider consideration to the policies and power of the state in determining whether regulatory measures of states amount to expropriation or not. In the first two cases, the tribunal held measures taken to protect human health and the environment is lawful non-compensable regulation and not amount expropriation as it is taken for a public purpose in a non-discriminatory manner, through a law enacted with due process.

3.2.5. Stabilization Clause

The stabilization clause is a contractual clause mainly designed to protect an investor from negative regulatory change and gives BITs plus protection for investors.[85]It limits the power of host states to take regulatory measures.[86]The clause usually addresses how changes in the law following the execution of the investment agreement are to be treated. It may take the forms of *freezing* clauses or *economic equilibrium* clauses or *hybrid clauses*. The freezing clause limits the applicability of post-treaty legislation unless the investors agree. The best example is an old investment contract between Ethiopia and a US company Called Baruch-Foster Corporation (Texas).[87] This clause replaces the doctrine of rule of law by rule of the investor consent and goes against the principle of political democracy. E*conomic equilibrium* clauses do not prohibit changing the law without the consent of foreign investors but oblige the host state to indemnify the costs incurred by investors following the change. Under *hybrid* clauses, foreign investors are not automatically exempted from the application of new laws, rather the investors may be granted an exemption. It is possible to use the same

[80] Feldman v Mexico, ICSID Case No ARB(AF)/99/1, Award (16 December 2002)
[81]*Chemtura Corporation v Government of Canada, NAFTA Tribunal, Award (2 August 2010)*
[82]*Metalclad Corporation v United Mexican States, ICSID Case No ARB(AF)/97/1, Award (30 August 2000); Methanex Corporation v United States of America, 44 ILM (2005) 1345*
[83]*Saluka Investments BV v The Czech Republic, UNCITRAL, Partial Award (17 March 2006)*
[84] *El Paso v Argentina, ICSID Case No ARB/03/15, Award (31 October 2011)*
[85]Subedi (n 75), 104
[86]Subedi (n 75), 104
[87] An old investment contract between Ethiopia and a US company, provided that the rights of the parties may neither be increased nor restricted or otherwise changed by means of current or future laws, regulations etc. See also, Investment Contract between Ethiopia and Baruch-Foster Corporation (Texas), 1966, Art. XXVII, para. 4b (reprod. in Merkt (1990), p. 267, emphasis added); JolaGjuzi, Stabilization Clauses in International Investment Law A Sustainable Development Approach, 68 (2018)

clause for the benefit of the public interest without affecting the right of investors. This is possible by narrowing the scope of stabilization clauses. Narrowing the scope of the stabilization clause allows for limiting the regulatory measure to a limited number of new laws, and allows for more flexibility for the state regarding social and environmental issues.[88]Avoiding or removing the stabilization clause has a great impact on widening the regulatory freedom of the host state to act for public benefit. However, it negatively affects the protection available to investors and triggers disputes. To ensure the security of investors without negatively prejudicing the public interest or to strike a balance in the state-investor relationship narrowing the scope of stabilization clauses is less evil.[89]

3.2.6. Dispute Settlement Clause

Investment disputes can be settled by a court of the host state or international tribunal.[90]BITs usually provide for the settlement of investor-state disputes settlement before an impartial international arbitration tribunal. In Ethiopia, BITs give priority to the settlement of disputes amicable through consultation and negotiation within fixed periods.[91]Where amicable settlement fails, the treaty provides for settlement through adjudication before a court or arbitral tribunal.[92]The rationale behind availing access to an international tribunal is that the

[88]Semenko (n 20),14

[89] Investment Contract between Ethiopia and Baruch-Foster Corporation (Texas), 1966

[90] Pohl, J., K. Mashigo and A. Nohen (2012), *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*", 10 (OECD Working Papers on International Investment, 2012/02)

[91] Ethiopia-Brazil BIT, Art.23&24; Ethiopia-Qatar BIT-Art.16&19; Ethiopia-United Arab Emirate BIT-Art15&16; Ethiopia-UK BIT-Art.9&10; Ethiopia-Spain-Art.10&11; Ethiopia-South Africa BIT-Art.7&8; Ethiopia-India BIT-Art.9&10; Ethiopia-Belgian BIT-Art.11&12; Ethiopia-Egypt BIT-Art.8&9; Ethiopia-Finland BIT-Art.9&10; Ethiopia-Sweden BIT-Art.9&10; Ethiopia-Austria BIT-Art.11-22; Ethiopia-Libya BIT-Art.8&9; Ethiopia-Germany BIT Art.10&11; Ethiopia-Israel BIT-Art.8&9; Ethiopia-Iran BIT-Art.12&13; Ethiopia-France BIT-Art.9&10; Ethiopia-Netherlands BIT-Art. 9&10; Ethiopia-Algeria BIT-Art.9&10

[92]Ethiopia-Brazil BIT- Art.23&24; Ethiopia-Qatar BIT-Art.16&19; Ethiopia-United Arab Emirate BIT-Art15&16; Ethiopia-UK BIT-Art.9&10; Ethiopia-Spain-Art. 10&11; Ethiopia-South Africa BIT-Art.7&8; Ethiopia-India BIT-Art.9&10; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.11&12; Ethiopia-Egypt BIT-Art.8&9; Ethiopia-Finland BIT-Art.9&10; Ethiopia-Sweden BIT-Art.9&10; Ethiopia-Austria BIT-Art.11-22; Ethiopia-Libya BIT-Art.8&9; Ethiopia-Germany BIT

arbitral tribunal acts impartially and balances the interests of investors and states while interpreting treaties clauses. Unfortunately, the arbitral tribunal has been not functioning as expected impartially and objectively. The international investment arbitration has suffered from a legitimacy crisis because of the biased focus on the protection of investors without due regard for the state's right to regulate foreign investment for the public interest. However, there is an emerging tribunal that takes a balanced approach to address the concerns of investor protection and state regulatory right in a balanced and reasonable manner. The futurity of an arbitral tribunal concerning the issue of balancing the interest of the host state and investors is not yet certainly determined but the inclination toward investor protection is inevitable because of strong nudging from capitalists.

3.3. Exit Stage

The foreign investor has the right to exit his/her investment at any time unless agreed not to do so. The regulatory right of the state and the right of an investor during the exit stage of investment are mainly related to the transfer of funds and payment. The right to freely and without delay transfer fund (investment and its return) convertible currency is one fundamental right available for the investor. All BITs of Ethiopia and investment proclamation have expressly recognized the right of foreign investors to transfer funds and payment or repatriate their investment after payment of essential tax.[93]It also requires the transfer of funds and payment to be effected without delay in freely convertible currencies, at the official exchange rate prevailing on the date of transfer for the currency to be transferred.[94]The domestic investment law also has guaranteed the freedom to transfer funds.

Art.10&11; Ethiopia-Israel BIT-Art.8&9; Ethiopia-Iran BIT-Art.12&13; Ethiopia-France BIT-Art.9&10; Ethiopia-Netherlands BIT-Art. 9&10; Ethiopia-Algeria BIT-Art.9&10

[93]Ethiopia-Brazil BIT- Art.10; Ethiopia-Qatar BIT-Art.10; Ethiopia-United Arab Emirate BIT-Art7; Ethiopia-UK BIT-Art.6; Ethiopia-Spain-Art. 7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Israel BIT-Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-France BIT-Art.6; Ethiopia-Netherlands BIT-Art.5; Ethiopia-Algeria BIT-Art. 6. See also Art.20 of Investment Proclamation No1180/2020

[94] Ethiopia-Brazil BIT- Art.10; Ethiopia-Qatar BIT-Art.10; Ethiopia-UAE BIT-Art7; Ethiopia-UK BIT-Art.6; Ethiopia-Spain-Art.7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-

The transfer of capital has a great impact on the economy of the host state, especially in the case of a huge investment. It may cause a big balance of payment (BOP) disequilibrium in countries like Ethiopia that suffer from a trade deficit. Balancing BOP is the sovereign regulatory power of the state. To this end, the host state has the power to suspend the transfer of investment and return thereof with the aim to balance the BOP. Except for Ethiopian BITs signed with Brazil, Qatar, UAE, UK, Israel, and France, all others do not expressly recognize the BOP problem exception.[95]In other words, most BITs have not expressly recognized the regulatory power of the host state to take BOP safeguard measures.[96]The absence of the BOP exception limits the regulatory power of the state. On the opposite, the BOP exception is essential in balancing the regulatory power of the state and the right of an investor. BOP exception is conditional safeguard measures that shall be temporary, necessary, non-discriminatory, legitimate consistent with IMF Article of Agreement, and imposed against the serious balance of payment disequilibrium.

3.4. New Development under Investment Regime

There is a concern that laws of foreign investment are blind concerning the state's right to regulate. In response to this, regaining the inherent regulatory right of the state is at the center of recent investment law development.[97]In recent years, there is a growing recognition of legitimate domestic regulatory measures.[98]This may reverse the trends of considering the right to regulate as something is exercised only in defined circumstances.[99] The new

Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Israel BIT-Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-France BIT-Art.6; Ethiopia-Netherlands BIT-Art.5; Ethiopia-Algeria BIT-Art. 6.

[95] Ethiopia-Brazil BIT- Art.10(3&4); Ethiopia-Qatar BIT-Art.11; Ethiopia-United Arab Emirate BIT-Art.9; Ethiopia-UK BIT-Art.7; Ethiopia-Israel BIT-Art.6(3); and Ethiopia-France BIT-Art.6

[96]Ethiopia-Spain-Art. 7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg EU BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-Netherlands BIT-Art.5; Ethiopia-Algeria BIT-Art. 6

[97] Kurtz, (n 33), 8

[98] Mann,(n 22), 5

[99] ibid

direction sees the right to regulate as something inherent in sovereignty.[100]This new direction is the main defining feature of new generation investment treaties. With the aim to create a regime in which the rights and duties of state and investor are balanced, the states have been adopting different measures or mechanisms of which some are briefly discussed as follows as a lesson for Ethiopia.

3.4.1. Interpretation Referring to a Broader Norm

The international investment law is criticized for being isolated from wider international law and focusing on investment protection. Save its special feature, it is a subset of international law. International law regulates wider competing and sometimes complementing interests such as human rights, labour standards, environment, trade, and investment. A foreign investor may abuse labour, human right, and the environment against international law regulating respective areas. In such a case, BITs should be interpreted in light of a wider international norm to protect other competing values and ensure the complementary operation of such norms. This leads to recognition of the regulatory right of the state to interfere in circumstances where the foreign investor abuses human rights such as labour rights, causes environmental damage, or poses a national security problem.[101] The increasing recognition of such a regulatory right may undermine the aim of investment protection. Hence, it needs due consideration to ensure equilibrium.

3.4.2. Using Domestic Laws

In recent years, states have been using their domestic laws to balance the relationship between investors and states. Domestic law provides the duties of investors and the right of the host state. In Ethiopia, for instance, Article 54 of the investment proclamation has obliged investors to observe the laws of the country including environmental law in carrying out their investment activities. Host states use domestic labour law, environmental law, human rights law, tax law, and others to regulate foreign investors.[102] The foreign investor is bound by domestic law and bears relevant obligations. In the 17th century, Emer de Vattel wrote that foreigners cannot pretend to enjoy the liberty of living in the country without

[100] ibid
[101]Sornarajah, (n 15), 77 &78
[102]Sornarajah, (n 15), 77

respecting the law.[103]However, this is not free from counterarguments; the host state cannot raise domestic law as a defense for its violation of international law like BITs.

Despite such controversies, without violation of international commitment, states have the freedom to regulate foreign investors in their territories. This is why it is argued that the potential conflict of interest between investor and state is taken care of by the inter-relationship between BITs and the domestic legislation of the host state.[104] The BITs protect the legitimate interests of foreign investors, while the national laws of the host state ensure that the investment remains subject to the regulatory powers of the host state. Hence, provided that host countries respect their international commitments deriving from BITs, they remain free to subject foreign investors in their territories to social, fiscal, environmental, and other regulations that they deem necessary to meet their national development objectives. The fundamental question is whether the interplay between BITs protection and domestic regulation achieves an appropriate balance of investor rights and obligations or not. Besides, the possible contradiction between the two regimes may lead to other controversies and problems. The most pressing problem is that the existing BITs go well beyond supplementing one aspect of the legal and institutional infrastructure in host states and create both choices of law and choice of forum rules that allow foreign investors to completely replace the host state laws on how they may be treated with international laws and remedies.[105]

3.4.3. Adjustment of Investment Treaties

BITs have been accused of investor bias. In response to the imbalance of rights and duties of investors and states, in recent years, countries have been responding to this problem by adjusting their investment treaties.

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[103]Emer de Vattel, *The law of nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, (Liberty Fund, Inc 2008) para 108

[104]Weber, (n 10), 2

[105] Mann, (n 22), 4

A. Incorporation of Social and Environmental goals

One of the methods of adjustment is by setting social and environmental goals for the investment under the BITs. Previously, the preamble of BITs focuses on economic goals and investment protection. This trend is changing with some newly emerging BITs' incorporation of social and environmental goals along with the economic objective of investment in the preamble.[106]The preamble of BIT between Finland and Ethiopia provides that '… *these objectives can be achieved without relaxing health, safety and environmental measures of general application*.'[107]Likewise, the preamble of Ethiopia-Brazil BIT has recognized the regulatory autonomy and policy space of the host state and the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity, and human development. Though its degree is less clear, such a statement has an effect on balancing the rights and duties of investors and the host state. It widens the regulatory rights of the host state and the duties of an investor. Against this, some scholars argue that the preamble serves only less purpose only during interpretation by a tribunal as a guide. ViacheslavSemenko argues that apparently, setting social and environmental goals of investments enlarges the scope of responsibilities for investors without providing a list of specific duties.[108] This legal technique helps to presume that the investor is committed to following the BIT goals, which implies the fulfillment of relevant duties. On the other hand, such a goal gives power to the host state to undertake such measure which is relevant to achieve stated goals. This is true as the preamble sets the framework for the whole treaty.[109] Moreover, the commitment of the parties to pursue the aforementioned goals imposes respective responsibilities on investors. Consequently, the investor is expected to follow all the host state regulations that are adopted to promote the stated goals.[110] Furthermore, if some goals are part of international law, the investor is expected to ensure them without waiting for the enactment of relevant local

[106] See the Preamble BITs signed by Ethiopia with UK, Brazil, Qatar, United Arab Emirate, and Algeria.
[107] See preamble of investment agreement between Finland and Ethiopia
[108]Semenko, (n 20), 16
[109]Semenko, (n 20), 14
[110] ibid

laws.[111] Despite all these, most of the Ethiopian investment treaties are devoid of clear social and economic goal under their preamble and needs reconsideration.[112]

B. Recognition of State regulatory rights

The *second* adjustment method is through express recognition of state regulatory rights in BITs. The BITs had been considered a charter of investor protection. As a result, it imposes duties on the state unaccompanied by rights. On the reverse, entitle investors with rights without duties. Consequently, the state regulatory right was seen as an exception to protection. Such imbalance made the investment regime subject to a legitimacy crisis. This trend is changing to create a balanced regime. One of the measures taken to reduce the problem of imbalance is an express recognition of the regulatory right of the state. In this regard, the preamble of Brazil-Ethiopia BIT has expressly recognized the general regulatory right and autonomy of the state.[113]Besides, the BIT of Ethiopia with the United Arab Emirate has also recognized regulatory autonomy of state under Art.18 entitled "**right to regulate**".[114] Other than these two, all investment treaties lack a general clause that expressly recognizes the regulatory rights of Ethiopia. Despite this, some investment treaties of Ethiopia addressed one or more specific circumstances in which the state undertakes regulatory measures concerning security, labor and environment, the balance of payment, health, public morality, tax, and prudence.[115]On the opposite, some treaties have neglected

[111] ibid

[112] See preamble of Ethiopia-UK BIT-Art.6; Ethiopia-Spain-Art. 7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Israel BIT-Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-France BIT-Art.6; and Ethiopia-Netherlands BIT-Art.5. Some of these agreements have set "increasing prosperity" as an ambiguous goal of foreign investment

[113] Preamble of Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation

[114] Ethiopia -United Arab Emirate BIT, Art.9, 11-13, 18 and 19

[115] Brazil-Ethiopia BIT-Art.10(3),11-13, &16, Qatar-Art.11, 13,14, United Arab Emirate –Art.9, 11-13, 18&19; UK-Art.7; Belgian-Luxemburg Economic Union-Art.5,6 ; Finland-Ethiopia BIT-Art.14, Netherlands- Ethiopia BIT-Art.4

the regulatory right of the state.[116] Finally, the issue of how many rights of investors and host state counterweight obligations of the same is less clear.

C. Incorporation of Investor's Duties

The *third* new development is the imposition of an obligation on an investor.[117]Against this, some scholars argue that it is difficult to impose any liabilities on investors under BITs since they lack personality under international law.[118] This argument arises from a misunderstanding of the special nature of international investment law. Under the international investment law, investors have the right to institute an international claim against a host state before an international arbitral tribunal. This shows investors have a special international personality to carry out duties and responsibilities.[119] Hence, no longer does the hoary idea of lack of personality nullify the responsibility of investors for abuses of human rights. Otherwise, it is difficult to require foreign investors to behave in a certain manner. In recent years, the old trend in which investor is entitled only to rights while the state carries duties is shifting towards more balanced BITs or balanced investor-state relationship.[120]Among, there is a trend of imposing duties and responsibilities on an investor. Usually, such duties are imposed under soft laws like codes of conduct, guideline, and declaration. Beyond, the model BITs developed recently by Norway, USA and others have imposed duties on an investor. Some BIT recently signed by Ethiopia has also expressly or impliedly recognized the duties of an investor concerning the protection of the environment, respecting human rights, labour, security, and health standard.[121] BIT with United Arab Emirate has devoted a separate section of duties of investor. Save the opposite debate, the

[116] Spain-Ethiopia BIT; South Africa-Ethiopia BIT; India-Ethiopia BIT; Egypt-Ethiopia BIT; Sweden-Ethiopia BIT; Ethiopia-Austria BIT; Libya-Ethiopia BIT; Germany-Ethiopia BIT; Ethiopia-Israel BIT; Ethiopia-Iran BIT; France-Ethiopia BIT; and Algeria-Ethiopia BIT
[117]Mann, (n 22), 3; Semenko, (n 20), 3
[118]Sornarajah, (n 15), 174
[119]Sornarajah, (n 15), 78
[120]Semenko, (n 20), 3
[121]Brazil-Ethiopia BIT-Art.12-16, 24

implied duties of investors can be inferred from the contrary reading of rights and regulatory space of the host state.[122]

D. Clarification of standards of treatment

The *fourth* new development that promotes the state's regulatory right is a clarification of the standard of protection.[123] Usually, BITs set a standard of protection in vague and ambiguous terms lacking clarity. The lack of precision is being used by foreign investors to threaten states by arbitrations, leading in many cases to a phenomenon of regulatory chill, or fear of governments to take measures.[124] The best example is the scope of indirect expropriation. Now, states are responding with the clarity and precision needed to give governments security in their ability to act in the public interest.[125]In response to this, a few countries like Canada and the United States have revised their BITs. They spell out in more detail the content of some core provisions, in particular the minimum standard of treatment per international law (often also called the "fair and equitable treatment" standard) and the provision dealing with indirect expropriation.[126]Ethiopia should take a lesson from this, and clarify the vague standard of protection through the revision of BITs.

E. Recognition of Treaty Exceptions

The *fifth* important new development under BITs is the incorporation of treaty exceptions (general, security, cultural, BOP exceptions) to show that investment protection must not be pursued at the expense of other legitimate public interests. This is done in addition to the traditional exceptions that have been a common feature of BITs for many years, namely taxation and regional economic integration. Many BITs now also exempt host country measures related to such diverse fields as essential security and public order, protection of

[122] Brazil-Ethiopia BIT-Art.10(3),11-13, &16, Qatar-Art.11, 13,14, United Arab Emirate –Art.9, 11-13, 18&19; UK-Art.7; Belgian-Luxemburg Economic Union-Art.5,6 ; Finland-Ethiopia BIT-Art.14, Netherlands- Ethiopia BIT-Art.4
[123] Mann (n 22), 8
[124] ibid
[125] ibid
[126] Kingsbury and Schill, (n11), 76

health, safety and natural resources, cultural diversity, and prudential measures for financial services fully or partially from the scope of the BITs. These exceptions clarify the scale of values in the policy-making of contracting parties and subordinate investment protection to these other key policy objectives. In Ethiopia, some treaties have expressly recognized legitimate exceptions to widen the regulatory space of the state. For instance, the Brazil-Ethiopia BIT has recognized the BOP exception, tax measure exception, prudential measures exception, security measures exception, and labor, environmental, and health measures exception.[127]However, most BITs of Ethiopia are devoid of treaty exceptions.[128]Those exception clauses in BITs impart flexibility to host states in enacting new legislation and enlarging their leeway to regulate.[129] On the one hand, this legally set leeway shields host states from potential claims. On the other hand, it may potentially result in new duties imposed by host states under newly adopted regulations.[130]

F. Revision of Dispute Settlement Clause

The *sixth* new development under BITs is the revision of the dispute settlement clause. The process for adjudicating disputes is essential in balancing the right to regulate and investor protection.[131] This issue is fundamentally important for three reasons. First, balancing the government's right to regulate is a matter of significant public interest that requires a public hearing in an impartially chosen and open tribunal in a democratic society. Second, the concept of sustainable development is increasingly understood as incorporating public rights of access to information and decision-making processes, and accountability of decision-making bodies. The existing investor-state process fails to take into account these two. Finally, the credibility of BITs has been savaged by the secrecy of the investor-state process.[132]Recent BITs signed by the United States, Canada, and Mexico have introduced innovations concerning dispute settlement including greater and more substantial transparency in arbitral proceedings, open hearings, a publication of related legal documents,

[127] Brazil-Ethiopia BIT, Art.10(3), Art 11, Art. 12, Art.13 Art. 16
[128] Spain-Ethiopia BIT; South Africa-Ethiopia BIT; India-Ethiopia BIT; Egypt-Ethiopia BIT; Sweden-Ethiopia BIT; Ethiopia-Austria BIT; Libya-Ethiopia BIT; Germany-Ethiopia BIT; Ethiopia-Israel BIT; Ethiopia-Iran BIT; France-Ethiopia BIT; and Algeria-Ethiopia BIT
[129]Semenko, (n 20),14
[130]Semenko, (n 20),14
[131] Mann, (n 22), 9
[132] Mann, (n 22), 9

and the possibility for representatives of civil society to submit "amicus curiae" briefs to arbitral tribunals. Other new detailed clauses provide for more law-oriented, predictable, and orderly conduct at the different stages of the investor-State dispute settlement process, and envisage the possibility of setting up an appellate mechanism to foster a more consistent and rigorous application of international law in arbitral awards.

3.4.4. Principle of Proportionality

The other new development to balance investor rights and host state rights to regulate is the principle of proportionality.[133]There is an ongoing debate over the issue of whether the principle of proportionality constitutes a general principle of law and forms part of customary international law.[134]To the extreme, some scholars argue proportionality analysis is not an alternative to the rules on treaty interpretation.[135]Despite such controversies, some tribunals have employed it as an interpretation technique in settling investment disputes. The principle of proportionality comprises a three or four-pronged test, which the measure under review has to pass through.[136] These are: (1) an assessment of the legitimacy of the objective of the measure, (2) an analysis of the measure's suitability to achieve this objective, and (3) a determination of whether there exist alternatives, which infringe the right in question to a lesser degree, and (4) a final balancing exercise evaluating the importance of avoiding the interference vis-à-vis the importance of achieving the objective.[137] The first, third, and fourth criteria of assessments are called the criterion of suitability, necessity, and proportionality in the narrow sense or *strictosensu*. As of today, there is no agreement among scholars about the role and effect of proportionality in balancing the right of the host state to regulate and

[133] Kingsbury and Schill, (n 11), 77
[134]N. Jansen Calamita ,*The Principle Of Proportionality And The Problem Of Indeterminacy, Yearbook On International Investment Law & Policy* 2013–2014 edited by Andrea K. Bjorklund, Oxford University Press, (2015), PP-159
[135] Kingsbury and Schill, (n 11), 78
[136] University of Oslo Faculty of Law, *Striking a fair balance between foreign investor protection and host states' right to regulate: A review of the international investment law awards of 2016 through the lens of the principle of proportionality*, 7 (2017); Kingsbury and Schill, (n 10), 86
[137] Kingsbury and Schill, (n 11), 87

the right of an investor to receive protection. Some scholars like Benedict Kingsbury and Stephan W. Schill view it as a tool to cope with the imbalance of the international investment regime by making the system: pay due regard to regulatory concerns, and overcome an excessive emphasis on the rights of the foreign investor.[138]Despite this, serious concerns and criticism have also been raised regarding its application and efficiency in addressing the problem.

Some scholars claim the fair and equitable standard is best suited to meet the concerns of both investors and states under the international investment regime. Likewise, some scholars claim that the international minimum standards solve the problem of imbalance. Despite such arguments, the content and threshold of these two standards are undefined. In this situation, it cannot able to be a solution. Rather, fair and equitable treatment and international minimum standard treatment are the major headaches in balancing investor-state rights and duties. To the extreme, they are a Pandora's Box of problems of imbalance of interest of the host state and investor under the investment regime.

Concluding Remarks

BITs are subject to backlash because of investors' bias to a degree of disregarding the inherent state regulatory space. The survey of Ethiopian investment treaties reveals the same. In response to investor bias, there are multidimensional international moves including adjustment of investment treaties, use of domestic laws as a balancing tool, development of the principle of proportionality, and development of public-centric arbitral award. Among these, some treaties of Ethiopia have tried to consider the interest of the host state through express and implied recognition, which is a great step, but not enough as it may be devoid of value by the MFN clause which avails all available favorable treatments with no consideration of state regulatory rights. Beyond, the inherent right of the host state to regulate for the benefit of the wider public needs to be expressly and broadly recognized under BITs. In contrast to this, there is a capitalist move that calls plus protection. This is the state-investor (private-public) war of the 21st century and the question of who will get the trophy needs time to get an answer. This movement has a huge impact on capital-importing countries with weak bargaining power like Ethiopia. What makes the future

[138] Kingsbury and Schill, (n 11), 78

direction more unpredictable is the dynamic and diversified nature of the interests involved. The direction of future development of BITs seems to fall in the hand of giant economies adjusting their treaties. With challenges ahead in mind based on the lesson from the new development under-investment regimes, the researcher calls for a reconsideration of investment treaties signed by Ethiopia.

Most Favored Nation Clauses and their Potential Effect on Ethiopia's Bilateral Investment Treaties: Substantive Protections, Perspectives and Stepping the Reconsiderations

Feven Aberham[♣]

Abstract

Under the disguise of MFN treatment, claims to import protections from third party BITS by overriding the independently negotiated basic BITs with home state has caused the purpose and scope of MFN clauses in BITs to be contested. Substantive protections are among the subjects of MFN based allegation. Supplemented with international investment tribunals' blessings to liberal MFN clauses having loose components, host states are repeatedly exposed to international litigations and payments of damage for the violation of unconsented protections. In response to this, the wake up calls by international organizations has led states to reconsider the context of their BITs' MFN clauses. Up-to-date, Ethiopia has signed 35 BITs. All the BITs grant MFN treatment. Thus, this piece of writing aims to examine the MFN clauses under Ethiopian BITs against the divisive international investment law jurisprudences on using MFN clauses to shop substantive rights. Accordingly, it has been found out that Ethiopian BITs MFN clause have major problems in incorporating key components. This would subject the BITs to importation claims and put the country at the most disadvantageous position exposing it to unintended litigation. Thus, it is recommended that Ethiopia is required to either cautiously reconsider the BITs in light of the suggested options of incorporating MFN clauses or to their abrogation at all. This calls for policy level decision, relatively clear guidance informing the country's position to the issue with farsighted negotiation efforts.

Keywords: Most Favoured Nation, Basic Treaty, Bilateral Investment Treaty, Comparator Treaty, International Investment Tribunal

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1. Introduction

Bilateral investment treaties are agreements between two countries on the reciprocal promotion and protection of investment comprising various substantive and procedural protections.[1]Most favoured nations principle (hereinafter MFN) is a treaty-based substantive protection principle that obliges contracting states to treat each other's investors and investments not less favourably than investors and investments from third state.[2]MFN is introduced under Bilateral Investment Treaties (hereinafter BITs) to prohibit discrimination on foreign investors and investments from different countries by host states.[3] MFN under BITs context presupposes the existence of relation among three states namely granting, beneficiary and third states by which the status of a state under any of this categories is determined when MFN claims are instituted.[4]

While basic treaty refers to the BITs between the MFN granting and beneficiary state, the comparator treaty denotes the BITs of the granting state with any other third state.[5] Investors tendency to create juridical link between basic and comparator treaty with the aim to import what they deemed is more beneficial protection than what is provided under the basic treaty[6]has resulted to pose different questions on the purpose and scope of MFN clauses under BITs. Above all, International

[1]M.Sornarajah, *International Law on Foreign Investment* (Cambridge University Press 2010) 79.
[2]ChristophSchreuer, *Investment, International Protection* (Cambridge University Press 2020) 71.
[3] Catharine Titi, 'Most favoured Nation Treatment : survival clauses and Reform of International Investment Law' (2016) 33Journal of International Arbitration427.
[4] Stephan W.Schill, 'Mulitilateralizing Investment Treaties through Most-Favoured-Nation Clauses' (2009) 27Berkeley Journal of International Law506-507.
[5] Ibid 506, the granting state is the state that is expected to provide the MFN treatment or the host state, the beneficiary state refers to the state that would receive the MFN treatment and the third state refers to any other state other than the beneficiary but has BIT relation with the granting state.
[6] Tony Cole, 'The Boundaries of Most Fvoured Nation Treatment in International Investment Law' (2012) 33Michigan Journal of International Law568 .

Investment Tribunals (hereinafter IIT) divisive approaches in interpreting the essence of MFN treatment have made the liability of host states, on the ground of their BITs protections, to be unpredictable.

Ethiopia is a developing and host state of different types of foreign direct investments. Up-to date in general Ethiopia has signed 35 BITs.[7] Martha and Tilahun, under their article, have made basic exposition on the relation between Ethiopian BITs MFN clauses with dispute resolutions provision. Accordingly, it has been indicated that Ethiopian BITs requires rethinking against the new IIT jurisprudences basically focusing on their dispute resolution provisions as part of MFN treatment.[8]This article claims that the issue of MFN, in the context Ethiopian BITs, shouldn't only be limited to be reconsidered in light of its' effect on dispute resolution protections but it has to be also examined in terms of its' prospective consequences on substantive protections which establish the essences of signing independent BITs. Thus, the article contends that the issue needs to be further investigated on the basis of the newly emerged debated matter against the long held approach of taking substantive protections as part of MFN treatment.

The paper tries to indicate the possible measures to step to the rethinking phase. Thus, it discloses the key components of MFN clauses in terms of their role in determining the scope of MFN protections. It also reviews the options suggested by international organizations with due emphasis to their wakeup calls for host states

[7]UNCTAD, Investment *Policy Hub* available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>, accessed on 16th November 2021. 12 are not entered in to force & the 2 are terminated. In order to examine the feature of Ethiopian BITs in incorporating MFN clause and so as to be able comprehend the tendency in incorporating the clause with their possible implication, all Ethiopian BITs regardless of their status in relation to entrance in to force, are made to be subject of analysis.

[8] For the detail discussion on the other aspect of the contemporary debate on MFN clauses: Its' role to import procedural protections see Martha Belete and Tilahun Esmael, 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration' (2014) 8Mizan Law Review 1.

who are victims to the evils of the unsettled scope of MFN clauses.[9] Further than this, the article attempts to address the experiences of different countries; both of those who have passed through the flame of MFN claims as well as those who opted to take lessons from others by taking measures on their BITs early.In response to this endeavour, qualitative doctrinal legal analysis using both primary and secondary sources of data has been made.

In line with the aforementioned issues, this article is organized into six sections. The first part gives brief introduction about Bilateral Investment Treaties and MFN concept in general. The second part discusses the MFN treatment and the contemporary contested issues. The third part covers key components of MFN clauses and their role in determining the scope of MFN protections.The fourth section provides an overview regarding the wake-up calls by international organizations and the measures taken by different countries accordingly. The fifth section covers the analysis on Ethiopian BITs MFN clauses in light of the contemporary controversies on MFN concept. Finally, concluding remarks are given under the sixth part of the paper.

2. General overview on BITs and MFN Treatment

2.1. Bilateral Investment Treaties

Bilateral investment treaties (BITs) are agreements independently negotiated between two countries to regulate the undertaking of foreign investment in a host state.[10]The foremost BIT was signed between the Federal Republic of Germany and

[9] Organization for Economic Cooperation and Development, Most Favoured Nation Treatment in International Investment Law , 2004, see also United Nation Conference on Trade and Development, *MostFavoured Nation Treatment,*2010 and International Institute for sustainable development ,The most favoured nation clauses in investment treaties (IISD Best Practices Series 2017 }

[10]Kenneth Vandevelde, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 The American Journal of International Law 4.

Pakistan for promotion and protection of investment in 1959.[11] Since then, BITs have become widely used sources of international investment laws that grant multiple protections for foreign investors and their investments. Currently from the number of International Investment Agreements (IIAs) that have reached more than the 3000 above the 2500 are BITs.[12]

BITs uphold the aim of providing reciprocal promotion and protection to foreign investments.[13]The forms of protections conferred by BITS are mainly two types in nature i.e. substantive and procedural. While the substantive aspects of the protections deal with the various forms of rights granted to foreign investors and their investment,[14]the procedural parts cover issues of investment dispute settlement mechanisms.[15] Of the various types of substantive protections, MFN is one of the widely recognized as well as most debated form of protection provision under BITs.

2.2.Most Favoured Nation Treatment: Origin, Meaning, and Purpose

[11]Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 Thomas Jefferson School of Law 1.

[12]UNCTAD Investment Hub, available at <https://investmentpolicy.unctad.org/international-investment-agreements> accessed December 2021.

[13]Salacuse J, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer 3.

[14]BITs substantive protections mainly comprise Full Protection and Security (FPS), Fair and Equitable Treatment (FET), Prohibition from Unlawful Expropriation, Prohibition of Discrimination and Arbitrary Measure, Compensation for Loss, Repatriation Right, Stabilization and Umbrellas Clauses, Most Favoured Nation (MFN) and National Treatment(NT).See Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 Global Business & Development Law Journal 337, 341-342.

[15]Concerns with regard to competent organs, procedures , period of limitation, waiting period , jurisdiction and applicable rules to remedy investment disputes form the procedural protection.

Commercial treaties in the 11th and 13th centuries are evoked as the roots of MFN treatment.[16]However, the wider incorporation of MFN clauses was made under the 18th and 19th centuries Friendship, Commerce, and Navigation treaties (FCN).[17] Modern MFN treaty clauses which are reciprocal and unconditional in their nature were introduced in the 15th century.[18] These forms of MFN clauses have retained to be the governing modality of incorporating MFN clauses under various legal frame works including that of World Trade Organization legal frame works.[19]The introduction of MFN concept to IIAs trace back to 18th and 19th FCN treaties which are regarded as the earliest forms of investment agreements.[20]The incorporation of MFN clauses, particularly under BITs, began since the signing of the very first BIT which was between the Federal Republic of Germany and Pakistan in 1959.[21]

With the proliferation of BITs, the insertion of MFN in the treaties has also simultaneously expanded.[22]Despite its' wider usage under various agreements, there is no universally agreed meaning on what particular elements constitute as MFN

[16]Thomas Barclay, 'Effect of "Most-Favoured-Nation" Clause in Commercial Treaties'(1907) 17 The Yale Law Journal 1891 1892. See also Endre Ustor, 'Most-Favored-Nation Clause' (1969) 2 Yearbook of International Law Commission 157 15

[17]John F. Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modem Era' (2013) Columbia Journal of Transnational Law 311.)<http://jtl.columbia.edu/wp-content/uploads/sites/4/2015/01/51ColumJTransnatlL302.pdf ,accessed 6 January 2018.

[18] Andrew Newcombe and LluisParadell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 4. see also Seymour J. Rubin, 'Most Favoured Nation Treatment and the Multilateral Trade Negotiation a Quiet Revolution' (1981) 6 (2) Maryland Journal of International Law 221 222-223

[19]See WTO economic regulatory legal frame work provisions such as The General Agreement on Trade and Tariff (GATT), Agreement on Technical Barriers to Trade (TBT), art. 5.1.1 The General Agreement on Trade in Services (GATS) art II and Agreement on Trade-Related Aspects ofIntellectual Property Rights (TRIPS) art 4

[20]Kenneth J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017) 179

[21]Vorgelegt Von, 'The Most Favoured Nation Clause in International Investment Agreement Law ' (Dissertation, Hamburg University 2018) 352

[22]Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries'(1990) 24 (3)The International Lawyer 655 668.

treatment. Although different international organizations such as International Law Commission had exerted their effort to codify MFN principles in a single document, it was not successful.[23]Nonetheless, the draft article of the commission is the commonly referred source to capture the general definition of MFN. Accordingly, MFN is defined as "a clause" as well as "treatment" as follow:

> "*Most-favoured-nation clause is a treaty provision whereby a state undertakes an obligation towards another state to accord Most-favoured-nation treatment in an agreed sphere of relations.*"[24]

> "*Most-favoured-nation treatment is a treatment accorded by the granting state to the beneficiary state, or to persons or things in determined relationship with that State, not less favourable than treatment extended by the Granting State to a third State or to persons or things in the same relationship with that third State." [25]*

In the context of investment agreement, MFN is a standard of protection in which an investor from a party to an agreement, or its' investment, would be treated by the other party "no less favorably" with respect to a given subject-matter than an investor or an investment from any third country, in like circumstance.[26]

The introduction of MFN principle under international investment law is triggered by different justification. First, originally, MFN protection in investment treaties was granted with the aim to prevent arbitrary discrimination between foreign investor by host state national laws, regulations and administrative decisions or by its actions, measures and practices. Second, in early BITs, MFN was incorporated to ensure the observance of National Treatment (NT) i.e. as a means to warrant that the NT is

[23]Vorgelegt (n 21) 38-44. Another institution that has tried to codify MFN principles was Insititute de Driot International.
[24] United Nation International Law Commission, *Final Draft Articles on Most Favoured Nation Clauses in Treaties Between States*(ILC International Legal Materials 17 (6) 1978) Art 4
[25]Ibid Art 5
[26]Andrew and Lluis, (n 18) 225.

applied to all foreign investors regardless of their origin.[27] Third, MFN is seen as legal machinery that helps to prevent states from forming economic alliances in a way that negatively affects other states which could increase the potential economic tension resulting military conflict. Fourth, it aims at averting monopoly and keeping the value of original concession made between the granting and beneficiary states.[28]

Generally, the introduction of MFN principle in economic treaties is prompted by both economic and political rationales.[29]Laying a fair playing ground by creating equal competitive opportunities for foreign investors of different nationalities, protecting the rights of investors and maintaining sovereign equality of states through preventing nationality based discrimination among foreign investors of different countries by host states are the major reasons justifying the inclusion of MFN in investment treaties.[30]

3. MFN Treatment and the Contemporarily Contested Issues

As the consequence of international investment tribunals new and divisive jurisprudences on MFN , the purpose and the scope of MFN treatment in the context of BITs has grown to be the most debated and controversial standard of investment protection.[31] Foreign investors' tendency of using MFN clauses under basic treaties

[27] United Nation Conference on Trade and Development, *Most Favoured Nation Treatment,* (UNCTAD Series on Issues in International Investment Agreements II, 2010) 13

[28]Robertus Bima, Wahyu Mahardika1 and Emmy Latifah, 'Varying Application of Most Favoured Nation Principle in International Investment Treaty'(2018) 7 392

[29]Ibid 392 and 394.

[30]International Law Commission, *Most-Favoured-Nation clause , Final Report of the Study Group on the Most-Favoured-Nation clause* (ILC 2015) 8-10

[31]TarcisioGazzini and Attila Tanzi, 'Handle with care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) 14 The Journal of World Investment & Trade, 978 983.

to import what they considered as relatively better granted protections from comparator treaty is the source of the contemporary debate regarding the function and scope of MFN under BITs. The unintended utilization of MFN clauses by investors has expanded than ever imagined and taken the concern of states, international investment tribunals themselves, scholars and international organizations.

BITs uniquely entitle individual investors to institute claims against host states before international investment tribunals. [32]Accordingly, more than 20 MFN based claims with aim to import substantive protections were brought before these tribunals and host states were exposed to frequent litigations and were made to pay huge amount of compensation.[33] Though countries sign BITs in consideration of several socio-economic and political based strategic alliances,[34] the MFN claims of investors by shopping rights from third party BITs have rendered the role of MFN under BITs to be contested from different perspectives.

Generally, the function of MFN under international investment treaties can be categorized into two contradictory scholars view. While some scholars argue that MFN clauses under BITs are apparatuses to multilateralization, hence, claim easing treaty negotiations, promoting economic liberalization and providing uniform high standards of protections for foreign investors are their major purposes by admitting that protection under third party treaty constitute MFN treatment.[35] On the contrary, other scholars debate that such approach of utilizing MFN defeats the purpose of independent negotiation, affects regulatory autonomy of host states, elevates and

[32] Scott Vesel,(Clearing a path Through a Tangled Jurisprudence: Most-Favoured –Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties) (2007)(32) 126 Yale Journal of International Law

[33]International Institute for Sustainable Development, *The Most Favoured Nation Clause in Investment Treaties* (IISD Best Practices Series 2017 10-17

[34]M.Sornarajah (n1) 183

[35]Stephan W. Schill, 'Allocating Adjudicatory Authority: Most Favored Nation Clauses as a Basis of Jurisdiction A Reply to Zachary Douglas' (2011) 2 (2),Stephan (n4) Catharine Titi (n 3) Aron (n 39)

renders the scope of obligation of host state unpredictable. It also disregards the significant variations that exist among the different substantive as well as procedural standards of protections under separate BITs. Moreover, the scholars invoke that it violates the sovereign right and freedom of making independent negotiation by states. In this reasoning,[36]Kenneth has briefly expressed the essence of the counter argument stating:

"As result of the MFN treatment provision, every BIT concluded by a country is as strong as the strongest BIT concluded by that country"[37].

3.1. Importing substantive protections via MFN: Tribunals' Jurisprudences and the divergences

BITs provide various forms of substantive protection for foreign investors and their investment. Full Protection and Security (FPS), Fair and Equitable Treatment (FET), Prohibition from Unlawful Expropriation, Compensation for Loss, Repatriation Right, Umbrella and Stabilization Clauses, National Treatment (NT) and Most Favoured Nation Treatment (MFN) are among the various forms of protections.[38] The majority of the substantive protections are fluid concepts and complex in their nature. [39]MFN adds fuel to this through creating juridical link among the substantive protections under different BITs paving the way for investors to shop rights from

[36]YannickRadi, 'The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse''(2007) 18(4) EJIL, 757, 764,Simon & Benton (n 61) Patric(n56)

[37]Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press 2010) 339-346

[38]Rudolf Dolzer and ChristophSchreuer, *Principles of International Investment Law* (Oxford University Press 2008) 119-191

[39] Aaron M. Chandler, 'BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice' (2009) 43(3) The International Lawyer, American Bar Association 1301, 1302-1310.

one BIT to another BIT which reciprocally extend the obligation of host state.[40]For instance, FET is one of the repeatedly claimed substantive protections for its' importation through MFN clause by investors before IIT.[41]

In light of substantive protections, MFN clauses under basic treaties are invoked by investors for various purposes:[42] Such purposes are to import substantive provisions from comparator treaties which they deem are more beneficial than that exist in the basic treaty as in the cases of *ADF v. United States*[43] *and CME v. Czech Republic*[44], to avoid provisions of obligations that exist in the basic treaty but not under comparator BITs of host state as in the case of *CMS v. Argentina*[45], to widen the scope of application of the basic treaty such as the definition of investor and investment as in the case of Tecmed v. Argentina[46] and to amend the date of the entry into force of a given BIT so as to bring prior claims through packages of protections provided in a BIT as in the case of *Societe Generale v. Dominican Republic*.[47]

The utilization of MFN clauses to import substantive protection from comparator BITs has been an accepted jurisprudence for long period of time.[48]*AAPL v. Sri Lanka* is the pioneer BIT case to recognize the right to import better substantive provision

[40]Stephan (n 4) 5.
[41]United Nation Conference on Trade and Development, *Fair and Equitable Treatment* (UNICTAD Serious on issues in International Investment Agreements II 2012)
[42]International Institute for Sustainable Development, *The Most Favoured Nation Clause in Investment Treaties* (IISD Best Practices Series 2017) 10-17
[43]*ADF Group Inc. v. United States of America, ICSID , Case No ARB (AF)/00/1,2003 https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/53/adf-v-usa accessed 10 December 2021*
[44] *CME Czech Republic B.V. v. Czech Republic, UNCITRAL, 2003,https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/52/cme-v-czech-republic accessed 10 December 2021*
[45]*CMS Gas Transmission Company v. The Argentine Republic, ICSID, Case No. ARB/01/8, 2005, https://www.biicl.org/files/3913_2005_cms_v_argentina.pdf accessed 13 October 2021*
[46]*TecnicasMedioambientalesTecmed S.A. v. United Mexican States, ICSID, Case No. ARB(AF)/00/2,2003,https://www.iisd.org/itn/2018/10/18/tecmed-v-mexico/ October 2021*
[47]*SocieteGenerale v. Dominican Republic, UNCITRAL, Case No. UN 7927,2008, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/250/soci-t-g-n-rale-v-dominican-republic accessed 18 June 2018*
[48] Aaron (n 39) 1

through MFN clause.[49]Later, different tribunals such as *MTD v. Chile* ruled that more beneficial substantive provision in third party BITs form MFN treatment and the tribunal justified its' ruling providing that the MFN exception of the basic BIT doesn't restrict from utilizing MFN in such way.[50]In the *White Industries vs. The Republic of India* case, the tribunal passed,

"The role of MFN for importation of substantive provisions is not at all controversial".[51]

Similarly, *Vladimir Berschader and MoiseBerschader v. Russian Federation,*tribunal pointed out, 'it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties'[52]

Conversely, the above interpretation of the tribunals with regard to the scope and function of MFN clauses is rejected by another investment tribunal as well as received criticism from other concerned bodies. For example, in the case between *Ickalelnsaat Limited Sirketi vs. Turkmenistan* the tribunal ruled that claimant can't invoke MFN clause to import substantive protections from third party BIT unless it is clearly provided to do so.[53] Likewise, states acting as litigants, non-disputing

[49]*Asian Agricultural Products Ltd v Sri Lanka, ICSID, Case No/ ARB/87/3 ,1990, https://www.biicl.org/files/3937_1990_aapl_v_sri_lanka.pdf accessed 18 June 2018*

[50]*MTD Equity SdnBhd and MTD Chile SA v Chile, ICSID, Case No ARB/01/7 2004, http://oxia.ouplaw.com/view/10.1093/law:iic/174-2004.case.1/law-iic-174-2004 accessed 17 December 2021*

[51] *White Industries Australia Limited v. Republic of India, UNCITRAL, 2011 https://www.italaw.com/cases/documents/1170 accessed 17 December 2021*

[52]*Vladimir Berschader and MoiseBerschader v. Russian Federation, SCC ,Case No. 080/2004 ,2006, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/155/berschader-v-russia accessed 21 December 2021*

[53]*Ickalelnsaat Limited Sirketi v. Turkmenistan, ICSID, Case No. ARB/10/24 ,2016 https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/387/i-kale-v-turkmenistan* accessed 3 December 2021

parties and treaty drafters have in several instances voiced that common terms in MFN clauses such as *"treatment*" do not necessarily permit the importation of substantive standards from third-party treaties.[54]

In response to the above IIT experiences, different scholars have forwarded their arguments and perspectives regarding the particular role of MFN clause to import substantive protections. For instance, Patrick has argued that unless similar measure that restricts the scope of application of the MFN clause under the basic treaty is taken, the effort of restricting other substantive protections such as FET under new BITs of host states would be futile.[55]He questions,

"if contracting states intended to reject a stand-alone FET clause, why were they not sufficiently prudent in drafting the MFN clause in order to give full effect to this exclusion?"[56]

This inquiry leads to the need to adjust the scope of MFN clause by giving due emphasis to its' pillar components that are treatment, beneficiary, like circumstance and MFN exception.[57]

Criticizing the importation role of MFN, Jeswald, states that in granting substantive protections under BITs variation in a given particular substantive provisions can be made in line to economic strategic alliance a specific developing country want to develop with a particularly industrialized state.[58] Thus, he argues MFN is hindrance to make negotiation with such variations.[59] Correspondingly, Simon and Heath, criticize the multilateralization role of MFN clauses in BITs in general, and its'

[54] UNICTAD *Most Favoured Nation Treatment* (n 27)
[55]Ibid 11
[56] Ibid 8 - 9
[57]Kenneth (n 10) (n 11)
[58] Jeswald (n 22) 667, He mentions the specific instances in which variations could be manifested these are definition of investment and investors, principles concerning repatriation of capital, elements on compensation for loss, protection and security and principles of prohibition of expropriation against compensation.
[59]Ibid 665

applicability on substantive protection, in particular. They characterize the trend of using MFN to multilateralize substantive protection as *"a conventional wisdom"* which relied on mere presumption on the role of MFN as means for importation of substantive rights.[60] They claim that such lean has led to "top-down "approach of interpreting MFN clauses resulting uniformity. They argued this inclination of using MFN clauses disregards and conflict with the meaningful differences that exist among substantive protections including MFN clauses themselves.[61]

On the contrary, Stephan, in his reply to Simon and Heath, has brought the counter argument that MFN clause is a tool for bilateral commitments to shift to multilateralism.[62] He argues that when countries incorporate MFN clauses in their bilateral investment treaties, it demonstrates their intention to multilateralise the substantive obligation under the bilateral treaty, thus, he concludes that the issue is not the approach of interpretation or presumption rather it is about accepting the inherent nature of MFN principle that is multilateralization.[63]

4. Components of MFN clauses and their role in determining the scope of MFN obligation

MFN protection promotes equal treatment by host state towards foreign investment. In line with this the protection clause has components that help to determine the scenario of granting the protection. The four components of MFN clause comprise treatment, beneficiary, like circumstance and MFN exception. These elements are

[60] Simon Batifort and J. Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2017) 111(4) The American Journal of International Law 873, 873-876.
[61]Ibid
[62] Stephan (n 4) 10-11
[63] Ibid

vital in the formulation and determination of the scope of MFN obligations of contracting states. The forthcoming sub-sections will discuss about each elements of MFN clause.

4.1.Treatment

Treatment refers to the specific subject matter or substance that is accorded through MFN as protection.[64]It is also defined as the conduct or behavior towards another party referring state acts towards investor.[65]Defining the term 'treatment' requires specifically diagnosing the wording of the term within MFN clause of the respective BIT and this makes finding uniform meaning of the term very difficult. [66]The term 'treatment' in context of investment treaties carry two main aspects; measures by host states on foreign investment and the actual material treatment granted to them in relation to creating competitive conditions.[67]

In terms of clarifying the content of the protection, MFN clauses take two major forms: stand alone and qualified clauses.[68] MFN clause in BITs that merely incorporate the term 'treatment' stating "no less favourable treatment" to be accorded is referred as "Stand Alone MFN Clause" or "Unqualified MFN". Such MFN clause is not restricted in its scope to any particular part of the treaty containing it or to any other subject matter. As result it is characterized as very general MFN clauses subjected to wide interpretation and rendering host states' scope of liability unpredictable.[69] Whereas, MFN clauses providing normative content of treatment or with identified specific subject matter are regarded as qualified or narrow MFN

[64] Rudolf and Christoph (n 38) 186-191
[65]Stephanie L. Parker, 'A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties' (2012) 2(1) Arbitration Brief 30 and 45.
[66] Ibid 44-46
[67] UNICTAD, *Most Favoured Nation Treatment* (n 27) 17-18
[68]Scott Vesel, 'Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties' (2007) 32 Yale Journal of International Law 126, 136-138.
[69] Andrew Liluis (n 18) 7-10 see also Rudolf and Christoph (n 38) 188-191

clause; they are less prone to broad interpretations and make the states' scope of liability to be predictable.[70]

4.2. Like Circumstance

Like circumstance is also known as "the same circumstances", "like situations" or "similar situations". It is a comparison standard that has to be fulfilled so as to allow foreign investors and investments enjoy similar protection through the means of MFN.[71] Like circumstance requires an assessment of a number of factors related to the nature and impact of foreign investments and could result a given foreign investment not being comparable to the others, thus, warranting a differential treatment.[72]If the need for foreign investment is not only for the matter of increasing economic aggregate but also to achieve sustainable development policies; it requires to be selective on the type of FDI countries are looking for and be strategic on the grant of protections accordingly.[73]In this regard like circumstance has the role of dissecting the level and type of protections that can be granted by host states via MFN.

4.3. Beneficiaries of MFN Treatment

Beneficiary refers to the specific subjects that are entitled to enjoy the MFN protection and it determines to whom host states' specific liability would be. Under the majority of BITs "investment" and "investor" are named as beneficiaries of MFN

[70] Ibid

[71]Marilda Rosado De Sa Riberio and Guterres Costa Junior, 'Global Governance and Investment Treaty Arbitration: The Importance of the Argentine Crisis for Future Disputes' (2015) 14 The Law and Practice of International Courts and Tribunals 20

[72]Soniae. Rolland & David M. Trubek, 'Legal Innovation in Investment Law : Rhetoric and Practice in Emerging Countries' (2018) 39 (2) Penn Law: Legal Scholarship Repository 335, 405.

[73]Ibid 366 -383

treatment[74]where as some BITs restrict the beneficiaries of MFN treatment only to "investment".[75]Beside this "activities related to investment" such as acts of management, maintenance, operation, use, conduct, enjoyment and disposal of investment are also mentioned as beneficiaries of MFN treatment in BITs.[76]In this regard, it is claimed that BITs that explicitly grant MFN treatment to both investment and investor create more favourable investment climate.[77]Conversely, it is argued that naming investor as well as the inclusion of activities related to investment as beneficiary adds pressure up on the host state by expanding the scope of the particular BIT obligation. [78]

4.4. MFN Exceptions

MFN exception sets reservations for the extension of MFN treatment. It is a mechanism to deviate from granting MFN protection. It has key role to retain regulatory freedom for host states and helps to keep socio-economic and political practicality by being responsive to pragmatic situations.[79]BITs as sovereign acts of states they shall balance the interest between foreign investment protections with that of public interest issues. In this regard, MFN exception is instrumental to retain the balance by making the discrimination by host states to be backed by legal ground.[80]In order to get proper attention of international investment tribunals', state interest has

[74] International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses*(n 24) 27
[75]Robertus, Wahyu and Emmy (n 28) 403
[76] UNICTAD *Most Favored Nation Treatment* (n 21)
[77] Kenneth (n 20) see also UNICTAD Most Favoured Nation Treatment (n 27)
[78] IISD *The Most Favoured Nation Clause in Investment Treaties* (n 22) 32
[79] David Schneiderman, 'The Constitutional Structures of the Multilateral Agreement on Investment' (1999) 9 (2) The Good Society 757, 758-760.
[80]Ahmad Ali Ghouri, 'Investment Treaty Arbitration and Development of International Investment Law as a 'Collective Value System': A synopsis of a new Synthesis' (2009) 10(6) Journal of World Investment and Trade 921, 925-928.

to be clearly provided under BITs.[81]Most of the international investment tribunals have directed contracting states to use their MFN exception in a way that is responsive to the contemporary issue i.e. whether states desire protections provided in third party BIT to form MFN treatment or not. For instance, the Siemen Vs. Argentina tribunals have rendered,

> *"The purpose of MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted."*[82]

Thus, providing clear MFN exception in this regard has the role of mitigating the complex effects of MFN clauses in BITs and warrant providing preferential treatment.[83]

5. Wake-up calls: An overview of international organizations and countries' reactions

Different international organizations have expressed their concerns on the dissected issues of MFN.[84]These bodies, through their analysis, options and comments, have made call for states to give due care incorporating MFN clauses in their BITs. They have also stressed that the complexity of the subject matter demands to exert the required level of professionalism intelligence and an open specific diplomatic dialogue on the issue.

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[81]Giovanni Zarra, 'The Relevancy of State Interest in Recent ICSID Practice' (2016) XXVI The Italian Yearbook of International Law 510, 511-512.

[82]*Siemens A.G. vTheArgentine Republic, ICSID, Case*No.ARB/02/8,2007*https://cil.nus.edu.sg/wp content/uploads/2015/10/Day4-11-Case-24.pdf accessed 29 December 2018*

[83] UNICTAD, *Most Favoured Nation Treatment* (n 27) see also Ahmad Ali (n 80)

[84] The International Law Commission (ILC), United Nations Conference on Trade and Development (UNCTAD), International Institute for Sustainable Development (IISD) and the Organization for Cooperation and Development (OECD) are among the organization that voiced their concern on the controversies of the concept of MFN treatment under investment treaties

For instance, the ILC has undertaken different studies on MFN with the aim to consider contemporary issues. Accordingly, though it couldn't turn it into a convention, ILC had prepared draft article on MFN. [85]The Commission analyzing the trends of interpretation of MFN clauses by tribunals has provided detail guidance for treaty negotiators, policy makers and practitioners.[86]UNCTAD has also provided several options that may assist for states to determine on what the interaction between MFN treatments of basic BIT and protections under third party BITs could possibly be. The major options provided by this organ are:1, accepting the multilateralization role of MFN with clear consent, 2, absolute prohibition of importation, 3, qualifying MFN through providing the contents of MFN components such as treatment, beneficiary , like circumstance &MFN exceptions , 4, taking radical approach or avoiding MFN clause from BIT. [87]In line with each option, UNICTAD has also further brought model MFN clauses that can be sample in crafting MFN clauses in BITs.[88]

IISD suggests that in all future treaties there is a need to adopt a consistent national position on the negotiation of investment treaties in general and on MFN clause in particular.[89] For the existing treaties with vague clauses, the options recommended by IISD are renegotiation or joint interpretation by the signatory states. Failing to do these, the concerned state could proceed to a unilateral interpretation of the treaty or the termination of the agreement on its expiry date.[90]For new BITs, the IISD has provided the option of avoiding MFN in the first place[91]. The second option is excluding all prior or subsequent investment treaties (or both) from the scope of MFN, starting with statement such as "for greater certainty" or a similar expression.

[85]Vorgelegt (n 21)
[86] See the details of the guidance from ILC document (n 24)
[87]UNICTAD (n27) 102-114
[88] Ibid
[89]IISD.*Best Practices* (n 33*)* 23 - 25
[90] Ibid
[91] Ibid

It also suggests MFN to be made applicable at the post-establishment stage and to include "like circumstances" component with "*indicative list of factors"* to be taken into account in assessing *"like"* character so as to provide similar protection. On MFN exceptions, it recommends the exceptions to include specific measures and sectors that are sensitive for the respective states. [92]

Based on the aforementioned points, different countries have taken different types of measures on their bilateral treaties. For instance, some countries under their BITs such as the Colombia-United Kingdom BIT, Switzerland–Georgia BIT, Canada-Peru BIT, Japan-Switzerland BIT, and China- New Zealand BIT have restricted the applicability of MFN clauses to be exclusively on procedural matters excluding substantive matters.[93]Again, the Central America Free Trade Agreement (CAFTA) has explicitly recognized the Maffizin approach by directly referring to the "*Maffizine Note*" under its' foot note which restrict the applicability of MFN on dispute settlement.[94]

Other countries have excluded the applicability of MFN on both procedural and substantive matter. For instance USA Model BIT has adopted that the MFN clause will not apply to future treaties of the state aiming to lesser its obligation.[95] The 2004 Canadian Model BIT provides that MFN doesn't apply to treatments under any prior

[92] Ibid

[93] see also UK Model BIT (2014), Republic of Colombia and the Swiss Confederation BIT (2006) cited in ILC Most Favoured Nation Clause (2018) (189), Colombia-United Kingdom BIT(2010) Switzerland–Georgia BIT (2014) New Zealand and China BIT(2000), Switzerland–Georgia BIT (2014) cited in International Institute for Sustainable Development (IISD) Best Practices, *the Most-Favoured Nation Clause in Investment Treaties* (IISD best practices 2017) 23, see also Andrew and Liuis (n 36) 26, Patric (n 56) and Soniae,Rollan and David (n 73)

[94] IISD, Best practices (n 33) 22-24

[95]Ibid

treaties.[96] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) MFN exception reads:

"For greater certainty, the [most-favoured-nation treatment] does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment,' and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."[97]

The other approach which is practiced to restrict the scope of MFN is defining the term treatment. In this regard the Germany-Egypt, and the Italy and Jordan BITs can be taken as an example. [98]Further than this, inserting like circumstance requirements and avoiding expansive terms are also used as a tool to limit the scope of application of MFN. In this regard, the India-Mexico BIT can be mentioned as instance.[99]The most radical approach adopted by some other countries to rescue themselves from the evils of MFN clauses is wholly abrogating the clause from their BITs. In this aspect, the India new Models BIT, the India-Singapore Comprehensive Economic

[96] Ibid

[97] EU-Canada Comprehensive Economic and Trade Agreement Art 8.7 https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ accessed 9 October 2021 . See also The China-Canada BIT excludes from the ambit of its MFN clause treatment by a contracting party pursuant to any existing or future bilateral or multilateral agreement.

[98]Germany-Egypt BIT (2005) cited in UNICTAD (n 27) 114 , and Italy-Jordan BIT Art 3 cited in Stephanie (n 4) 13 for example the particular elements of treatment s constitutes and provided as "*All activities relating to the procurement, sale and transport of raw and processed materials, energy, fuels and production means shall be accorded no less favourable treatment than the one accorded to similar activities taken by investors of third States "*

[99]India-Mexico BIT(2002) Art 4(1)(2) https://arbitrationlaw.com/sites/default/files/free_pdfs/mexico-india_bit.pdf accessed 9 October 2019, see also Biswajit Dhar, Reji Joseph and T C James , 'India's Bilateral Investment Agreements: Time to Review' (2012) 47 (52) Economic and Political Weekly 119-120 the expansive terms such as "whichever is more favourable", "enjoyment", and "effective means of asserting claims" that can be subjected to broad interpretation are avoided.

Co-operation Agreement [100]and the 2012 SADC model BIT can be mentioned as examples.[101]

Other than the above approaches, BITs as another method may incorporate clauses that give the chance for parties to have deliberation on new issues in applying their BIT. For instance, USA BITs with Senegal, Zaire, Morocco and Egypt have integrated provisions that read;

"Either Party may take all measures necessary to deal with any unusual and extraordinary threats to national security and interest."[102]

In line to this, the contemporary debatable issues on MFN can be taken as one example of extraordinary practical threats to national interest. Hence, incorporating such provision can help to circumscribe the employment of MFN in a way that cost the national interest of host state by providing legal capacity to have dealing on the issue when it encounters.

6. Analysis on Ethiopian Bilateral investment treaties MFN Clauses

6.1. General overview on Ethiopian BITs

Ethiopia envisions becoming a middle-income country and a leading manufacturing hub in Africa by 2025.[103]The economy policy of the country encourages foreign direct investment that lead to industrialization. [104]Hence, as a host state of investment

[100]India Model BIT (2016) https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb accessed 20 December 2021, see also IISD Best practices (n 22) 24
[101]See South African Development Community, Model Bilateral Investment Treaty ,2012
[102] Ibid see alsoJeswald (n 22) 658
[103] Ethiopian Investment Commission, Ethiopian Investment Policies and Incentives and Opportunities ,2021,3
[104]Ibid

creating conducive legal environment is key for the smooth functioning of such investments. BITs in this regard play their own role from different dimensions. In order to benefit from foreign investment it is important to make sure that the legal frame works are designed in a way that balance the interest of foreign investors and Ethiopia, as a host state. Ethiopia's experience of regulating foreign investment through BITs started since April 21, 1964, which marked the signing of the first Ethiopian BIT with Germany.[105]Since then, the trend of signing BITs has increased and reached 35 including the latest Ethio-Brazil BIT signed in 2018.[106]

Ethiopia BIT signatory states are namely Brazil, United Arab Emirate (UAE),Qatar, Morocco, United Kingdom (UK),Equatorial Guinea, Spain, South Africa, India, Belgium Luxembourg Economic Union(BLEU), Egypt, Finland, Sweden, Austria, Libya, Germany, Nigeria, Israel, Iran, France, Netherland, Algeria, Denmark, Tunisia, Turkey, Sudan, Russia, Yemen, Malaysia, Switzerland, China, Kuwait, and Italy.[107]As it can be grasped from the preambles, Ethiopian BITs majorly aim at granting reciprocal promotion and protection to foreign investments and creating favorable conditions for the undertaking of the investments. Accordingly, all the BITs provide both substantive and procedural protections.

The following section provides analysis on the MFN clauses of the BITs against the general jurisprudences on MFN concept and their subjection to the contemporary controversies on scope and purpose of MFN protection. Of the 35BITs, 29of them are made part of the analysis.[108]

[105]UNICTAD, *Investment Police Hub*,https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia accessed 7 December 2021

[106]Ibid, see Agreement between the Federal Republic of Brazil and The Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, signed in April 11 2018

[107]UNICTAD , Most Favored Nation treatment (n 27)

[108]The remaining 6 BITs are not included on the ground of accessibility on line and some language of the BITs being different

6.2.Analysis on the components of MFN clauses under Ethiopian BITs

6.2.1. Treatment

Ethiopian BITs MFN clauses depict inconsistency in terms of elucidating what constitutes the particular subject of MFN as treatment**.** The BITs have incorporated both stand alone and qualified forms of MFN clauses. However, the majority of the clauses falls under stand alone or liberal MFN clause category in which they have incorporated the term treatment without providing the specific subject matters or substances that can establish the MFN protection. [109]These BITs are vulnerable to any forms of MFN claims rendering the BIT obligations of Ethiopia wholly unpredictable. The MFN clauses are subject to investment tribunals' discretion of interpretation and prone to all legal regimes including third parties BITs and government measures towards investments and investors to be regarded as treatment.

Very few BITs such as the BITs with Yemen, China, Russia, Malaysia, Denmark, Egypt, Libya, and German have qualified MFN clauses. Of these, the first seven BITs have no separate MFN clause; rather they have only recognized certain substantive protections to have MFN status. The Ethio-German BIT grants MFN treatment with regard to inputs of production and marketing. Exceptionally, the Ethio-Britain BIT MFN clause has explicitly recognized the whole part of the treaty to form treatment of the MFN clause and it is qualified in the way that subjects the whole part of the BIT for importation. Above all, the inconsistencies of the MFN clauses are also susceptible to the new dimension of utilizing MFN clauses to import other MFN provisions from third party BIT as independent substantive protection.

[109] For instance see Ethio-Tunisia, Ethio-South Africa, and Ethio-Netherland, Ethio-Sudan, Ethio-Finland BITs despite these BITs are concluded after the Maffizni case they are not reactive to the issue.

In terms of relating MFN clauses with the substantive protections under Ethiopian BITs , it can be said that almost all the BITs have recognized certain substantive protections such as Fair and Equitable Treatment, Compensation for loss,[110] Prohibition of expropriation against compensation,[111]Protection and security, [112]Taxes and other fiscal matters [113] to form MFN treatment. Few BITs such as BITs with Yemen, China, Russia, Malaysia, Denmark, Egypt, and Libya have MFN clauses with identified subject matters. [114] These BITs have no independent MFN clause but only have provision that recognize certain substantive protections to be provided not less favorably than investors and investments from a third state. These BITs depict the systematic restriction of the scope of MFN protection and attempt the scope of obligation of the states to be relatively predictable. In contrast, there are

[110]Ethio-Yemen (to provide FET art 3(2)) and (compensation for loss art 5),Ethio-Sudan (art)Ethio-Turkey art 4 (compensation for loss),Ethio-Spain BIT (Art 6),Ethio-South Africa BIT (for compensation in case of loss art 4) Ethio-Britain BIT(Compensation for loss 4(2)),Ethio-Brazil (Compensation for loss),Ethio-German (Compensation for loss) Ethio-France (in case of loss),Ethio-China BIT Art 5 (For compensation in case of loss, for FET and protection: the BIT simply state protection not clear whether it refers to full protection and security or mere protection and security),Ethio-Russia (to provide FET Art 3(2) and Compensation for loss Art (5)),Ethio-Netherland BIT (for compensation in case of loss),the Ethio-Iran BIT Art 4(1) (for FET, full and constant security and protection ,for compensation in case of loss),Ethio-Austria art 6 (for compensation of loss),Ethio-Algeria Art 5(7) (For compensation in case of loss),Ethio-UAE (For compensation in case of loss, Art 3(4),Ethio-Morocco BIT (for compensation in case of loss),Ethio-Tunisia (for compensation for loss, Art 4),Ethio-Swiss (Art 6(2), Ethio-Sweden (art 5),Ethio-Finland (art 6 in case of compensation for loss),Ethio-Kuwait Art 4(1) and 5 (to provide FET and Compensation for loss or damage),Ethio-Malaysia art (Art 3 for FET and Art 4 in case of compensation for looses), Ethio-Libya BIT (Art 3(2 for FET and compensation for loss), Ethio-Israel BIT(art (4) for compensation in case of loss), Ethio-Denmark art 3 and 6, Ethio-Egypt art 3(2) and 4,Ethio-India art 6.

[111]Ethio-Turkey, Ethio-France (Art 5(3)

[112] The Ethio –German BIT art 3(4) it provided the FPS to be provide for investor not less favourable than investor form third state, Ethio-Morocco art 3(1)(for protection and security),Ethio-Libyan BITs Art 3(2) (for protection)

[113]Ethio-Netherland BIT art 4. All Ethiopian BIT, Except for the Ethio-Britain BIT has provided MFN and NT separately provide MFN together with NT but this has no problem with the scope of MFN protection.

[114]Ethio-Yemen art 3(2) Ethio-China art 3(3) and (5), Ethio-Libya (art 3(2), Ethio-Denmark art 3 and 6, Ethio-Egypt art 3(2) and 4 these BITs make FET and compensation for loss to have MFN status, Ethio-China Art 3(3),Ethio-Libya (art 3(2) these BITs make protection, to have MFN status.

also Ethiopian BITS that partially excluded protections provided under third party BITs from forming MFN treatment. For instance, the Ethio- Brazil MFN provides,

> *"A bilateral investment treaty or free trade agreement that entered unto force prior to this agreement is not part of MFN"*[115]

Similarly the Ethio-Israel MFN states,

> *"Any Agreement for the Reciprocal Promotion and Protection of Investments between Israel and a third state as well as Ethiopia and a third state, that was signed before 1st of July, 2003 are out of the scope of MFN protection."*[116]

According to these provisions neither substantive nor procedural protections granted under third state BITs can be regarded as part of MFN protection. Nonetheless, they have limitation for not excluding or restricting BITs that are signed on the latter dates from being potential MFN claims Thus, their exclusion is partial comparing to the experience of other countries BITs which wholly excluded any third party BITs, regardless of the period of the signing, from being taken as MFN treatment. Conversely Ethiopia has a BIT that fully recognized both substantive and procedural protections in third party BIT to be part of MFN treatment. For instance Art 3(3) of Ethio-Britain BIT states,

"The MFN treatment applies to the provisions of Articles 1 to 10 of this Agreement"

[115]Ethio-Brazil BIT (n 105) Art 6(2)(c)
[116]Agreement Between The Government of The Federal Democratic Republic Of Ethiopia And The Government of The State of Israel for the Reciprocal Promotion and Protection Of Investments, signed on 26 January 2003 Art 7(d)

Articles 1 to 10 of the BIT coverall contents such as the definition of investment and investors, scope of applications of the BIT and all other substantives and procedural protection matters. Thus, investors from Britain would be fully entitled to raise MFN claim with regard to any part of the agreement as long as they deemed it is provided in a more favourable way under third party BIT; thus the whole part of the BIT is prone to replacement or amendment.

Ethio-Kuwait and Ethio-German BITs have exceptionally provided the definitional elements for the term treatment. It reads,

> *"The following shall, in particular, be deemed "treatment less favourable" within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the wholesale marketing of products inside or the marketing of products outside the country, as well as any other measures having similar effects"*[117]

Based on this provision, MFN claims can be brought if and only if the host state makes discrimination on the aforementioned subject matters which are also called material or operational treatment. Hence, the BIT excludes procedural and substantive protections in third party BITs from being subjects of MFN claim on the ground of treatment. This makes the clause to have the future of systematic restriction on its scope. Hence, such MFN clause helps to limit the utilization of MFN clauses to import substantive or procedural protection from third party BITS. However, since there is no clear MFN exception clause prohibiting MFN extension on substantive or procedural protection under third party BITs, as per to the

[117]Ethio-German art 3(3), See also the Ethio-Kuwait BIT art (3)(5),other than having separate MFN, it has also recognized similar subject matters to have MFN status.

international jurisprudence, it would be difficult to take such MFN clauses as a full warranty in restricting the MFN scope.

6.2.2. Beneficiary

The beneficiaries of MFN protection under the BITs are not uniform. The BITs with Yemen, Turkey, Sudan, Netherland, Sweden and Malaysia have made investment the sole beneficiary of MFN protection. Whereas the BITs Spain, South Africa, Brazil , German, France, Iran, Austria, Algeria, UAE, Morocco, Finland, Kuwait, Tunisia, Denmark, Egypt, and Belgium Luxemburg have entitled the MFN protection for both investor and investment.[118]On the other hand under the BITs with China, Russia and Libyan investment and activities related to investment are the direct beneficiaries of MFN clause.[119]Also the BITs with Swiss, India, Israel and Britain have recognized investors, investment and return on investment as beneficiaries of MFN.[120]The majority MFN clauses make investors beneficiaries of MFN protection with regard to activities related to investment and they are similarly formulated as follow:

> *"Contracting Party shall accord, in its territory, to investors of the other Contracting Party as regards their management, maintenance, use enjoyment or disposal of their investments treatment no less favorable than*

[118]Ethio-Spain Art 4(1) and 4(2),Ethio-South Africa (Art 3(2),Ethio-Morocco Art 5 (1) and 5(2)
[119]Agreement between the Governments of the Federal Democratic Republic of Ethiopia And The Government Of The People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, signed on 11 May 1998art 3(1)(2) and (3)
[120]Ethio-Swiss art 4(2)&(3), Ethio-India ,Ethio-Israel art 3(1) and (2), Ethio-Britain Art 3(2)

that which it accords to its own investors or to investors of any third State, whichever is more favorable to the investor concerned."[121]

Only two BITs provide the elements of activities related to investment. For instance, the Ethio-Tunisia BIT provides activates related to investment in separate provision with new elements.[122]Likewise the Ethio-Kuwait BIT defines "associated activities" very broadly.[123]Whereas the BIT with Morocco makes the investor beneficiary of the MFN protection with regard to activities in relation to the investment in general without stipulating the elements of the activities unlike to the other BITs.[124]

It has been indicted that Ethiopian BIT MFN clauses that protect investors with regard to management, maintenance, use, enjoyment and disposal of their investments have limited role to invite the importation of procedural protection and should be encouraged.[125] Nonetheless, now it is reached on the position that granting MFN protection for investors with regard to activities related to investment such as management and maintenance directly gives investors the right to import more beneficial procedural rights from third party BITs on the ground that it constitutes part of managing and maintaining of investment.[126]

Thus, Ethiopian BITs MFN clauses that recognize activities related to investment in particular attaching to investors as beneficiary would bear disadvantages to the

[121]Such formulation are available in Ethio-Spain BIT art 4(2), Ethio-Britain BIT art 3(2),*Ethio-Swiss BIT art 4(3),* the Ethio-Algeria BIT art 4(2),Ethio-Brazil art (6), Ethio-UAE, Ethio-Austria art 3(3), Ethio-Iran art 4(2), Ethio-German BIT art 3(2),Ethio-Kuwait Art 4(2),Ethio-Israel Art 3(2) ,Ethio-Belgium Luxemburg BIT art (4(2),Ethio-Denmark BIT art 3(2),Ethio-Egypt art 3(2)

[122]Ethio-Tunisia BIT art 1(4) state *"Associated activities" includes the organization, control, operation, maintenance, and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds.*

[123]Ethio-Kuwait BIT art 1(6) *the establishment, control and maintenance of branches, agencies, offices or other facilities for the conduct of business; The organization of companies, the acquisition of companies or interests in companies or in their property, the management control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution and others*

[124]Ethio-Morocco art 5(2)

[125]Martha andTilahun (n 8)142

[126]IISD (n 9) (n 33)

country in two ways.First, since the elements that establish activities related to investment have no clear reference it is subjects to open interpretation. Second, it makes procedural protections provided under third party BITs to be considered as treatment, and this would result the violation of the specific consent of the country to arbitrate. Additionally, the BITs with beneficiary statement that say *"Whichever is more favorable to the investor concerned"*[127] seem to allow seeking rights from any BITs of Ethiopia with third states.

6.2.3. Like Circumstance

Out of the 29 Ethiopian BITs, 24 of them are silent on like circumstance requirement. The 5 Ethiopian BITs that have incorporated explicit like circumstance requirements are Ethio-Turkey, Ethio-Spain, Ethio-Brazil, Ethio-Morocco, and Ethio-UAE.[128]However, except the BIT with UAE and Brazil others have not provided the required elements to establish like circumstances. The Ethio-UAE BIT art (1) provides,

> "*Like circumstance means an overall examination on case by case basis of all the circumstances of an investment including, inter alia its' effect on the national environment, the sector of investment and the aim of the laws and regulations concerned."*

This BIT can be taken as good experience in terms of guiding the elements that can establish like circumstance for investors and investment to enjoy the same protection through MFN. However, the lists are very shallow in light of the suggested elements

[127]For instance see Ethio-Spain BIT, Ethio-Tunisia BIT, The Ethio-Iran BIT art 4(2), The Ethio-Turk BIT, Ethio-Finland art 3(1),Ethio-Kuwait art 4(2),Ethio-Denmark art 3(1)
[128]Ethio-Spain BIT art 4(1) and 4(2)

in establishing like circumstance.[129] The Ethio-Brazil BIT in general has stipulated legitimate public welfare objectives to be considered in evaluating the existence of like circumstance among investments and investors.[130]

Conversely, parts of the MFNs of the Ethio-Netherland and Ethio-Denmark BITs provide,

> *"Each Contracting Party shall accord to such investments treatment which* ***in any case*** *shall not be less favourable than that accorded either to investment of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned."*[131]

The term **"*in any case*"** directly assert that the treatment in these BITs is not qualified to like circumstance and such formulation could result the country to grant similar protection to investors and investments governed under this BIT despite they are on unlike circumstance.

Like circumstance requirement is pillar in maintaining the socio-economic objectives of a country.[132] Ethiopia prioritizes sectors of investment based on their contribution to the country economy and accordingly grants various incentives. The investment priorities of the country are manufacturing, agriculture (commercial farming), and service, energy, and mining sectors. Each major sector has sub-sectors prioritized based on the investment policy direction of the state.[133]Ethiopian BIT MFN clauses require explicit like circumstance requirement that give emphasis to

[129] See Kenneth (n 37) and the SADC Model BIT discussion on elements of like circumstance (n 10) (n 100)
[130]Ethio-Brazil BIT art (6)(2)(c)
[131]Ethio-Netherland Art 3(2), Ethio-Denmark art 3(1)
[132] Kenneth (n 37)
[133]For instance under the manufacture from the top to the least includes; Textile & apparel, leather & leather products, agro processing, pharmaceuticals, chemical products, metal & engineering industry, electronics & electrical products, paper & paper products, and construction materials. For agriculture investment it follows; Horticulture (flowers, fruits, vegetables and herbs), plantation of cotton, palm tree, rubber tree, coffee, tea, sugarcane, oilseeds, livestock, apiculture, and high-value crops such as barley for malting. see Ethiopian Investment Police Guide Line

the specific area of engagement and the inclusion of such requirement shall promote sameness but not similarity.

Ethiopia looks for foreign investment for various reasons such as with the aim to foster transfer of technology, create employment, knowledge transfer and potential for foreign capital. Accordingly, the role of foreign investments has to be evaluated based their potential contribution to the transfer of technology, creation of employment, the amount of foreign currency to be brought , and knowledge transfer. Beside this, foreign investments in the country are expected to go along with public policy directions of the country and sustainable development agendas such as maintaining high environmental standards through the use of renewable energy and zero liquid discharge (ZLD) technology and local linkages, maintain human rights standards, public morality, health and other public policy considerations.

Thus, this issues need consideration through like circumstance parameter because it warrants differential treatment on the basis of priorities of the country, their role to the transfer of technology, foreign currency, the legal of the entities and knowledge transfer and other public policy considerations. As result, the like circumstance requirement can be a positive tool for the country to promote productive investment and demote extractive investments.

6.2.4. MFN Exceptions

The two BITs that have incorporated dispute settlement matters under their MFN exceptions are Ethio-UAE and Ethio -Morocco. Though these BITs MFN exceptions seem to be reactive to the contemporary issues of applying MFN on procedural matters they have limitations from protecting the utilization of the clauses to import

procedural aspects from future BITs. The other two BITs that have made both substantive and procedural protections part of their MFN exception are the Ethio-Brazil and Ethio-Israel.[134]

MFN exception is basic tool to protect public interest issues, warrant differential treatment and determine the operation of MFN right.[135] The three Ethiopian BITs that have made public interest issue part of their MFN exception are Ethio-Britain, Ethio-Morocco and Ethio-German.[136] Comparatively, The Ethio-Britain BIT MFN has integrated national security, public security or public order matters under its exceptions in addition to the common elements.[137] The Ethio-Belgium Luxemburg BIT has provisions that obligate the observation of environmental and labor legislation. The provisions discourage the expansion of investment through compromising labor and environment standards.[138] However, such stipulations are not available in many other Ethiopian BITs. Thus, this can be viewed as less favourable treatment in the eye of investors and be requested for the avoidance of the obligation through the general MFN clause of the BIT. [139]

Generally, all Ethiopian BIT MFN exceptions have the commonly mentioned elements such as rights and privileges gained from being a member of existing or future customs unions, regional economic organization, agreements in relation to taxation, membership in monetary or economic unions, advantages that result from existing or future free trade areas and so on .[140]Other than the above discussed BITs,

[134] See the discussion under component of treatment under Ethiopian BIT
[135] David (n 80)
[136]Ethio-Britain BIT art 3(2), Ethio-German art 3(3), Ethio-Morocco, Art 2(5) & 6
[137]Ethio-Britain BIT art 3(2)
[138]Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia On The Reciprocal Promotion And Protection Of Investments, signed in Brussels 26 October 2006, art 5 and 6
[139]Ibid art 4 (1)
[140]Ethio-Yemen, Ethio-Turk ,Ethio- Sudan ,Ethio-Spain, Ethio-South Africa, Ethio-France, Ethio-China ,Ethio-Russia, Ethio-Netherland ,Ethio-Iran, Ethio-Austria, Ethio-Algeria Art 4(3),Ethio-UAE (Art 5(2),Ethio-Morocco art 5(4),Ethio-Tunisia (Art 3(3),Ethio-Swiss (art 4(4),Ethio-Sweden (Art3(2),Ethio-Finland Art (4) Ethio-Kuwait Art 4(3),Ethio-Malaysia (art 3(2),Ethio-Libya (art 3(3),Ethio-Belgium Luxemburg (Art 4(3)

the MFN clause exceptions in the remaining BITs lack to be responsive for the contemporary issue of the clause as means for importation and this would expose the BITs for broad interpretation.

6.3. An overview on the substantive protections variations under Ethiopian BITs

Variation of protection under Ethiopian BITs is not only limited to procedural protections[141] but it also exists under substantive protection clauses. Ethiopian BITs have incorporated different substantive protection such as Fair and Equitable Treatment, Full Protection and Security, National Treatment, Prohibition of Expropriation against Compensation, Umbrella and Stability Clauses. One very crucial point that can be understood from an in depth exploration of Ethiopian BITs is that the BITs are inconsistent in granting substantive protection to investors and their investment in terms of the elem. This is on the grounds that, 1, the substantive protections are not uniformly recognized under all BITs,2, though similar protections are granted under some of the BITs, the way the protection clauses are formulated in terms of content depict variation which directly have implication on the scope of the obligation of Ethiopia as host state.

For example, FET is one of the widely provided substantive protections under Ethiopian BITs. However, the FET is not granted consistently i.e. under some of the BITs such as the Ethio-Kuwait, the Ethio-Morocco, and the Ethio-Brazil BITs, it is incorporated in qualified way by which the elements of the protection are known whereas in case of the other BITs like Ethio-India, Ethio-Egypt, Ethio-Finland Ethio-

[141]For in depth explanation on the variation of procedural protection seeGideyBelay ,*Investors-State Arbitration Under Ethiopian Bilateral Investment Treaties* (Omni.Univ.Europ 2018) 85, 56 -64 & Marta and Tilahun (n 8)

Turk and Ethio-Belgium is granted in its stand-alone form. The stand-alone FET easily provides investments and investors to be accorded fair and equitable treatment in the territory of the other contracting party, and many of the BITs have recognized this form of FET.[142] Contrarily, few other Ethiopian BITs have incorporated qualified FET requiring the protection to be accorded in accordance with the minimum standard under customary international law or with respect to identified subject matter.[143]However, the MFN clauses under the latter BITs, as it is analysed under section 5.2, are susceptible to importation invocation of the standalone FET clauses from the other BITs.[144]

Ethiopian BITs have also incorporated MFN clause that can be invoked to import new FET protection from third party BIT which was not at all intended to be granted under the basic BIT. For instance, the Ethio-UAE BIT is devoid of FET protection. However, the MFN clause of the BIT is formulated as:

> *Contracting states should provide no less favorable treatment to the investor of the other contracting party, than it accords in like circumstance, to the investors of third states. The MFN shall not apply to treatment accorded under any bilateral agreement in force or signed prior to the date of entry into force of this agreement, for more certainty, MFN shall not apply to any procedural or judicial matters'*.[145]

[142] Such unqualified FET provisions are available in BITs Ethiopia has signed with India, Egypt Finland ,Belgium Sweden ,Israel Netherlands ,Austria ,Turkey, South Africa ,Spain ,Tunisia Swiss confederation , Germany ,United kingdom . see also SelamawitGetahun,The right to regulate under Ethiopain International Investment Agreements ,(LLMthesisHU university) (2019) (85)

[143] The protocol of Ethio-France BIT provides non exhaustive list host state behavior that could amount to de jure or de facto impediment to the fair and equitable standard. The list include any restriction on purchase or transport of raw materials and auxiliary materials energy and fuels, any restriction on means of production and operation and on sale and transport of products within the country and abroad. The Ethio-Kuwait, the Ethio-Morocco, and the Ethio-Brazil BITs, have also recognized qualified FET. see also Selam (n 142) 88

[144] See the dissections under components of MFN clauses under Ethiopian BITs

[145]Ethiopia-UAE BIT Article 5(1) and 5(3)

The MFN exception of this provision excludes only the importation of procedural matter but not substantive protection. Thus, for instance, an investor from UAE using this MFN clause would be able to import FET from any third party BITs of the country. As pointed by Patric, this shows avoidance of certain obligations from BITs with the above form of MFN clause is meaningless.

The other substantive area that has variation under Ethiopian BITs and possibly be subject to MFN claims is prohibition of expropriation against compensation. This is on the ground that while the majority of the BITs recognize both direct and indirect expropriation the others BITs such as BITs with Brazil, Malaysia and South Africa are restricted only to granting direct expropriation protection.[146]Equally, Umbrella clauses and Denial of benefit provisions which are available provisions under some of the BITs but absent in others are also subjected to the same issues of MFN. [147]The variation of Ethiopian BITs extends also to the definition they provide for investors and investment [148] and the respective MFN clause can have the role of widening the scope of the BITs protections through enlarging the subjects of the protection in a given BIT.

[146]Ethio-Brazil Art 7(1) & (5) ,Ethio-Malaysia BIT Art 5and Ethio-South Africa Art 6

[147] Umbrella clause helps to encompass any obligations that emanate from national and international laws of the state. This clause is available in Ethiopia BIT with Belgium, Algeria, China, Iran, Israel, Kuwait, Morocco, United Kingdom, Finland, Germany, South Africa, Spain and Swiss but absent in other BITs of the country. Denial of benefit provision denies investors rights in a given BIT if national of third state own or control the investment or national of contracting party acquire nationality of third state with the aim benefiting from the BIT. The Ethiopia BIT with United Arab Emirate and Austria have incorporated denial of benefit clause but the remaining BIT doesn't contain this clause. Thus, investors from the former countries can invoke the MFN clause in their BIT to avoid the denial clause since it gives wide standing opportunity for the investors. For further see Gidey (n 11) 57-59

[148]See for example BITs with Austria, UK and German require mere incorporation based on the law of the other contracting state, the BITs with Algeria, Denmark, Morocco, Egypt, Yemen,, Libya and South Africa put further criteria, other than incorporation, such as head office, having economic activity or significant economic activity, and effective control by the national.

Selam in her study on Fair and Equitable treatment has appreciated the emphasis given to the public policy objectives and obligations in some of the BITs of Ethiopia such as the BITs with United Arab Emirates, South Africa, Finland, Belgium and Brazil.[149]Now, the question is whether the appreciated BITs would be effectively observed by the investors or not. The answer would be adverse. This is because none of the MFN clauses of the BITs, except for the Ethio-Brazil to some extent, have excluded the applications of the MFN treatment on substantive provisions.[150]

6.4. MFN and Host States: Brief review on its impacts

The effect of MFN on host states can be seen from different perspectives. First, it affects strategic alliance. Countries that look for industrial growth prefer foreign investments that contribute to such advancement.[151] On this ground, the special economic interest makes certain countries strategic partners requiring for the extension of special protection to investors and investments from such countries. Nonetheless, for host states, arbitrarily granted MFN makes to extend similar protection to non-strategic states too and this would undermine strategic alliance.[152]

Second, since investors are entitled to directly sue host states without being mediated by the foreign policy goals of the party states, this would force host states to abandon social policy initiatives they intended to achieve through investment activities.[153] Third, MFN widens the scope of obligation of host states exposing them to unintended international litigation, which adversely affect their economy. Investor-state dispute settlement has become a way for investors to enhance profit through the arbitral awards when they encounter loss in the profit margins of their companies by searching loopholes in BITs.[154]And for this, MFN is the most convenient clause that

[149]Selam(n 142) 52
[150] See the discussion under components of MFN clauses under Ethiopian BITs: Treatment and MFN exception
[151]UNICTAD, *Most Favoured Nation Treatment*, (n 27)
[152] Ibid (n27) 93-94
[153]David(n79) 95
[154]Biswajit, Reji and James (n 99) 119

opens a fertile ground to bring multidimensional claims for the violations of different protections under various BITs against host states and this makes host states to face frequent litigation, unintended liabilities and costs.[155] Fourth, it affects the investment climate of host states. Checking the existence of smooth relationship between investors and their host is among the preliminary assessment that is undertaken by developed countries before concluding BITs.[156]In relation to this, the frequent litigation of host states before IIT would have a negative story telling role that would negatively influence the foreign investment climate of the states. Fifth, above all, MFN has the potential to result in state-state dispute since it shakes the scope of the application of BITs. This would also disturb diplomatic relations between home and host states, and defeat the purpose of recognizing investor-state dispute settlement mechanisms under BITs.

Sixth, it affects the sovereignty of the hosting states and their freedom of negotiation. Developing countries have begun to question the value of many aspects of BITs after passing through certain experience in terms of social, political, and economic cost. One of the aspects that is questioned by host states is MFN treatment clauses under their BITs which has resulted unpredictability on scope of their commitment by establishing juridical link among their BITs and challenge their police making capacity.[157] MFN makes them to provide extended foreign investment protection and affect their sovereign right to determine on their natural resources, economic

[155] Catharine (n 3) 428
[156]Jeswald (n 22) 663
[157]Soniae. Rolland & David (n 72) 358 -359

activities and freedom of negotiation. [158]Further, MFN limits the freedom of host states to make legal innovation in their new treaties.[159]

Generally, MFN intensifies the contention that exist between developed and developing countries regarding the level of protection toward foreign investment.[160] For instance, from BIT cases filed before international investment tribunals, 170 claims were against Latin American countries and the 51 arbitrations were against Argentina.[161]Seeking for more favourable treatment through MFN from another BIT including dispute settlement provisions will not get support from many states.[162]Developing countries prefer the restrictive interpretation approach of MFN; however, unless the MFN clauses in their BIT speak to that extent their preference to restrictive interpretation would be mere wish.[163]

Conclusion

The international jurisprudence depict that either retaining the status quo of basic BITs as independent negotiations or accepting the multilateralization role of MFN under BITs are the two options availed. This requires countries to pass particular decision in line with their foreign investment policy. Though there is no comprehensive ruling in this regard, various approaches are recommended to remedy the challenges faced by host states. Under the majority of Ethiopian BITs, the overall formulations of the MFN clauses shows inconsistency confined with the generic term

[158] Ahmad (n 80) 920-923

[159]Catherine Titi (n 3) 425, see also UNICTAD, *International Investment Agreements* (n 3) 428 -429 ,UNICTAD *Most Favoured Nation Treatment*(n 27)98 Countries for different reasons may need to reduce their treaty obligation in their future BITs. China, India, Brazil and south African can be mentioned as an example in this regard by limiting their obligation of FET,FPS and indirect expropriation.

[160]Jeswald (n 22) 660

[161]Marilda Rosado De Sa Riberio and Guterres Costa Junior, 'Global Governance and Investment Treaty Arbitration: The Importance of the Argentine Crisis for Future Disputes' (2015) 14 The Law and Practice of International Courts and Tribunals 426-428

[162]Anthony C. Sinclair and Lucia Raimanova, 'MFN Treatment and the Adjudication of Investment Disputes' (2009) 21 (2) National Law School of India Review 123

[163]Jeswald (n 22) 658-660

"treatment". In general, the MFN components are loose with the potential to be subjected to liberal interpretation and importation role. This would render the scope of BIT based international obligation of Ethiopia unpredictable subjecting the country to unintended litigations and to other unwanted consequences as a host state.

The international experience explains the key role of MFN components to mitigate the challenge. Above all, the suggested model MFN clauses and the specific mechanism of adjusting the scope of MFN obligation are much helpful for Ethiopia in terms of making the scope of her BIT obligation predictable, retaining her regulatory autonomy, building strategic alliance, and maintaining freedom of negotiation by being innovative in signing future BITs. However, this demands detail work with professionalism in approach and considering the MFN clauses under the BITs in light of the suggested options while drafting the BITs.

Ethiopia as host state of various forms of foreign direct investment can't escape this issue unheard off. Thus, Ethiopia shall stair to the reconsideration by being responsive to the waking up calls. Recognizing some of the positive developments under the recent Ethiopian BITs, the state demands to lay strong foundation in order to make up to the required level with consistency. This call for the concerned government body policy level decision in granting MFN protection to foreign investment via BITs and back it by skill full diplomatic negotiation efforts for the realization.

The Disparity of Ethiopia's Hate Speech and Disinformation Prevention and Suppression Proclamation in Light of International Human Rights Standards

Addisu Genet Ayalew[♣]

Abstract

The right to freedom of expression protects information regardless of the medium employed for dissemination. It has recognized under the FDRE constitution and various human right instruments, as a qualified right. While states are required to enact laws restricting freedom of expression in the interest of prohibiting advocacy to hatred, the law must be clear, certain and published in accessible manner. Nowadays, it is apparent that technologically advanced means of communications given rise to the speedy dissemination of hate speech and disinformation that threatens the political and social fabric of the society in Ethiopia and many other countries. To curb the imminent risk of violence, hostility and discrimination that arises from hate speech, Ethiopia has adopted hate speech and disinformation laws. However, certain parts of this newly enacted proclamation do not meet international standards in restricting the right to freedom of expression. The proclamation-exhibited ambiguity in the definitional part and contain provisions lacking adequate clarity and specificity as well as overly broadened stipulations.

laws.

Keywords: Freedom of expression, Hate speech, Hate speech and Disinformation Laws

1. Introduction

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The right to freedom of expression protects information regardless of the medium employed for dissemination including internet based communications.[1] Under the FDRE Constitution and various human right instruments, the right to freedom of expression is a qualified right with the fulfillment of the three part tests: legality, legitimate purpose as well as necessity and proportionality requirements.[2] Among others, the right to freedom of expression may be restricted in the prevention of advocacy to hatred, which is strictly prohibited in the human rights law themselves.[3] Hate speech or incitement to hatred is strictly prohibited under the international covenant on civil and political rights (ICCPR) article 20(2) and other international laws.[4] Such prohibition is based on the fact that advocacy to hatred will pose a real risk of discrimination, hostility and violence as well as other grave crimes such as genocide and crime against humanity especially whenever they are made against a national, racial or religious groups.[5]

[1] *Autronic AG v. Switzerland*, 22 May 1990; *Gaskin v. the United Kingdom*, 7 July 1989; *Leander v. Sweden*, 26 March 1987; *Társaság a Szabadságjogokért v. Hungary*, 14 April 2009, paragraph 35.
[2] *Article 19, Freedom of Expression Unfiltered: How blocking and filtering affect free speech* (2016) < https://www.article19.org/resources/freedom-of-expression-unfiltered-how-blocking-and-filtering-affect-freespeech/> accessed on 12 December 2019; *Konaté v Burkina Faso*, application no. 004/2013 (African court of human rights, 2013) para 35; *Media Rights Agenda v Nigeria*, Communication no. 105/93, 128/94, 130/94 and 152/9 (African Commission,1998) para 68; Understanding the right to freedom of expression (2015) an international law primer for journalists, international human right program, pp 30.
[3] *Handyside v. the United Kingdom*, 7 December 1976, paragraph 49; 5 Dominic McGoldrick and Thérèse O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', (1998) 18 Legal Studies, p. 454.
[4] "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".
[5] General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (29 July 1983) (General Comment 11); Stephanie Farrior, 'Molding Te Matrix: *the Historical and Theoretical Foundations of International Law Concerning Hate Speech*', (1996) 14.1, Berkeley Journal of International Law pp 4; Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing; Religion and Human Rights* 5 (2010) 171–190, pp. 8.

While the imposition of limitation on the exercise of freedom of expression to curve advocacy to hatred has no doubt, laws limiting the right to freedom of expression must comply the strict requirements of article 19 paragraph 3[6] of the ICCPR and be in light of the aims and objectives of the Covenant.[7] States are required to draft laws entailing restriction clearly, precisely and publish them in an accessible manner. Having this in mind it is necessary to reiterate the FDRE constitution requiring human rights and fundamental freedoms to be interpreted pursuant to international human right instruments such as the ICCPR. Nowadays, it is apparent that technological advanced means of communication given rise to the speedy dissemination of hate speech and disinformation that threatens the political and social fabric of communities in Ethiopia and many other countries. To curb such imminent risk of violence, hostility and discrimination that is arising from hate speech, Ethiopia has come up with hate speech and disinformation laws.

However, there are concerns that certain parts of the newly enacted law do not meet international standards. So far, in Ethiopia one official case has been brought to the federal courts based on the newly enacted law.[8]

Thus this article converses Ethiopia's newly enacted hate speech and disinformation proclamation no. 1185/2020 in light of the standards adopted under international laws concerning limitations that may be imposed in the exercise of the right to freedom of expression. In addressing these points the study will have two sections. The first section rely on discussing various international human right laws on freedom of expression to appreciate the standard that are required to meet before

[6] The FDRE constitution under art 13(2) dictates interpretation of chapter three of the constitution in light of human right conventions Ethiopia is a state party. Among others Ethiopia is a state party to the ICCPR. So while interpreting the right to freedom of expression and restriction by law we need to attract the attention of international human right laws and jurisprudence.

[7] See *Toonen v. Australia*, communication no. 488/1992, (HRC GC. 30 March 1994); *General Comment 34'* (12 September 2011) UN Doc CCPR/C/GC/34 ('General Comment 34'), para. 26.

[8] *Public prosecutor vs. Yaysew Shimles*, (federal first instance court, 2020), criminal file no. file 213101. This case is the first allegation that has submitted to the court of law based on the newly enacted hate speech and disinformation proclamation no. 1185/2020.

restricting the right. The second section devotes in analyzing the hate speech and disinformation proclamation in light of international standards and jurisprudences discussed in section one.

2. Hate speech and a limitation by law

The freedom of expression under Article 19 of the ICCPR is not absolute,[9] and can cedeto a state's duty to protect society from speech that incites discrimination, hostility or violence.[10] Thus states are required to denounce the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence through its domestic laws.[11] The rationale is clear under article 5 of the covenant itself. No one may engage in an activity aimed at limiting or destroying the

[9] See Art 19(3) ICCPR; *Shchetko v Belarus*, UN Doc CCPR/C/87/D/1009/2001 (HRC, 8 August 2006) para 7.3; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression',* UN Doc A/66/290, (10 August 2011) (hereinafter, 'UNHRC August 2011 Freedom of Expression Report') para 15; UNHRC, '*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'* (11 May 2016) UN Doc A/HRC/32/38 para 7; HRC, *'Views adopted by the Committee under Article 5 (4) of the Optional Protocol'* (29 November 2018) UN Doc CCPR/C/124/D/2441/2014 para 13.3; HRC, *'Views adopted by the Committee under Article 5 (4) of the Optional Protocol'*, UN Doc CCPR/C/124/D/2260/2013 (13 December 2018), para 6.3.

[10] Art 20(2) ICCPR; UN Economic and Social Council, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'*, UN Doc E/CN4/2002/75, (30 January 2002), para 64; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression',* UN Doc A/HRC/17/27, (16 May 2011), (hereinafter, 'Special Rapporteur May 2011 Freedom of Expression Report') para 25; UNHRC August 2011 Freedom of Expression Report, para 26; UNHRC, *'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence',* UN Doc A/HRC/22/17/Add 4, (11 January 2013), (hereinafter, 'UNHRC Rabat Plan of Action') para 14; UNGA, *'Promotion and Protection of the Right to Freedom of Opinion and Expression'*, UN Doc A/74/486, (9 October 2019), para 8; IACHR, 'Freedom of Expression and the Internet' CIDH/RELE/IN F11/13, (2013), para 135.

[11] UNGA, *Report of the Special Rapporteur on freedom of religion or belief,* (23 December 2015), p. 15; UN OHCHR, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,* Frank La Rue, UNGA Human Rights Council, 14th Sess, A/HRC/14/23, (20 April 2010), para 79(h); UN OHCHR, towards an interpretation of article 20 of the ICCPR: thresholds for the prohibition of incitement to hatred (February 8-9, 2010).

right of others contrary to what is provided on the covenant.[12] Therefore, if freedom of expression serves as a tool to offend or restrict the right of others, it should be liable to restrictions.[13] The ICCPR under article 20(2) imposes the state party the obligation to prohibit any kind of advocacy to hatred based on a certain status that constitutes incitement to discrimination, hostility or violence. According to the Human Rights Committee (HRC) article 20(2) is compatible with Article 19.[14] While this freedom is not absolute,[15] its significance for society's progress mandates that any interference with this freedom should only be imposed in exceptional circumstances and must be convincingly established.[16] Consequently, interference may only be justified if it is prescribed by law, pursues a legitimate aim, and is necessary and proportional.[17] These three requirements have been applied so many times by the United Nation Human Right Committee (UNHRC),[18] African human

[12] Stephanie Farrior, '*Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech'*, (1996) 14.1 Berkeley Journal of International Law pp 4; Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing; Religion and Human Rights* 5 (2010) 171–190, p. 8.

[13] Stephene Farrior, Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech, supra note 6, p. 5.

[14] HRC, *General Comment 11*, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (29 July 1983) (General Comment 11).

[15] See article 29 of the FDRE constitution, art 19(3) UDHR; art 10(2) ECHR; art 13(2) ACHR; art 10(2) ACHPR.

[16] UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'* (28 February 2008) UN Doc A/HRC/7/14 ('UNHRC February 2008 Report') para 49; '*General Comment 34'* supra note 10, para 21

[17] ICCPR art 19(3); Art 10(2) ECHR; *Vörður Ólafsson v Iceland,* App no 20161/06, (ECtHR, 27 April 2010) ('*Vörður*') para 51; UNHRC, '*Report of the Special Rapporteur on the Promotion and Protection*
of the Right to Freedom of Opinion and Expression', UN Doc A/HRC/23/40 ('UNHRC April 2013 Report'), (17 April 2013), paras 28–29.

[18] *Womah Mukong v Cameroon*, UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) para 9.7; *Sohn v Republic of Korea*, UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4; *Malcolm Ross v Canada*, UN Doc CCPR/C/70/D/736/1997 (HRC, 26 October 2000) ('Malcolm Ross') para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'*, UN Doc A/66/290, (10 August 2011), 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', UN Doc A/HRC/23/40 ('UNHRC April 2013 Report'), (17 April 2013), para 15; General Comment 34 para 35.

right commission,[19] the European Court of Human Rights (ECtHR)[20] and the Inter-American Court of Human Rights (IACtHR).[21]

2.1. Existence of the law

Human right laws are inviting a room to enact laws restricting the right to freedom of expression. Most of these laws are arising out of criminal laws in due course of safeguarding the right of others. Criminal law is not only created by legislations but also prohibitions must be drafted in 'clear, certain and unambiguous language'.[22] Within the wisdom of human right laws, a person should not be charged with or convicted of a criminal offence and his right restricted to an act that he did not and could not have known existed at the time when he allegedly committed it. This is construed as the "certainty principle".[23] There may be various indications to uncertainty of the criminal law. For instance, where an offence has been created (or altered) retrospectively the criminal law is considers to be uncertain.[24] Where a law has not been publicized, when it refers to irrelevant laws, or when it is difficult to

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[19] ACommHPR, '*Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa'*, ACHPR/Res 62(XXXII)02, (2002), principle II; *Interights v Mauritania*, AHRLR 87 Comm no 242/2001 (ACommHPR, 2004), paras 78–79; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in wAfrica v Zimbabwe*, AHRLR 268 Comm no 294/04 (ACommHPR, 2009), para 80.

[20] *Handyside v UK*, App no 5393/72 (ECtHR, 7 December 1976) ('Handyside') para 49; *Sunday Times v UK*, (No *1)* App no 6538/74 (ECtHR, 26 April 1979), para 45; *Ceylan v Turkey*, App no 23556/94 (ECtHR, 8 July 1999) ('Ceylan') para 24; *Murat Vural v Turkey*, App no 9540/07 (ECtHR, 21 January 2015), para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) ('*Perinçek*') para 124.

[21] *Francisco Martorell v Chile*, (IACtHR, 3 May 1996), para 55; *Herrera-Ulloa v Costa Rica*, Preliminary
Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120; IACHR, *'Inter-American Legal Framework Regarding the Right to Freedom of Expression'* OEA/SER L/V/II CIDH/RELE/INF 2/09 ('Inter-American Legal Framework') 24; IACHR, *'Freedom of Expression and the Internet',* OEA/SER L/II CIDH/RELE/INF 11/13 ('IACHR December 2013 Report') 26–29.

[22]Glory Nirmala K. Ato Serkaddis Zegeyem criminal law I teaching material 2009, pp 60.

[23] Fran Wright, *certainty and ascretianity of criminal law after the Pitcairn trail, 39* Victoria U. Wellington l. rev. 659 2008-2009.

[24] *Ibid*.

ascertain with certainty what are/is the elements of a particular offence, then the criminal law is uncertain.[25] In international conventions containing a legality provision, certainty is generally considered as a natural component of the legality principle.[26] Certainty principle is inherent in article 15 of the ICCPR.[27]

The law should specify in detail the precise circumstances in which any interference may be permitted[28], This foreseeability allows citizens to know when their actions will constitute an offence and enables them 'to regulate [their] conduct'.[29] Law prescribes a prosecution under a statute if the relevant statute is sufficiently precise.[30] Laws drafted in imprecise terms are vulnerable to arbitrary application by state authorities,[31] thereby impeding individuals from being able to reasonably foresee liability.[32] A restriction of the right to freedom of expression through the criminal

[25] *Ibid.*
[26] *kokkinakis v. greece*, application no. 14307/88, ECtHR 25 May 1993, para. 52; *Cantoni v France [judgment]* ECtHR app 43522/98 reports 1996-v Para. 35.
[27] Article 15(l) provides: no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed... see also Fran Wright, certainty and ascertainity of the criminal law after pitcairn trail, (2008) pp. 661).
[28] HRC, '*General Comment 16'*, UN Doc CCPR/C/21/Rev 1 ('General Comment 16'), (19 May 1989), para10.
[29]*The Sunday Times v United Kingdom*, app no 6538/74 (ECtHR, 26 April 1979), Para 49.
[30] *Sunday Times*, para 49; *Muller v Switzerland*, App no 10737/84 (ECtHR, 24 May 1988), para 29; *Kokkinakis v Greece*, App no 14307/88 (ECtHR, 25 May 1993), para 40; *Wingrove v UK*, App no 17419/90 (ECtHR, 25 November 1996), para 40; *Lindon, Otchakovsky-Laurens and July v France*, App no 21275/02 (ECtHR, 22 October 2007), para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine*, App no 33014/05 (ECtHR, 5 August 2011), para 52; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, '*Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR'*, UN Doc E/CN 4/1984/4, (1984) (hereinafter, 'Siracusa Principles') principle 17; HRC, *'General Comment 16'* (19 May 1989) UN Doc CCPR/C/21/Rev 1 ('General Comment 16') para 3; *General Comment 34*, paras 24–25.
[31] 'UNHRC, *'Rabat Plan of Action; UNHRC, 'Report of the Special Rapporteur on Freedom of Religion or Belief'*, UN Doc A/HRC/28/66/Add.1, (23 December 2014), para 49; UNHRC, *'Report on Best Practices and Lessons Learned on How Protecting and Promoting Human Rights Contribute to Preventing and Countering Violent Extremism',* UN Doc A/HRC/33/29, (21 July 2016), para 21; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'*, UN Doc A/71/373 ('UNHRC September 2016 Report'), para 13.
[32] *Altuğ Taner Akçam v Turkey,* App no 27520/07 (ECtHR, 25 October 2011) para 95; European Commission for Democracy Through Law of the Council of Europe, *'Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation'* (*Council of Europe*, 20 June 2012) *<www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)016-e>* accessed 21

law which is vague, ambiguous, overly broad, open ended or difficult to understand by the subjects tantamount to an arbitrary intrusion of the right susceptible to violation. Hence, certainty, preciseness/clarity of the criminal law is an essential ingredient of the principle of legality.

2.2.The existence of pressing need

State imposing restriction on freedom of expression is contrary to article 19(3) if it fails to reveal the existence of pressing need and is not otherwise averted less costly.[33] State party to the covenant invoking a legitimate ground for restriction of freedom of expression, requires demonstrating in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, specifically by establishing a direct and immediate connection between the expression and the threat it triggers.[34] It requires the national authorities to give convincing reason for their decision to restrict freedom of expression.[35] The list of purposes to restrict freedom of expression is the same under various international treaties including article 19 (3) of the ICCPR and are exhaustive.[36] According to the ECtHR, restriction must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[37] The UN Special Rapporteur (UNSR)

January 2020, paras 70, 74; UNHRC, *'Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism',* UN Doc A/HRC/28/28, (19 December 2014), para 48.

[33] *Zana v Turkey*, Application No. 18954/91 (ECHR, 25 November 1997) para 51; *Lingens v Austria*, application No 9815/82 (ECHR, 8 July 1986) para 39-40.

[34] *Shin v. Republic of Korea*, communication no. 926/2000 (HRC GC, 2000); *Thorgeirson v Iceland*, application No. 13778/88, (ECHR, 1992) para 63.

[35] *Fatullayev v. Azerbaijan*, application no. 40984/07 (ECHR, 22 April 2010).

[36] *Prohibiting incitement to discrimination, hostility or violence*, policy brief, (December 2012), pp 26.

[37] *Thorgeirson v Iceland*, No. 13778/88, (ECHR 1992) para 63.

notes the principle that "restriction on expression via the internet must be exceptional and in a limited circumstance for the protection of others right justified under international law.[38]

Expressions via internet can be limited exceptionally and in accordance with the procedure set under international law for the protection of others rights.[39] Online platforms such as instant messaging and broadcasting applications have enabled the instantaneous and widespread dissemination of harmful content, rendering this duty increasingly onerous.[40] It has been even applying publications that "offend, shock or disturb" in the interest of freedom of expression.[41] HRC emphasize prohibitions enacted in the name of article 20 (2) against advocacy to hatred must comply "with the strict requirements of "purpose" under article 19 paragraph 3.[42] In the nonexistence of a direct and immediate threat against a group, even extreme views on a matter of serious public interest including the practice Church or mosque do not constitute incitement under article 20 of ICCPR.[43]

A state invoking a restriction on freedom of expression on the basis of advocacy to hatred through article 20 (2) of the ICCPR must demonstrate the expression is intended to incite violence and the degree as well as its level of intensity against a

[38] UNGA '*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue' supra note 5.
[39] *Ibid.*
[40] UNHRC Rabat Plan of Action'; Kurt Wagner, 'WhatsApp Is At Risk in India So Are Free Speech and Encryption' (19 February 2019) <*https://www.vox.com/2019/2/19/18224084/india-intermediary-guidelineslaws-free-speech-encryption-whatsapp*> accessed 6 November 2019; Zachary Laub, 'Hate Speech On Social Media: Global Comparisons' Council on Foreign Relations (7 June 2019) <*https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons*> accessed 6 November 2019; Bloomberg, 'Mob Lynchings: WhatsApp At Risk of Being Labelled Abettor' (19 June 2018) <*https://www.bloombergquint.com/law-and-policy/mob-lynchings-whatsapp-at-risk-of-being-labelledabettor#gs.0mf5kq*> accessed 6 November 2019.
[41] See UNHRC, 'Rabat Plan of Action, supra note 4, para. 17.

[42] *General Comment 34* supra 1, para 48.
[43] UN Office of the High Commissioner for Human Rights, *Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred,* (Vienna, February 8-9, 2010).

certain group.[44] 'Advocacy' is to be understood as intentional act of promoting hatred publicly towards the target group while 'incitement' is a statement about national, racial or religious groups, which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.[45] Article 19 rejects the approach of negligent incitement/advocacy because it does not meet article 20's wording or its principles.[46] Advocacy requires the advocator to specify the target group and did the victim group suffered from any recent violence as a result.[47] Advocacy is present when there is a direct call for the audience to act in a certain way (violence, hostility or discrimination).[48]

The jurisprudence of ECtHR is likely to grant the State a wide margin of appreciation in determining the legitimacy of restrictions of expression relating to religious nature.[49] Similarly article 20 of the ICCPR gives the national court the power to draw between freedom of expression and possible triggering of advocacy to violence, discrimination and hatred.[50] Within the jurisprudence of an advocacy for hatred, analysis of 'the content of the opinions expressed' its impact on the audience and the public nature of the expression as well as the extent and repetition of the

[44] See *Karatas v Turkey,* App no 23168/94 (ECtHR, 8 July 1999) [53]; See *Athukoral v AG,* 5 May 1997, SD nos 1-15/97, (Supreme Court of Sri Lanka); *Secretary of State for the Home Department v Rehman,* UKHL 47 (United Kingdom House of Lords), (2001); Council of Europe Convention on the Prevention of Terrorism (entered into force 1 June 2007) ETS no 196 art 5(1); Council Framework Decision 2008/919/JHA' (COE, 2008); IACtHR 'Annual Report of the Inter-American Commission on Human Rights 1994' (17 February 1995).

[45] ARTICLE 19, *Camden principle on freedom of expression and equality,* (April 2009), para 12.

[46] *Towards an interpretation of article 20 of the ICCPR,* supra note 37.

[47] See Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred,* (2006).

[48] Prohibiting incitement to discrimination, hostility or violence, supra note 30.

[49] Gündüz v Turkey, application no. 35071 (ECtHR, 1997), para 37.

[50] Prohibiting incitement to discrimination, hostility or violence, supra 30, p 28.

communication are paramount to determine hatred in the expression.[51] The original intention of the statement including whether it was intended to spread racist or intolerant ideas with hate speech are also paramount,[52] though not expressly envisaged under article 20 of the ICCPR. The tone of the speech and circumstances in which it was disseminated are also relevant.[53] Moreover, a statement made during live programming carry greater evidence of advocacy to hatred.[54] In addition, the scale and repetition of the communication plays a decisive role to determine the existence of intent. Likewise the existence of historical pattern of violence among the competing group may also be taken as a manifestation to show promotion of hatred within the speech.[55] The level of the speaker's authority or influence over the audience is relevant as is the degree to which the audience is already primed or conditioned, to take their lead from the inciter.[56] In addition, the content and context of the expression including the style and degree of provocation likelihood of its imminence are necessary parameters to determine the existence of advocacy to religious hatred.[57]

2.3.Proportionality

Proportionality element requires states to make a fair balance between the aim and measure to be taken and the right to be violated and adopt the least restrictive one.[58] Imprisonment is inappropriate for the expression of opinion unless such expression

[51] *Jersild v Denmark* application no 15890/89 (ECtHR, 22 August 1994); Stephanie Farrior, 'Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech', (1996) 14.1 Berkeley Journal of International Law, p. 66.
[52] ARTICLE 19, prohibiting Incitement to Discrimination, Hostility or Violence, policy brief, (December 2012), p. 22; UN OHCHR, *towards an interpretation of article 20*, supra note 37.
[53] Ibid.
[54] Gündüz v Turkey, supra note 43, para 49.
[55] Nazila Ghanea, supra note 6.

[56] Rabat plan, supra note 4; UN OHCHR, Towards an interpretation of article 20 of the ICCPR, supra 37.
[57] ARTICLE 19. Supra note 39.
[58] UNHRC, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism'*, UN Doc A/HRC/13/37, (28 December 2009), para 17.

amount to an incitement to discrimination, hostility, or violence.[59] Even then, criminal imprisonment is still only reserved for the most severe cases of incitement.[60] Nevertheless, when a statement incite to violence against an individual or a sector of the population, the State authorities enjoy a wider margin of appreciation of interference with freedom of expression including the imposition of criminal responsibility.[61] The state as it has the obligation to respect freedom of expression, equally imposed to protect others rights and remedied whenever the right is violated.[62] The ECtHR stressed the fact that the amount of imprisonment is sever does not make it disproportionate with the aim pursued when freedom of expression is incompatible with the notion of tolerance and the fundamental values of justice and peace set forth in the preamble of the Convention.[63] A restriction is proportionate if it goes no further than necessary to achieve the legitimate aim.[64] In assessing proportionality, the nature and severity of the punishment must be considered with the aim achieved.

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[59] *Marques de Morais v Angola*, UN Doc CCPR/C/83/D/1128/2002, (HRC, 18 April 2005), para 6.8; *Adonis v Philippines*, UN Doc CCPR/C/103/D/1815/2008/Rev 1, (HRC, 26 April 2012), para 7.7; UNESCO, *World Trends in Freedom of Expression and Media Development: Special Digital Focus* (UNESCO Publishing, 2015) 164; David Kaye, '*Jailing Teen Blogger in Singapore Sends Wrong Message on Free Expression'* (*UN News Centre*, 4 October 2016) <www.un.org/apps/news/story.asp?NewsID=55207#.WF1KaVN97IU> accessed 21 November 2019; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 September 2011) paras 58– 60; *Belpietro v Italy* App no 43612/10 (ECtHR, 24 September 2013) paras 61–62. See also *Lohé Issa Konaté v The Republic of Burkina Faso* application no 004/2013 (ACHPR, 5 December 2014), para 167.

[60] *Lehideux and Isorni v France* application no. 24662/94, (ECtHR, 23 September 1998) para 57; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'* (16 May 2011) UN Doc A/HRC/17/27 ('UNHRC May 2011 Report') para 36; Law Commission of Canada, *What is a Crime? Defining Criminal Conduct in Contemporary Society* (UBC Press, 2014).

[61] *Sürek v. Turkey*, application no. 26682/95 (ECtHR, 1999) § 62, ECHR 1999-IV.

[62] See ICCPR article 2(3), 5 and 18 (2).

[63] Gündüz v. Turkey, supra note 43.

[64] Siracussa Principles on the Limitation and Derogation, para 11; *General Comment 34*, supra note 1, para 34.

Hence, it is concluded that the validity of restriction imposed based on a national law in the enjoyment of freedom of expression would be assessed based on the above standards; existence of the law, existence of pressing need as wells as necessity and proportionality.

3. Proc. No. 1185/2020 eroding international human rights standards

As it is clearly provided under article 13(2) of the FDRE constitution, its stipulations concerning human rights and fundamental freedom shall be interpreted in light of relevant international standards. Among others Ethiopia is a state party to the international covenant on civil and political rights as well as the African charter on human and people's rights. Accordingly, in imposing restriction against the right to freedom of expression it requires to give due attention to the jurisprudence of interpretations adopted by a treaty monitoring bodies such as the human right committee. As we can note from the preamble of the proclamation the very essence of enacting the proclamation is "…to prevent and suppress by law the deliberate dissemination of hate speech and disinformation". Besides this, the proclamation under its preamble is also cognizant of the fact that limitation of right must be duly tailored with legality, legitimacy and proportionality principles. Again it has also emphasized the need to have the essence of democratic society in mind. Hence, as the proclamation itself announces, the analysis on its legal provision is subject to the jurisprudence of limitation of freedom of expression by law.

3.1.Lack of adequate definition

The proclamation under article 2 (3) states "*Disinformation* means speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict".

Although the proclamation tries to restrict the term such as "knew or should reasonably have known" the definition adopted for disinformation under article 2(3)

raises a number of doubts owing from the nature and standard of the criminal law principles. Firstly, although studying whether the proclamation is in line with article 19 and 20 of the ICCPR in terms of the scope of restriction is beyond the reach of this paper it is important to note that Article 19 does not, by its terms, limit the freedom of expression to "truthful" information. Instead, it applies to "information and ideas of all kinds". Second, the definition under the proclamation assumes as if "falsity" has objective definitions. Emanating from this, one can say the proclamation adopt overly broad approach towards defining disinformation. This overbroad definition will embrace law enforcer the liberty to incorporate even issue not anticipated in the proclamation itself. Third, it is unclear whether the knowledge standard applies not only to falsity but also to the likeliness of causing a public disturbance. Fourthly, as we will discuss later in depth, the proclamation ignore the intent requirement to a promotion to hatred contrary to international standards. In such a case, even if a person were to share false information, knowing it was false, but intended to imply disagreement with the content, or to raise an alarm that such false information was circulating, the definition may yet cause that person's action to be deemed a criminal offense.[65] As it is noted by the joint declaration of 2017[66] "*General prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are*

[65] United Nations Special Rapporteur on the right to freedom of opinion and expression David Kaye Visit to Ethiopia, 2-9 December 2019 End of mission statement, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E visited May 3, 2020.

[66]Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. *Joint declaration on freedom of expression and "fake news", disinformation and propaganda* , fom.gal/3/17 3 March 2017 https://www.osce.org/fom/302796?download=true

incompatible with international standards for restrictions on freedom of expression … and should be abolished. Fifth, articulating as "speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict" lacks specificity and entrusted a broad discretion to law enforcers to determine a number of elements stipulated there by themselves. Knew or should reasonably know, likely to cause public disturbance… which is to be decided in case by case basis is left to the discretion of the law enforcers and the courts. This kind of articulation on to top of violating the right of the accused brings non-standard application of the law before various tribunals.

In addition to this, though the Proclamation offered some guidance on how to define disinformation, the boundary between fake news and free speech remains unclear in Ethiopia. Not only this in the context of social media, it is not precisely provided whether the law targets all those involved in the distribution and redistribution of hate speech and disinformation.

The proclamation defines **"***Hate speech***"** as speech promoting hatred, discrimination or attack against a person or an identifiable group, based on ethnicity, religion, race, gender or disability. The first thing the law encounters is that, it employs "promote instead of advocacy to hatred unlike article 20(1) of the ICCPR. It would not be as such arguable in the change of the word had it not been the meaning the word themselves carrying. Given the fact that Ethiopia is organized in ethnic line and the prevailing widespread, antagonistic here and there between ethnic backgrounds unmanaged definitions of this law would offer the law enforcers to pick somebody they intend to detain. The definition adopted above is quite imprecise and overbroad. It fails to define what constitutes "hatred" nor "discrimination" or "attack." Even the "promotion" part of the definition is too vague and does not necessarily require a

direct link between the speech and the consequences.[67] Moreover, the basis for the "identifiable groups" are designed as exhaustive, while in reality there are more bases for groups, such as political opinion.[68]

3.2.Certain parts of the proclamation lacks sufficient precision

As stated in the firsts section for a restriction to be prescribed by law, a statute must be sufficiently precise as to the rule's constraints, limitations, and penalties. This foreseeability allows citizens to know when their actions will constitute an offence and enables them 'to regulate [their] conduct'.[69] Further, vague and overly-broad laws are often found to be impermissible since they provide officials with discretionary power to make arbitrary decisions.[70] The UNHRC expressed 'repeated concerns' about Russia's on the general use of extremism lacking specification.[71] According to the committee the general use of "extremism" is 'increasingly used to curtail freedom of expression, including political dissent'.[72] In addition, the Kyrgyz Law on Extremism Activity[73] was criticized for using 'extremism' as an umbrella term to describe a list of activities,[74] which could lead to abuse against 'religious

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[67] Girmachew Alemu, '*Narrow hate speech law will not broaden minds'*, January 24, 2020.
[68] *Ibid.*
[69] *The Sunday Times v United Kingdom*, App no 6538/74 (ECtHR, 26 April 1979), Para. 49.
[70] UNGA '*Communications report of Special Procedures'*, A/HRC/31/79, case no CHN 7/2015, (30 November 2015); (hereinafter, Article 19) <www.article19.org/pages/en/limitations.html> accessed 25 March 2020.
[71] Russian Model Law 2009 No 32-9; Yarovaya Law 2016.
[72] UNHRC '*Concluding observations on the seventh periodic report of the Russian Federation'*, UN Doc CCPR/C/RUS/CO/7, (28 April 2105), Para. 19-20. See also Tanya Lokshina, '*Draconian Law Rammed through Russian Parliament'* (*Human Rights Watch*, 7 July 2016) <www.hrw.org/news/2016/06/23/draconian-law-rammed-through-russianparliament> accessed 1 December 2019; Evgeniya Melnikova, '*Yarovaya Law. The Death of the Russian Constitution*' Huffington Post (11 July 2016) <www.huffingtonpost.com/evgeniya-melnikova/yarovaya-law-the-deathof_b_10864882.html> accessed 1 December 2019.
[73] Kyrgyz Law on Extremism Activity 2005 No 150 (amended 2016).
[74]Article 19, '*Kyrgyzstan: Law on Countering Extremist Activity'* (2015) <www.article19.org/data/files/medialibrary/_38221/Kyrgyzstan-Extremism-LA-Final.pdf> accessed 27 November 2019. See also Paul Daudin Clavaud and others, '*Freedom of Expression and Public*

minorities, civil society, human rights defenders, peaceful separatists . . . and political opposition parties'.[75] Of course, statutes need not be absolutely precise, as laws must keep pace with changing circumstances somehow through flexible interpretation.[76] The degree of precision required depends on the content and area that the law is designed to cover.[77] States cannot be faulted for every element of uncertainty surrounding a new law.[78] However, laws especially whenever it is a criminal issue must as far as possible embrace "reasonable clarity" so as not to give discretion to law enforcers to violate the human right and fundamental freedom of a person in the whim of prosecution.

The proclamation is managing to provide what is prohibited as "hate speech and disinformation" in only two articles. That is too rushing and short. It is also imprecise and overly broad. For instance, the prohibition of "disseminating hate speech" under article 5 is problematic to exactly figure out what is typically governing given the breadth of the term "dissemination". International human rights law such as article 20 of the ICCPR obligates states to prohibit "*advocacy* of national, racial or religious hatred," but it does not address mere "dissemination,"[79] given the endless reasons why a person might share hateful speech. Even if the proclamation adopts exempting

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Order Training Manual' (*UN Educational, Scientific and Cultural Organisation*, 2015) <*http://unesdoc.unesco.org/images/0023/002313/231305e.pdf*> accessed 25 November 2019.

[75] See UNHRC '*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism'*, A/HRC/16/53/Add.1, (22 February 2016), p. 99-106. See also UNHRC '*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin', A/HRC/10/3, (4 February 2009); 'Russia: amendments to extremist legislation further restricts freedom of expression' *Article 19* (19 July 2007) <*www.article19.org/data/files/pdfs/press/russia-foeviolations-pr.pdf*> accessed 4 December 2019.

[76] *Tolstoy Miloslavsky v UK*, App no 18139/91(ECtHR, 13 July 1995) para 41; *Kudrevičius v Lithuania*, App no 37553/05 (ECtHR, 15 October 2015); *Sekmadienis Ltd v Lithuania*, App no 69317/14 (ECtHR, 30 January 2018) para 66.

[77] *Centro Europa 7 SRL and Di Stefano v Italy*, App no 38433 (ECtHR, 7 June 2012) para 142; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 72; *Delfi v Estonia*, para 122; *Karascony v Hungary*, App nos 42461/13 and 44357/13 (ECtHR, 17 May 2016) para 125; Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland, para 144

[78] *Savva Terentyev v Russia*, App no 10692/09 (ECtHR, 28 August 2018), para 58.

[79] Article 20(2) of the ICCPR states 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

approach under article 6 it does not cover all kinds of sharing that might not only be perfectly legitimate but also desirable for purposes of awareness-raising, criticism, and other reasons.[80] Since the proclamation does not reveal clear and precise parameters or standards to say "hate speech" it is inevitably difficult to figure out the gravity required to characterize expression as hate speech against a certain group. The Ethiopian Human Right Commission commissioner raised this concern during the laws approval[81] although it has been remained unsolved in the laws draft-ship. This problem could have been simplifying if the proclamation incorporate the parameters being employing by the Rabat plan of action[82] and international human right instruments. Within the jurisprudence of an advocacy for hatred, analysis of 'the content of the opinions expressed' its impact on the audience and the public nature of the expression as well as the extent and repetition of the communication are paramount to determine hatred in the expression.[83] The original intention of the statement including whether it was intended to spread racist or intolerant ideas with hate speech is also paramount.[84] In addition to this, the tone of the speech and circumstances in which it was disseminated are also relevant.[85] Moreover, a statement made during live programming carry greater evidence.[86] While a state is

[80] United Nations Special Rapporteur on the right to freedom of opinion and expression David Kaye Visit to Ethiopia, 2-9 December 2019 End of mission statement, *https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E* visited May 3, 2020.

[81] Watch at https://www.youtube.com/watch?v=LDbSfXv787M&t=244s accessed May 27 2020.

[82] See UNHRC, 'Rabat Plan of Action, supra note 10.

[83] *Jersild v Denmark*, application no 15890/89 (ECtHR, 22 August 1994); Stephanie Farrior, 'Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech', 1996, 14.1 *Berkeley Journal of International Law*, pp. 66.

[84] ARTICLE 19, prohibiting Incitement to Discrimination, Hostility or Violence, policy brief, (December 2012), pp. 22; UN OHCHR, towards an interpretation of article 20 of the ICCPR, supra note 37.

[85] *Ibid.*

[86] Gündüz v Turkey, supra note 43, para 49.

required to denounce the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence through its domestic laws,[87] applying vague criminal law and penalties would generally be inappropriate. In the context of being vague and excessively broad law there is a fear that the officials would have practically unbridled discretion to determine whom to investigate and prosecute, leading to an almost certain inconsistency in approach and a potential wave of arbitrary arrests and prosecutions.[88]

Unfortunately, the marriage with un-clarity and imprecise terms does not end in the articulation of disseminating of disinformation. Under article 7(4), it is provided that if the offense of disinformation was committed through a social media account with more than 5,000 followers, the person responsible for the act shall be punished with simple imprisonment not exceeding three years, or a fine not exceeding 100,000 birr. In this sub article, in the first place there is a clear controversy between the Amharic and the English versions where the English version employs "or" the Amharic employ "and" which means both imprisonment and fine may be imposed.[89]

The proclamation also does not specify and differentiate the responsibility of the creator of the hate speech and disinformation and the people involved in disseminating the hate speech and disinformation through share or likes. Under

[87] UNGA, *Report of the Special Rapporteur on freedom of religion or belief*, (23 December 2015), pp. 15; UN OHCHR, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Frank La Rue, UNGA Human Rights Council, 14th Sess, A/HRC/14/23, (20 April 2010), para 79(h); UN OHCHR, towards an interpretation of article 20 of the ICCPR, supra note 37; United Nation human rights office of the high commissioner, Beirut declaration, 18 commitments on faith for rights (UN OHCHR, March 2011).

[88] United Nations Special Rapporteur on the right to freedom of opinion and expression David Kaye Visit to Ethiopia, supra note 74.

[88] Watch at *https://www.youtube.com/watch?v=LDbSfXv787M&t=244s* accessed May 7 2020.

[89]Of course, we need to resort to article 2(4) of the federal Negarit gazette establishment proclamation No. 3/1995 to reconcile since this one make the Amharic version to prevail. Nevertheless, this easy solution may trigger the principle that interpretation in favor of the accused. In fact article 2 (4) of the criminal code invites interpretation within the spirit of the law [the hate speech proclamation]. However, it is still open that whether one may consider simply article 2 (4) of proclamation No. 3/1995 or adhere strong human right based laws to interpret such ambiguous criminal laws in favor of the accused.

article 7 (4), it is stipulated that dissemination of hate speech and disinformation by a social media user with more than 5, 000 followers is an offense punishable with a maximum of three years imprisonment and fine not exceeding 100,000 birr. The use of this term i.e. social media user more than… is too vague and broad which is difficult to anticipate who is liable under this law. It is not clear if a person having more than 5000 followers likes or shares someone's post would be considered as disseminating hate speech within the meaning of the proclamation. If the proclamation is also meant to address individuals inter alia who likes others post, that would rise issue of over-criminalization and will not be managed to address all this kinds of issues.

Besides, while the proclamation repeals article 486 of the criminal code it is not clear why it does not consider other similar stipulation of the code like article 813. Article 486 is a stipulation intended to protect government and public officials from false rumors and charges that would distort public opinion, or incite hatred or public disturbance including religious, ethnic and political acts of violence. Whereas, article 813 states that "whoever…announces, spreads, publishes or reports to the authorities false, exaggerated or biased news intended to or capable of perturbing public order or tranquility is punishable with fine or arrest." Article 813 governs acts apart from article 486. The only difference between article 813 and article 486 of the code is the gravity of the acts; while serious acts goes to the later simple cases fall within the ambit of article 813. They are built up in the three laws i.e. the hate speech and disinformation proclamation, article 486 and 813 rely on "false information". However, such degree of classification is not expressly revealed in the proclamation at least in the manner the code has approached. This will cast doubt on the prosecutor and the judge on how to handle an allegation, which is likely fall to both the

proclamation and the criminal code given the fact that both laws carry different penalty.

Indeed, the above problem on the parts of the law has been envisaged in Yayesew Shemlis[90] case which has been known as the first case brought to the courts attention through the hate speech and disinformation proclamation. The cases factual scenario was as follows… On March 27, federal police arrested Yayesew at a relative's home in the town of Legetafo.[91] On 28 April 2020, the Federal Attorney General charged[92] him under Ethiopia's newly enacted Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185/2020. In its tweets, *Addis Maleda* cited an official who said that Yayesew would be tried under the criminal code, but the official did not indicate the specific sections of the law under which he would be charged.[93] As discussed above, the proclamation fails to concretely provide its relationship to article 486 and 813 of the criminal code. This creates difficulty to exactly figure out the alleged acts of Yayesew in one of those laws in the investigation process and drafting of charges. Initially there was apparent vagueness in framing the charge such as incorrect filing and framing of charges. First the prosecutor indicted him under the criminal code Article 485 for alarming a

[90] *Public prosecutor vs. Yaysew Shimles*, criminal file no. file 213101. Before March 26/2020 (before he has been caught by the police), Yayesew was used to work as a columnist for Feteh magazine and hosts a weekly political program on Tigray TV, a regional government broadcaster. He also posts reports on Facebook and the Ethio Forum YouTube channel. Yayesew is vocal and has criticised the current administration for issues including the process to create Prosperity Party, unrealistic regional diplomacy, and its Nile policy.

[91] https://twitter.com/addismaleda/status/1243547593898106884?s=20 accessed June 1, 2020. See also https://twitter.com/addismaleda/status/1243547593898106884?s=20 accessed June 1, 2020.

[92] In April 21 E.C, the attorney General office announced that it has instituted a criminal charge against Yaysew based on Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2012 Article 5 and 7/4. According to the charge, he was accused on account of distributing false information in 17/07/2012 E.C (March 26/2020) that the government has ordered the readying of 200,000 burial places amid corona virus pandemic spreading. The attorney general further depict the said proclamation has published in *negarit gazette* and put in place before the alleged act has been committed. https://www.facebook.com/photo?fbid=2938152326278832&set=a.671951436232277 visited May 13, 2020.

[93] Yohannes Eneyew Ayalew, *Is Ethiopia's first fake news case in line with human rights norms?* May 1, 2020.

provision explicitly repealed by the hate speech and disinformation suppression proclamation. Then, this was dropped and altered to terrorism charges.[94] In the end, Yayesew was charged for article 5 and 7(4) of the Hate Speech and Disinformation Suppression Proclamation no. 1185/2012.

Although, one can stipulate various reasons for such irregularities this article clarifies some of them specially those related to the clarity of the hate speech and disinformation proclamation as well as the date of its publishing (raising concern of non-retroactivity; not in the scope of this study). First of all as stipulated above since the proclamation does not make clear its stand toward approaching similar provision in the criminal code ambiguity towards framing Yayesew's case is expected. Even though, such alterations are not illegal, owing from such clarity issue initially prevented Yayesew from accessing bail as well as the right to speedy trail. The Ethiopian Human Rights Commission has cautioned the government that the prosecutors' alterations of charge violated the accused's rights to bail. Normally when police arrests a person as well as avail him before the court the he is expected to show the type of offense the arrestee is being caught. Specifying the type of the offense inevitably invites the police to stipulate the types of criminal law that has been violated in the suspected act of the individual. The specification in terms of the type of offense and law violated helps the court to determine on the bail issue. In addition to this, logically in situations where no possibility of bail exists, the suspect will have a keen interest in knowing whether the prosecution's evidence warrants his arrest and continued detention. In such way it is essential to clearly show in the

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94Ethiopian police hold journalist Yayesew Shimelis pending terrorism investigation April 16, 2020 3:10 PM EDT **https://cpj.org/2020/04/ethiopian-police-hold-journalist-yayesew-shimelis-/** accessed June 1, 2020.

summon as well as during arrestees appearance before the court as to which law the case falls and the offense the accused is being suspected of. In the case at hand, since the police and the prosecutor were not clearly envisaged as to which law the case might falls with, compelled him to wait in arrest, until they finish their prosecution in three laws.

3.3.Intent requirement missed

The intent of a speech as opposed to mere negligence is the central theme to determine advocacy to hatred.[95] Article 19 of the ICCPR rejects the approach of negligent incitement/advocacy because it does not meet article 20's wording or its principles, particularly in relation to "advocacy," which must be understood as intentional action.[96]

Article 5 of the Proclamation forbids any dissemination of disinformation by means of broadcasting, print or social media using text, image, audio or video." This provision embraces broad stipulation. For instance, the term 'disseminating' is difficult to interpret since it is too broad and may incorporates a number of subtle dissemination of information. This could have been simplified had it incorporate the intent requirement within it. This issue was raised in the parliamentary hearing[97] on the proclamation and subsequent consultations.[98]

The then deputy Attorney General Gedyion Temoteos explained the law has targeting to hold criminally responsible to those who intentionally promote hatred. However, the law does not clearly contemplate such element in defining hate speech.

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[95] UNHRC, 'Rabat Plan of action, supra note 5, para 29; ARTICLE 19, supra note 39, p 27.

[96]UN Office of the High Commissioner for Human Rights, towards an interpretation of article 20 of the ICCPR, supra 37. UNHRC, 'Rabat Plan of action, supra note 5, para 29; ARTICLE 19, supra note 39, p 27.

[97] Watch https://www.youtube.com/watch?v=LDbSfXv787M&t=244s visited 7 May 2020.
[98]Yohannes Eneyew Ayalew**,** '*Muting sectarianism or muzzling speech***?'** January 31, 2020**.** https://www.ethiopia-insight.com/2020/01/31/muting-sectarianism-or-muzzling-speech/ visited 3 May 2020.

Probably we may employ article 59(2) of the criminal code which excludes criminal liability for negligence crime. In addition, the definition failed to clearly define the fate of dissemination such as through tag, share, like or retweet. Moreover, the proclamation has also failed to define what "dissemination". So that we cannot exactly say this or that regarding subsidiary manipulation of messages. It would have been embracing clarity if the law was employed advocacy than promoting since promote' does not set out the intention to encourage hatred, discrimination or an attack against the target group.[99] Regardless of the aim and purpose of advocacy suppressing laws, various human right defenders has begun to criticize the government stating it is employing the law to silent expression which are not necessarily incite hatred or concrete cases of disinformation.[100]

Conclusion

The recently enacted Ethiopia's Hate Speech and Disinformation Proclamation endorse certain concrete problems in its definition and provision of crime. It lacks adequate definition, clarity and specificity of crimes unlike international human right law standards. In particular, lack of clarity in its approach with similar stipulation of the criminal code as well as general stipulation of words such as hate speech, dissemination, encompass unfriendly with the principle of legality. Moreover, it also employs vague and open ended terms. These kinds of articulation on to top of violating the right of the accused bring non-standard application of the law before various tribunals. As a way forward, some points could be remarked. The principle of legality is pivotal instrument to ensure restriction and derogation of the right to freedom of expression is undertaken according to accepted law and process. Under

[99] Yohannes, Muting sectarianism or muzzling speech**?'** supra note 86.

[100] https://www.article19.org/resources/ethiopia-hate-speech-and-disinformation-law-must-not-be-used-to-supress-the-criticism-of-the-government/. Visited July 17/2022.

the constitution article 13 (1) the executive, legislative and courts are imposed to respect and enforce human right and fundamental freedoms to safeguard the interest of the accused. Therefore, the parliament, executive and courts need to develop the habit of abiding with human right laws. Based on this: the legislature is advised to revisit the aforementioned problems in order to make them human rights friendly. Besides, legislature shall comply with its constitutional duty and act as protectorates of human rights and fundamental freedom of the people. Moreover, courts need to seriously advocate judicial activism regarding human rights and exploit all tools of interpretation at their disposal. For instance, when they approach criminal statutes, which does not satisfy accessibility requirement judges are required to check whether they comply with the legality requirement of adequate accessibility. Regarding accessibility, the criminal code itself has a very good stipulation that may be a basis for interpreting various special laws and regulation that has the problem of effective accessibility. In such case, the criminal code would be a good lesson for courts to refer and develop their cases based on it.

Furthermore, this study recommends the courts to refer international human right laws and the constitution to interpret vague, ambiguous or imprecise terms of the law. For instance, under the hate speech proclamation the law does not sufficiently define various issues including failing to explicitly provide intent requirement. In such case, courts should refer human right instruments to give adequate safeguard to the right of the accused. For instance while interpreting "promoting to hatred"; the court may draw inspiration on accepted parameters such as content and context of expression, the status of the speaker, motive and the modality of expression. Perhaps the court may consult the Rabat Plan of Action that recommends a six-part threshold test in determining whether the severity of incitement to hatred rises to the level of criminalization under article 20 of the ICCPR. These factors include: (a) context, (b) speaker, (c) intent, (d) content and form, (e) extent of the speech act, and (f) likelihood, including imminence, of incitement leading to violence. This approach

helps the court to effectively enforce the rights of the accused and bring standard application of the statute itself.

Prisoners' Right to Conjugal Visits in Ethiopia: An Insight into Laws

Alemu Balcha Adugna[♣]

Abstract

The right to Conjugal visit is recognized inherent right of married prisoners that extends up to the right to have sex and procreation. There are numerous arguments for and against conjugal visits. The arguments in favor of it are based on the human rights' approach and its advantages for the reintegration of inmates, while the arguments against it are based on the difficulty in administering it and the lack of resources. Despite the debates against it, studies have revealed that allowing conjugal visits for prisoners can reduce the problems of homosexuality, sexual assaults, and physical violence in prisons. Further, denial of conjugal rights to the prisoners' spouses could be a form of punishment for innocent victims. In addition, conjugal visits can incentivize good prisoners behavior and rehabilitation in prisons. Doctrinal legal research methodology is employed to assess the legal status of conjugal visits under Ethiopian laws. Accordingly, the research finding shows that, in Ethiopia, the jurisprudence on the concept of conjugal rights is in its infancy stage. The Federal Democratic Republic of Ethiopia (FDRE) Constitution neither clearly allows nor prohibits the rights of the prisoners to conjugal visits. No interpretation is also made to clarify whether the constitution intends to deny the rights of the prisoners to conjugal visits or otherwise. Further, no other subsidiary legislation has conferred right to conjugal visit to prisoners. Hence, it is recommendable for Ethiopia to recognize prisoners' conjugal visits via integration into its domestic legal framework.

Keywords: Human rights, conjugal rights, prisoners, family visits

1. Introduction

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Conjugal rights are the sexual rights or privileges implied by, involved in, and regarded exercisable in law by each partner in a marriage.[1] It refers to the mutual rights between two individuals arising from being married. These rights include mutual rights of companionship, support, sexual relations, affection, and the like. The act of a husband or wife staying separately from the other without any legal cause is a subtraction of conjugal rights.[2] Conjugal visits in prison are private meetings between a male or a female inmate with their spouses, whereby the couple may engage in whatever legal activity they desire.[3] Conjugal visits haphazardly started in the 1900s in Mississippi before becoming official programs in 1989.[4] There is no consensus on the importance of granting conjugal rights for prisoners.[5] Those who support the idea claim that it will aid in addressing homosexual orientation and changing the prisoner's conduct while those who disagree with this claim that variables such as custody and security issues, single parenting, the smuggling of illegal products from outside, etc. counteract the beneficial effect.[6]

It is a truism that international human rights documents like the International Convention on Civil and Political Rights, the African Charter on Humans and Peoples Rights, American Convention on Human Rights, and the European Convention on Human Rights accord various rights to prisoners. Yet, none of these

[1] Busari Halimat Temitayo. (2018). *Conjugal Rights for Prisoners: To Be Or Not To Be?,*. https://unilaglawreview.org/2018/01/21/conjugal-rights-for-prisoners-to-be-or-not-to-be/
[2] Ibid.
[3] Caitlin Thomson&Ann.B.Loper. (2005). Adjustment patterns in an incarcerated woman: An analysis of differences based on sentence length. *Behavioral Sciences & the Law*, *32*, 714–732. https://doi.org/10.1177/0093854805279949
[4] Samson C. R. Kajawo. (2021). Conjugal Visits in Prisons Discourse: Is it Even an Offender Rehabilitation Option in Africa? *Advanced Journal of Science*, *8*(1), 67.
[5] Shruti Goyal. (2018). Conjugal Rights Of Prisoners. *Bharati Law Review*, *April-June*, 57.
[6] Ibid.

instruments explicitly recognize the right to conjugal visits of the prisoners.[7] All of the international human rights instruments provide the general principles and absence of clear provision may not be taken as though the right to conjugal visit is prohibited. Taking it that way seems to violate both the minimum basic principle and the general human rights limitation system that restrictions to these rights must be lawful, serve a legitimate aim and be necessary. Because, the fundamental premise that people retain all of their human rights after being convicted, except their right to liberty, only permits restrictions that are inescapable in a closed environment or required for security and maintaining order. In principle, conjugal visits concern private life, the family, and the possibility of begetting children.[8] More importantly, denying such visits infringes the human rights to private life, family life, and the possibility of founding a family. Therefore, the legal starting point is an obligation on the authorities to present every prisoner with the opportunity to enjoy conjugal visits.[9]

From the perspective of the human rights-based approach and other benefits of allowing conjugal visits for prisoners, conjugal visits have been provided in many penitentiary facilities in America, Europe, Asia, and Africa.[10] The idea is being gradually adopted by countries worldwide on the widely agreed grounds that conjugal visits are essential in preserving family bonds and reducing tendencies in prisoners to break prison rules and regulations.[11] In modern-day countries like Canada, Germany, Russia, Spain, Belgium, Spain, Denmark, Pakistan, and, to some

[7] Piet Hein van Kempen, (2008). Positive obligations to ensure the human rights of prisoners: Safety, healthcare, conjugal visits, and the possibility of founding a family under the ICCPR, the ECHR, the ACHR, and the AfChHPR. In *Prison policy and prisoners' rights* (Vol. 42, p. 38). Wolf Legal Publishers. http://www.antoniocasella.eu/archica/Kempen_2008.pdf
[8] Ibid.
[9] Ibid.
[10] Samson C. R. Kajawo (n 4).
[11] Geordon Omand. (2016). *Conjugal visits help Canadian inmates reintegrate into society* [Press]. The Canadian Press. https://www.thestar.com/news/canada/2016/10/30/conjugal-visits-help-canadian-inmates-reintegrate-into-society-experts-say.html?rf

extent, the U.S.A, Brazil, and Israel even allow same-sex conjugal visits for prisoners.[12]

In the Ethiopian context, the jurisprudence of allowing conjugal visits for the prisoner is at an infancy stage. It is a truism that Ethiopia's Constitution and other subsidiary laws have recognized that prisoners have the right to be visited by their spouses or partners. Not only this, the international human rights instruments ratified by Ethiopia have explicit provisions for the issues of family visits. Though the domestic laws and international instruments that are ratified have recognized family visits, the issue as to whether this visit includes prisoners' conjugal visits or not is not clear under both domestic laws and international human rights instruments. Further, the pardon and parole system as an alternative for allowing conjugal visits in other countries is not correctly working in Ethiopia. Various studies have proved that Ethiopia's pardon and parole system has a limitations due to the absence of pertinent organs that implement the program.

Therefore, this article examined and assessed the legal status of prisoners' conjugal visits under Ethiopian laws and the need for integrating conjugal visits into the Ethiopian legal framework. To this end, the article investigated all pertinent provisions of Ethiopia's domestic laws that deal with prisoners' rights in general and conjugal rights in particular. Besides, the article examined the experiences of Canada and Pakistan as they shared the chalices of allowing conjugal visits for prisoners. Canada and Pakistan were purposefully chosen because both nations have had success in ensuring that inmates are rehabilitated and that the rate of homosexuality is reduced by including a clear provision on prisoners' conjugal visits

[12] *Ibid*

in their domestic legal frameworks. Additionally, an attempts made by African nations to permit conjugal visits for prisoners are purposefully taken to demonstrate how strongly the subject is desired and gaining attention on our continent. In doing so, the paper employed doctrinal legal research methodology.

The remaining parts of this article are classified into five sections. The second section uncovers the general overview of historical development and theoretical debates against and in favor of conjugal visits. The third section provides the prisoners' conjugal visits and the obligation of the states to make provisions for conjugal visits under international human rights law. The fourth section presents Canada and Pakistan's experiences on conjugal visits of prisoners. The fifth section critically analyzes conjugal visits and the need for recognizing it under the Ethiopian legal framework. The sixth section provides conclusions and recommendations.

2. General Overview of Historical Development and Theoretical Debates *against* and *in favor* of Conjugal Visits

2.1. Historical development of conjugal visits

As mentioned above, a conjugal visit is a scheduled period in which an inmate of a prison or jail can spend several hours or days privately with a visitor, usually their legal spouse.[13] The parties may engage in sexual activity. The Mississippi State Penitentiary at Parchman was the first jail in history to permit conjugal visits.[14] Hopper traced the first instances of conjugal visits at this jail facility in 1900.[15] Hopper claims that the conjugal visits program got off to a rough and dishonorable start without adequate planning. In the 1930s, visits were only permitted on Sundays, and such trips included the use of prostitutes' services.[16] Around 1940, there was some movement toward the program's credibility. In the neighborhood of the jail,

[13] Busari Halimat Temitayo(n1).
[14] Samson C. R. Kajawo (n 4) 68.
[15] Columbos B. Hopper. (1962). The conjugal visit at the Mississippi State Penitentiary. *Journal of Criminal Law, Criminology and Police Science*, *53*(3), 340-44. https://doi.org/10.2307/1141470
[16] Ibid.

the inmates constructed their visiting structures out of leftover lumber and gave them the nickname "red homes" since they were painted the easily accessible color of red. The program was made available to all prisoners, regardless of race, in the 1940s.[17] A conjugal association can be developed nowadays when a prisoner is allowed to spend some private time with his spouse or family. If the state permits "conjugal visits" in jails, the prisoner can exercise their conjugal rights while they are incarcerated.[18] Depending on the policy of the relevant state, this visit could last for hours or even days.[19]

Parole, also known as a "furlough," is another way for inmates to exercise their conjugal rights.'[20] When prisoners are temporarily released out of custody, they spend time with their spouses or other family members. Nearly every State has established regulations for releasing people on parole or furlough. Contrary to "furlough" or "parole," which involves unsupervised journeys away from the correctional facility for various ill-defined activities, including possible conjugal intercourse, conjugal visits are not permitted.[21] When a prisoner is on parole or furlough, he or she returns home, where the atmosphere is more hospitable, welcoming, and conducive to forging family relationships. However, many inmates who do not meet the requirements for parole or furlough (because of the length of their sentences or failure to comply with other terms like posting a bail bond) may

[17] Samson C. R. Kajawo (n 4) 68.
[18] Shruti Goyal (n 5) 60.
[19] Ibid.
[20] Ibid.
[21] Norman Elliot Ken. (1975). The Legal and Sociological Dimensions of Conjugal Visitation in Prisons. *New England Journal on Prison Law*, *2*, 47–68

also forfeit their right to engage in conjugal relations.[22] It is important to remember that all governments around the world have laws governing parole or furlough.[23]

Moreover, "procreation" is one of the fundamental aspects of marital rights.'[24] With the advancement of science and technology, artificial insemination has become a possible alternative to ensure the right to procreation. The male provides sperm for artificial insemination when the female and male are not in physical touch, and the female becomes pregnant through it using the tools of artificial insemination. [25] Recently, inmates have pounded on the doors of courts to gain access to artificial insemination clinics for conception, notably when the state lacks conjugal visits programs, or the prisoner is ineligible to claim this right or to be temporarily released on parole or furlough. [26]

2.2.The Theoretical Debates *against* and *in favor of* Conjugal Visit

As it is mentioned in other parts of the paper, the issue of conjugal rights for prisoners remains controversial with two distinct points of argument. The detailed scholarly debates on the conjugal visits are presented in the following sections.

2.2.1. Arguments *in favor of* conjugal visits

Arguments favoring conjugal visits in prisons have generally been based on the benefits of conjugal rights to the inmates, spouses, and prison facilities.[27] The first argument in favor of conjugal visits is that "it can help to lessen the issues associated with homosexuality in prisons."[28] Many studies have shown that conjugal visits can help to reduce the problems related to homosexuality in prisons.[29] For instance,

[22] Norman S Hayner. (1972). Attitudes towards Conjugal Visits for Prisoners. *Federation Probation, 36*, 48–53.
[23] Ibid.
[24] Shruti Goyal (n 5) 60.
[25] Ibid.
[26] Ibid.
[27] Shruti Goyal. (2018). Conjugal Rights Of Prisoners. *Bharati Law Review, April-June*, 70
[28] Ibid.
[29] Samson C. R. Kajawo (n 4).

Hopper, a pioneer in the study of extended family visits in jail, found that these visits drastically decreased homosexuality at the Mississippi State Penitentiary.[30]

The second argument favoring allowing conjugal visits for a prisoner is that conjugal visits can reduce the incidences of sexual assaults and rape in prisons.[31] Several studies in some states in the U.S.A., such as Tennessee and New York, found that many prison officials believed that conjugal visits alleviate male rapes among prison inmates.[32] Accordingly, allowing conjugal visits for the prisoners can reduce and prevent male rape, which has become a grave concern for many states.[33]

The third argument favouring conjugal visits for a prisoner is that it can reduce physical violence in prisons. Some scholars believe that conjugal visits can lessen physical violence in jails and prisons.[34] By allowing prisoners to spend a significant amount of time with their spouses, the negative effect of the unisex prison environment can be diminished.[35]

The fact that conjugal visits in prison can be used to change offenders' conduct is another argument in its favor.[36] Building relationships with the family has a normalizing effect that can lessen instances of violence in jails and prepare the inmate for re-entering society after release.[37] According to a 1983 research by Howser et al., male inmates who took part in family-reunion programs in New York,

[30] Columbos B. Hopper. (1962). The conjugal visit at the Mississippi State Penitentiary. *Journal of Criminal Law, Criminology and Police Science*, *53*(3), 340-44. https://doi.org/10.2307/11414
[31] Samson C. R. Kajawo (n 4)70.
[32] Ibid.
[33] James E. Robertson. (2003). A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison. *North California Law Review*, *81*, 433–481
[34] Samson C. R. Kajawo (n 4).
[35] Shruti Goyal (n 5) 58.
[36] Ibid.
[37] Ann Goetting. (1982). Conjugal Association in Prison: The Debate And Its Resolutions. *New England Journal On Prison Law*, *8*, 141–154

which included conjugal visits, displayed better behavior than those who did not.[38] In his research, Clemmer also found that convicts who keep in touch with their families have a considerably better chance of recovery than those who do not.[39] Therefore, conjugal visiting privileges would serve as a reward for a detainee's behavioural improvement and prisoner rehabilitation.[40] Thus, it has been determined that giving lawfully married inmates and their spouses the opportunity to have conjugal visits is beneficial for everyone, especially in jurisdictions that support the rehabilitative philosophy.[41]

Last but not least, several academics supported conjugal visits from the standpoint of the rights of the prisoner's spouse. Not a spouse, but the prisoner, is the one who broke the law. Therefore, denying spouses of the perpetrators their conjugal rights could result in punishing an innocent victim.[42] To this end, refusing a spouse who requests conjugal visits should be viewed as denying that person's civil and human rights.[43] Losing a partner to incarceration can lead to financial difficulties, marital issues, and increased childcare responsibilities.[44] Hence, one of the possible steps to easing the suffering of jail on their families can be to grant conjugal visits to the prisoner's spouse.[45]

2.2.2. Arguments against Conjugal Visits

Despite the justifications for conjugal visits listed above, some academics have argued against allowing it to take place in prisons. The first is the expense of romantic outings. According to some studies, it might be difficult, especially in

[38] James Howser,Jody Grossman, & Donald MacDonald. (1983). Impact of family reunion programs on institutional discipline. *Journal of Offender Counseling Services and Rehabilitation*, *8*(1–2), 27–36. https://doi.org/10.1300/J264v08n01_04
[39] Donald Clemmer. (1950). Observations on imprisonment as a source of criminality. *Journal of Criminal Law and Criminology*, *41*(3), 311-319. https://doi.org/10.2307/1138066
[40] Samson C. R. Kajawo (n 4).
[41] Ibid.
[42] Donald.P.Schneller. (1976). *The prisoners' families:A study of the effects of imprisonment on the families of prisoners*. R and E Research Associates.
[43] Shruti Goyal (n 5) 57.
[44] Russil Durrant. (2017). *An introduction to criminal psychology* (2nd ed.). Routled
[45] Samson C. R. Kajawo (n 4)68.

developing nations, to reform prison legislation so that offenders can be granted the right to conjugal visits.[46] Besides, rooms would need to be built for such visits in addition to the funding needs to address prision overcrowding.[47] For instance, due to the country's ongoing problems with overcrowding and basic needs, the Ugandan parliament rejected the legislative revision that called for allowing conjugal visits in jail.[48]

Another solid objection to the legalization of conjugal visits programs is that their administration is prone to abuse by both prisoners and prison staff.[49] Some scholars have argued that "allowing conjugal visits for prisoners may turn the prisons into prostitution brothels at government expense."[50] Since most prison officers in developing countries are underpaid, they may fall prey to offers of setting up prostitutes for jail inmates, while others may even prostitute their family members to earn favors from fellow inmates.[51] Finally, though it has been discussed that allowing conjugal visits has a significant role in reducing homosexuality, two main arguments are advanced in opposition to this viewpoint.[52] The first argument is that prison homosexuality is not related to heterosexual deprivation but instead it is an expression of the urge for mastery by people who have been placed into a position of powerlessness. The second argument is that the frequency of heterosexual activity

[46] Anamica Singh and Anupal Dasgupta. (2015). Prisoners' conjugal visitation rights in India: Changing perspectives. *Christ University Law Journal*, *4*(2), 73–88. https://doi.org/10.12728/culj.7.5
[47] Shruti Goyal (n 5).
[48] Ssentongo Yakubu. (2018). The rights of inmates to conjugal rights: Uganda in perspective. *Unilag Law Review*, *2*(1), 169–182. https://unilaglawreview.org/james/wp-content/uploads/2018/09/the-rights-of-inmates-to-conjugal-rights-yakubu-ulr-2018-vol-2-ed-1.pdf
[49] Samson C. R. Kajawo (n 4).
[50] Anamica Singh and Anupal Dasgupta. (2015). Prisoners' conjugal visitation rights in India: Changing perspectives. *Christ University Law Journal*, *4*(2), 73–88. https://doi.org/10.12728/culj.7.5
[51] Ibid.
[52] Ann Goetting(n37)142

is so limited that it will have only minimal or negligible effect.[53] To this effect, it has been argued that allowing conjugal visits may not reduce homosexuality as it is attributed to other reasons than the absence of conjugal visits for the prisoners. Whatever the arguments against and in favor of conjugal visits, there is a need to change the attitude towards prisoners with the changing times and sensitization of society towards human rights.[54]

3. Prisoner's Right to Conjugal Visits and States Obligation under International Human Rights Law

Human rights are the primary and inalienable guarantees that describe specific standards of human behavior and are regularly protected as legal rights in municipal and international laws.[55] Various international human rights' instruments have provided a number of rights for all human beings in general and for prisoners in particular. Saving for the right to liberty which would inevitably be restricted as a matter of imprisonment, other human rights as envisaged under the international human rights instruments are equally applicable for prisoners.

Human rights do not end at prison gates since correctional facilities like prisons are designed to correct and rehabilitate inmates.[56] This is reaffirmed under various international and regional human rights' instruments. Prominently, the ICCPR under article 10 expressly provides that detained persons should be treated with their dignity. Moreover, the respective supervisory organs of the international and regional human rights' instruments make it clear through their jurisprudence that deplorable detention conditions constitute a violation of torture, cruel, inhuman, or degrading treatment or punishment.[57] This approach broadens the horizon of protection of human rights' abuses in detention places as torture in all its forms is

[53] Ibid.
[54] Shruti Goyal (n 5) 60.
[55] Busari Halimat Temitayo(n1).
[56] Ibid.
[57] Addisu Gulilat. (2012). *The Human Rights Of Detained Persons In Ethiopia :Case Study In Addis Ababa* [Master's Thesis]. Addis Ababa University.

prohibited in many human rights' instruments such as U.D.H.R., ICCPR, A.C.H.P.R., ECHR, and A.C.H.R.[58]

Furthermore, the 1996 Kampala Declaration on Prison Conditions in Africa and Plan of Action recommend that prisoners' rights should always be upheld and that their rights shall not be taken away by reason of being in imprisonment. Besides, it provides that prisoners' living conditions should respect their human dignity and that prison regulations must not "aggravate the suffering already caused by the detention."[59] One of the declaration's important statements in paragraph one No. 2 recognizes that prisoners should keep all of their rights that aren't expressly taken away by the fact of their detention.[60]

Unfortunately, no international human rights treaties, principles, or minimum requirements for inmates have established clear requirements or norms that specifically address the right to conjugal visitation. They only laid down fundamental rights and means of treatment that may ultimately be important for recognizing such rights of prisoners. The absence of explicit provisions that recognize a right to conjugal visits under the human rights treaties would inevitably take us to the interpretation. As it is mentioned above, saving for the right to liberty that would inevitably be restricted as a matter of imprisonment, other human rights of prisoners do not end at prison gates and prisoners' human dignity should not be ignored. Further, it is a minimum basic principle and the general human rights limitation system that restrictions to rights must be lawful, serve a legitimate purpose

[58] Ibid.
[59]'THE KAMPALA DECLARATION ON PRISON CONDITIONS IN AFRICA' <https://www.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf> accessed 25 June 2021.
[60] Ibid.

and should be necessary. Accordingly, the fundamental premise that people retain all of their human rights after being convicted, except their right to liberty, only permits restrictions that are inescapable in a closed environment or required for security and maintaining order.[61]

Moreover, the ability of prisoners and their relatives to exercise their rights to privacy, family life, and procreation is significantly impacted by the restriction of their liberty. The right to procreation is expressly recognized by human rights instruments like the ICCPR, UDHR, European Convention on Human Rights (ECHR), and the A.C.H.R.[62] Hence, limiting the ability of prisoners to enjoy conjugal visits with their legal spouse due to state action implies limiting the right to family life and possibly the right to have a family.

Furthermore, denying prisoners to enjoy conjugal rights has a negative implication on the right to health. As provided under the United Nations general comment no.14 on article 12 of CESCR, the right to health includes the right to control one's health and body, including sexual and reproductive freedoms, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment, and experimentation and by contrast, the opportunity for people to enjoy the highest attainable level of health.[63] The right to health is clearly recognized under international and regional human rights instruments like ICESCR, CEDAW, CRC,

[61] Piet Hein van Kempen, 'Positive Obligations to Ensure the Human Rights of Prisoners: Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family under the ICCPR, the ECHR, the ACHR and the AfChHPR', *Prison policy and prisoners' rights*, vol 42 (Wolf Legal Publishers 2008) <http://www.antoniocasella.eu/archica/Kempen_2008.pdf>.

[62] 'See Article 16 of UDHR, Article 23 of the ICCPR, Article 18 of ACHPR, and Article 12 of the European Convention on Human Rights.'

[63] Office of the higher commission for Human rights, 'CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' <https://www.refworld.org/pdfid/4538838d0.pdf> accessed 23 June 2022.

and ACHPR.[64] Limiting the ability of prisoners to enjoy conjugal visits is limiting the right to health of the prisoner.

In a nutshell, the absence of an explicit provision that recognizes a right to conjugal visits under the human rights treaties seems to violate both the minimum basic principle and the general human rights limitation system that restrictions to rights must be lawful, serve a legitimate purpose, and should be necessary.[65] Therefore, the legal starting point is an obligation on the states to present every prisoner with the opportunity to enjoy conjugal visits.[66] In State Reports to the UN Human Rights Council of the Committee on Economic Social and Cultural Rights, the allowance of and provision for conjugal visits has been presented as a fulfillment of the obligation to secure humane living conditions and treatment of prisoners.[67] More importantly, considering articles 7 and 10 of ICCPR, the UN Human Rights Council of the Committee on Economic Social and Cultural Rights holds that state parties must ensure that the rights of persons deprived of their liberty are protected on equal terms for men and women.

As provided under General Comment No. 22 on article 12 of the International Covenant on Economic, Social, and Cultural Rights, it was the stand of the committee that state parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual reproductive health.[68] To this effect, states are required to repeal or reform

[64] 'See Article 12 of ICESCR, Article Art.11(1)(f),12, and 14(2)(b) of CEDAW, Article 24 of CRC, and Article 16 of ACHPR.'
[65] Piet Hein van Kempen, (n 61)39.
[66] Ibid.
[67] Piet Hein van Kempen, (n 61).
[68] United Nations Economic and Social Council, 'General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and

laws and policies that nullify or impair certain individuals and groups' ability to realize their right to sexual and reproductive health and the state party has the obligation to mobilize all available resources, including those made available through international assistance and cooperation, with a view to comply with its obligations under the International Covenant on Economic, Social, and Cultural Rights.[69] Again, according to the general comments made by the UN Committee on article 23 of the ICCPR, state parties shall take legislative, administrative, or other actions to guarantee protection of a family.[70] States parties' reports should explain how the State and other social institutions provide the necessary protection for the family, whether and to what extent the State provides financial or other support for the activities of such institutions, and how it ensures that these activities are compatible with the Convention.[71] Therefore, it is the responsibility of states that are signatories to international human rights treaties to ensure that the right to family and the right to reproductive health are protected. This should be true both inside and outside the prisons.

4. Comparative Experiences on conjugal Visits

Despite arguments for and against conjugal visits mentioned above, societies around the world have tended to support it legally through constitutions and other subsidiary legislation. In this regard, Canada and Pakistan have successful experiences. Besides, the efforts made by several African governments are encouraging, albeit not yet successful. Accordingly, the experiences of Canada and Pakistan as well as initiatives from African countries will be presented as follows:

4.1.Canada

Cultural Rights)' <https://digitallibrary.un.org/record/832961/files/E_C.12_GC_22-EN.pdf> accessed 25 June 2022.

[69] Ibid.

[70] 'UN Human Rights Committee General Comment No.19 on Article 23 of ICCPR.', paragraph 3 <https://www.refworld.org/pdfid/45139bd74.pdf> accessed 23 June 2022.

[71] Ibid.

The Private Family Visiting program for prisons and other detention centers was established in Canada in 1980. Until then, only a few regional and sporadic municipal facilities with sentences of less than two years had used this kind of action**.**[72] The execution of these programs is consistent with creating a correctional ideology that bases punishment on offenders' social rehabilitation.[73] The 1970s saw growth and expansion of this mindset, which then blossomed within the Canadian Security Service (C.S.C.) in the 1980s and 1990s.[74]

Currently, the Correctional Service of Canada bases much of its philosophy on the notion that punishment is meted out to protect society by facilitating offenders' social rehabilitation. As provided under Article 71(1) of the Act on the correctional system and parole release, inmates have the right to pursue relationships with their family, friends, or other people to strengthen their ties to the community.[75] In Canada, all prisoners aside from those under disciplinary measures or in danger of family violence are allowed to have "private family visits" of up to 72 hours every two months.[76] The goal of this is to help offenders build positive relationships with society so that their release will be more accessible.[77] Article 3 of the Correctional and Conditional Release Act suggests that "the federal correctional system aims to

[72] T.Foran. (1995a). A descriptive comparison of demographic and family characteristics of the Canadian and offender populations. *Forum on Corrections Research, 7*(2), 3–5

[73] Marion Vacheret. (2005). *Marion Vacheret, Private Family Visits in Canada, Between Rehabilitation and Stricter Control: Portrait of a System*. https://journals.openedition.org/champpenal/2322#tocto2n1

[74]Ibid.

[75] Corrections and Conditional Release Act of canada, Pub. L. No. S.C. 1992, c. 20 (1992).

[76] Busari Halimat Temitayo(n1).

[77] Marion Vacheret. (2005). *Marion Vacheret, Private Family Visits in Canada, Between Rehabilitation and Stricter Control: Portrait of a System*. https://journals.openedition.org/champpenal/2322#tocto2n1

contribute to preserving a just, peaceful, and safe society by supporting criminals in their rehabilitation and community reintegration."[78]

Family relationships significantly influence successful social rehabilitation, according to a study done in Canada in 1998–1999 on the topic.[79] Families are portrayed as essential to successful social rehabilitation by virtue of their sheer presence and their involvement in private family visitation programs during the prison term. They uphold and strengthen the prisoner's connections to the outside world.[80]

4.2.Pakistan

Pakistan is one of the few countries in the world that allows couples to engage in sexual activity while incarcerated as a punitive measure. According to a ruling by Pakistan's Supreme Court on April 6, 2010, inmates must have access to opportunities for conjugal relationships inside prison.[81] According to a Federal Shariat Court ruling, married convicts must be permitted conjugal visits at the authorized facilities inside the jail complex. Alternatively, they should be given brief parole so they can see their spouses.[82] After the decision, Sindh Province was the first to pass legislation allowing married inmates to visit each other within the prison. Accordingly, the Sindh Home Department allowed convicted inmates" meetings with their spouses for one day or night in 3 months.[83] Given the facts above, we can conclude that prisoners who have the opportunity for conjugal meetings are more likely to follow the rules while they are in custody, are more likely to be successfully rehabilitated in their post-release lives, and that prison administrations can better

[78] Corrections and Conditional Release Act of canada, Pub. L. No. S.C. 1992, c. 20 (1992).
[79] Marion Vacheret. (2005). *Marion Vacheret, Private Family Visits in Canada, Between Rehabilitation and Stricter Control: Portrait of a System*. https://journals.openedition.org/champpenal/2322#tocto2n1
[80] T.Foran. (1995b). The Family Side of Corrections. *FORUM on Corrections Research*, *7*(2).
[81] Rais Gul. (2018). Prisoners' Right to Fair Justice, Health Care and Conjugal Meetings: An Analysis of Theory and Practice (A case study of the selected jails of Khyber Pukhtunkhwa, Pakistan). *Pakistan Journal of Criminology*, *10*(4), 42–59.
[82] Ibid.
[83] Ibid.

achieve the goal of prisoners' rehabilitation by giving them more opportunities for conjugal meetings.[84]

It should be highlighted that the Pakistani Supreme Court has protected and stressed the application of detainees' conjugal rights in all of the nation's prison centers.[85] In light of the supreme court orders, the rules that recognize the rights of conjugal visits of the prisoner are inserted into Pakistan's domestic statutes. Accordingly, under rule 545-A of PPR, the prisoners can avail the facility as a right (excluding a few exceptions). The said provision was inserted on the directions issued by the Federal Shariat Court in 2010 in *Dr. Muhammad Aslam Khaki and others vs. The State and others case*.[86] Despite having already been inserted by an adjustment termed "special meetings" under rule 544 in 2005 and Punjab under rule 545-A in 2007, the right was finally recognized at the federal level through this verdict.[87]

In a nutshell, the Federal Shariat Court's (F.S.C.) primary defense for ruling in favor of conjugal visits is that doing so might be the most effective way to curtail married criminals' propensity for drug misuse and sexual assault of other inmates. Further, his family should not suffer because only the criminal should be held accountable for his crime.[88] The Federal Shariat Court recommended two sets of possibilities while dealing with Aslam Khaki's case: the first was to create private family gathering spaces inside prison walls; the second was to send suitable inmates on conjugal parole for a few days every four months.[89] Through PPR Rule 223, the

[84] Busari Halimat Temitayo(n1).
[85] Ibid.
[86] Aisha Tariq. (2019). *Rights Of Prisoners: A Comparative Study of Sharīʻah & Law with Special Reference to Pakistani Statutes and Case Law* [Ph.D. thesis]. international Islamic university
[87]Ibid.
[88] Ibid.
[89] Ibid 119.

quick-release on parole process is already in place nationwide. To make the right actually usable, it is more simple and more practical to introduce a specific category of "conjugal parole" into the system. Such parole would be used as a chance for the offender's parents and other family members and their spouses.[90]

4.3. Initiatives taken by African countries toward Conjugal visits

Numerous African nations have begun to introduce conjugal visits for inmates after realizing the benefits of doing so, however, it has not yet been done well. The provision of conjugal visits to prisoners has long been a contentious topic in many African nations, with implementation meetings with little to no success, primarily because of a lack of funding.[91] To mention some of the initiatives, with the primary purpose of reducing sexual abuses among the inmates prevalent in prison, in 2012, the Tanzanian government announced plans to grant conjugal rights to prisoners.[92] However, the program, which was eventually introduced, was short-lived in Tanzania since the new President of the country directed an end to it in 2018.[93] Further, with the primary purpose of rehabilitating prison inmates and reducing prison homosexuality and HIV spread, in 2003, Kenya announced its plan to introduce conjugal visits for prisoners.[94] The government was even given a direction for the prison administration to make available suitable facilities within prison premises in readiness for this program.[95] However, the conjugal visit's introduction plans in Kenyan prisons were still in limbo in 2019.[96]

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[90] Ibid.
[91] Samson C. R. Kajawo (n 4) 71.
[92] Christopher Majaliwa, 'Tanzania: Conjugal Rights to Be Granted to Prisoners' *Tanzania Daily news* (Tanzania,Dere salaam, 2 November 2012) <https://allafrica.com/stories/201211030279.html> accessed 22 April 2022.
[93]Samson C. R. Kajawo (n 4) 71.
[94] *Ibid*.
[95] Rachel Wyatt, 'Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?' (2006) 37 Case Western Reserve Journal of International Law 579.
[96] Wachira Mwangi, 'Kenya: Inmates Demand Conjugal Rights, Balanced Diet and Right to Bury Kin' *Nairobi news* (kenya, Nairobi, 5 April 2019) <https://nairobinews.nation.co.ke/life/inmates-demand-conjugal-rights-balanced-diet-and-right-to-bury-kin> accessed 5 April 2022.

Again, Zambia has also chosen a wise course in allowing couples to visit prisons. The government was advised to consider establishing inmates' conjugal visitation rights in 2016 during the review of prison acts by the then-Commissioner General of Zambia Correctional Services, who noted that it was a good practice.[97] Conjugal visits were not included in the prison statute, but the topic is still active since some activists, including the Prison Care and Counseling Association, are still pushing for further revisions to the prison regulations to permit prisoners' conjugal rights.[98]

Swaziland is the other African nation that has taken a significant step toward allowing conjugal visits for prisoners. By citing the government's plan to introduce conjugal visits in prisons, Swaziland was reported to be the first African country and the only 16th country worldwide to introduce conjugal visits for inmates in 2012.[99] Beyond the plan to allow conjugal visits, the Swaziland correctional service had plans to construct two-bedroomed houses at every prison facility in the country for the well-behaving eligible inmates to enjoy their conjugal rights.[100] Though the government responded to the critics and objections against allowing conjugal visits for the prisoners, the program is not yet implemented. Other African countries like Zimbabwe, Egypt, and South Africa also took some initiatives though it is not yet fully implemented.[101]

5. Prisoners' Right to Conjugal visits in Ethiopia

[97] Kelvin Mbewe, 'Prisons Conjugal Visits on Cards' *Zambia Daily Mai* (zambia, 28 May 2016) <http://www.daily-mail.co.zm/prisons-conjugal-visits-on-cards/> accessed 22 April 2022.
[98] Samson C. R. Kajawo (n 4) 72.
[99] Mantoe Phakathi, 'Swaziland: Allowing Conjugal Visits - a Premature Adjudication?' *Think Africa Press* (12 October 2012) <https://allafrica.com/stories/201210150018.html> accessed 23 April 2022.
[100] Samson C. R. Kajawo (n 4) 72.
[101] Ibid 71–72.

Like other legal systems, the FDRE. Constitution (herein after Constitution) has a separate chapter that is exclusively dedicated to the Human Rights. Chapter three of the Constitution is divided into "Human Rights" [102] and "Democratic Rights."[103] Everyone is entitled to the rights entrenched in the Constitution. Accordingly, detained persons are entitled to these Constitutional rights, except those limited explicitly as a natural consequence of deprivation of liberty. Under its title that deals with the Rights of Persons Held in Custody and Convicted Prisoners, the constitution has reaffirmed that detained persons are entitled to the rights guaranteed by the Constitution and all persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity.[104] Under the same provision, all persons shall have the opportunity to communicate with and be visited by their spouses or partners, close relatives, friends, religious councilors, medical doctors, and legal counsel.[105] From this, it is clear that the Constitution has recognized the right to contact with the outside world or family visits for the prisoners. This provision is open for interpretation and it is possible to argue that the right to family visits as envisaged under the Constitution extends to prisoners. Again, article 34 of the FDRE Constitution has recognized the right to marital and family rights.[106] Specifically, Article 34(3) of the same constitution provides that "the family is the natural and fundamental unit of society and is entitled to protection by society and the State."[107] It is apparent from this article that the state has a commitment to defend the family as the natural and fundamental unit of society. This protection should not end at the prison gate, and prisoners should be allowed to have

[102] The Federal Democratic Republic of Ethiopia Constitution, Pub. L. No. Neg. Gaz.year 1,No 1, proc.No 1 (1995,article 15-29
[103] Ibid, article 29-44
[104] Ibid, article 21(1)
[105] Ibid,article 2 1(2)
[106] The Federal Democratic Republic of Ethiopia Constitution 1995, article 34.
[107] Ibid, article 34(3).

conjugal visits in order to maintain their constitutionally guaranteed right to the family.

Further, the FDRE Constitution has adopted the monist approach to incorporation of international law.[108] Accordingly, all international agreements ratified by Ethiopia are integral part of the law of the land.[109] Hence, international instruments that Ethiopia ratifies are subject to enforcement before domestic courts without further act for domestication.[110] Accordingly, the general international human rights instruments and those exclusively dedicated to detained person's rights can be invoked by detainees so long as they are ratified by Ethiopia. As it is discussed under section three of the paper, though the international human rights instrument does not clearly provide the right to conjugal visits, the UN Human Rights Council of the committee's general comments no.22 on article 12 of the International Covenant on Economic, Social, and Cultural Rights has clarified the issues and imposed an obligation on member states to ensure the right to sexual reproductive health which cannot be implemented unless we allow conjugal visits for prisoners.[111] The same position is reflected by the general comments of the UN Human Rights Committee on article 23 of ICCPR.[112] Ethiopia has already ratified both conventions[113], and hence, from the cumulative interpretation of the international human rights

[108] Sisay Alemahu Yeshanew. (2008). The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. *African Human Rights Law Journal*, *8*(2).
[109] The Federal Democratic Republic of Ethiopia Constitution, Pub. L. No. Neg. Gaz.year 1,No 1, proc.No 1 (1995
[110] Sisay Alemahu Yeshanew. (2008). The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. *African Human Rights Law Journal*, *8*(2).
[111] United Nations Economic and Social Council (n 69).
[112] 'UN Human Rights Committee General Comment No.19 on Article 23 of ICCPR.' (n 70).
[113] Abiyou Girma Tamirat, 'ETHIOPIA'S HUMAN RIGHTS TREATY REPORTING TO THE UN TREATY BODIES' <https://www.abyssinialaw.com/blog-posts/item/1483-ethiopia-s-human-rights-treaty-reporting-to-the-un-treaty-bodies#:~:text=.> accessed 23 June 2022.

instruments in which Ethiopia is a party and domestic laws, we can argue that conjugal visit is allowed under the Ethiopian legal system.

Though we may argue in favor of conjugal visits by citing domestic laws and international instruments ratified by Ethiopia, the country has neither clearly allowed nor prohibited the prisoners' conjugal visits. No interpretation is also made to clarify whether the Constitution intends to deny conjugal rights of prisoners or otherwise. Furthermore, the parliamentary debates and other technical notes are not clear enough on the issues of conjugal visits of the prisoners.[114] Accordingly, the minutes of debate during the adoption of the constitution, as well as the commentary by the Constitution's drafters did not unequivocally provide whether the right to family visits includes extended visits or conjugal visits. The explanatory notes on the Constitution provide that the right to be visited by a close family or legal partner, as stated in article 21(2) of the Constitution, is the right to be in the same room to share a secret with each other.[115] Beyond this, nothing is provided as to whether the right to conjugal visit is within the ambits of the right to family visit or not.

Another relevant law on the protection of prisoners, the Federal Prison Commission Establishment Proclamation of Ethiopia No.365/2003, has provided that prisoners are given the right to communicate with their spouses, close relatives, friends, medical doctors, legal counselors, and religious leaders.[116] This implies that prisoners have a right to be visited by their spouses and other close relatives/friends, doctors, and religious leaders. Yet, like that of the FDRE. Constitution, The Federal Prison Establishment Proclamation is not clear as to whether the right to be visited

[114] 'The 1995 Ethiopian constitution Explanatory Note' <https://www.abyssinialaw.com/laws/constitutions/constitutions/the-1995-ethiopian-constitution-explanatory-note-amharic-version>,p.48, accessed 13 July 2022.

[115] Ibid.

[116] Federal Prison Commission Establishment Proclamation, Pub. L. No. Fed, Neg.Gaz., Proclamation No.365/2003, (2003),article 29

by spouses extends to conjugal visits or not. Besides, no other administrative rules or directives provide prisoners right to conjugal visits.

As the FDRE Constitution and other subsidiary laws neither clearly allows nor prohibits the prisoners' rights to conjugal visits, the issue as to whether the prisoners should be allowed to enjoy conjugal visits or not may create a confusion. Yet, one may wonder whether the probation and parole system, and using artificial insemination may serve as an alternative for allowing conjugal visits for the prisoners. Ethiopia's criminal law has recognized the probation and parole system. Probation is the release of a convicted offender under the supervision of a probation officer subject to revocation upon breach of the conditions attached to his/her release.[117] The Ethiopian criminal code recognizes the idea of probation. The court is given a discretionary power to order probation if it believes that it will promote the reform and reintegration of the criminal.[118] In addition, the Ethiopian criminal law also recognizes parole, whereby a prisoner is conditionally released before completing the term of imprisonment.[119] The court may grant parole after receiving recommendations from the prison's administration and having regard to the criminal's behavioral reform, provided this process helps the offender at an earlier stage to reintegrate with his family and the community.[120] Like probation, parole is subject to certain conditions, and non-compliance with these conditions may lead to

[117] Endalew Lijalem. (2014). The Space for Restorative Justice in the Ethiopian Criminal Justice System. *Bergen Journal of Criminal Law and Criminal Justice*, *2*(2), 236.
[118] Federal Democratic Republic of Ethiopia Criminal Code, Pub. L. No. Neg.Gaz, proc. no.414/2004 (2004),article 190
[119] Ibid,article 201
[120] Ibid,article 202(1)

the revocation of the parole, whereby the prisoner is sent back to prison to serve the remainder of the sentence.[121]

Although the parole and probation systems are recognized by the FDRE. Criminal code, it is extremely difficult to use them as a substitute for permitting conjugal visits. According to studies, even though Ethiopia has some laws governing the pardon and parole system, they are useless as there are no institutions in place to monitor parolees and probationers.[122] The studies further demonstrate that Ethiopia's criminal justice system's most neglected components are the parole and probation systems.[123] Concerning the parole system, it is even challenging to justify parole for not allowing conjugal visits for the prisoners. Because the parole is applicable for specific groups of eligible prisoners based on the conditions specified under article 202 of the Ethiopian criminal code.

Besides, artificial insemination is another option that the international communities are using as a substitute to at least compromise the right to found a family or procreate, which may not be accomplished without permitting conjugal visits for prisoners. Yet, the country's economic status and the existing technological infrastructure will never enable Ethiopia to use artificial insemination in all prison centers across the country. Let alone facilitating artificial insemination for the prisoners, other necessary basic facilities like education, health services, and other related services are not being given properly. Hence, there is a pressing need for Ethiopia to recognize the right to conjugal visits for the prisoners. The author is of the opinion that only legal spouses/partners should be permitted to have conjugal visits, as allowing such visits for all convicts would turn the prison administration or facilities into a passageway for prostitution.

[121] Ibid,article 206
[122] Shewit khasey. (2017). Community based rehabilitation of offenders:an overview of pardon and parole in Ethiopia. *Hawasa University Law Journal*, *1*(1), 23
[123] Ibid.

5.1. The Need to Recognize Conjugal Visits under Ethiopian Law

As it is mentioned above, Ethiopia's existing legal framework does not recognize the right to conjugal visits for prisoners. This could inevitably be an obstacle for Ethiopia to share from the chalices of allowing conjugal visits for prisoners. Canada and Pakistan have recognized conjugal visits for prisoners by inserting an explicit provision into their domestic laws. By doing so, they successfully prevent homosexuality, rape, or physical violence by the same sex and ensure prisoners' rehabilitation.

Coming to the context of Ethiopia, there is a pressing need for the explicit recognition of conjugal visits for the prisoners. The prominent reason that necessitates Ethiopia to recognize conjugal visits for prisoners is the prevalence of homosexuality in different prison centers. Various reports and studies have proved that homosexuality is rampant in many prison centers of Ethiopia.[124] One of the driving factors for such perplexity is attributed to a non-recognition of conjugal visits for legally married couples. one of the research conducted on the treatment of prisoners in the Bale zone reveals that homosexuality and physical violence or rape by the same-sex have become a regular day-to-day activity of the prisoners.[125] Though homosexuality is recognized in different countries as legal right, under the new criminal code of Ethiopia, it is punishable by simple imprisonment.[126] Hence,

[124] Sailaja Busi and Zewdie Oltaye, 'Assessment of Magnitude of Sexually Transmitted Infections, Sexual and Reproductive Health Status among Prisoners Aged Between 18-49 Years in Tabor Prison, Hawassa, Ethiopia' (2016) 8 *Momona Ethiopian Journal of Science* 89.
[125] Zakarias Admasu and Alemu Balcha. (2018). *Treatment of juvenile offenders in law and practice: The case of Bale Zone* [Unpublished research]
[126] Federal Democratic Republic of Ethiopia Criminal Code, Pub. L. No. Neg.Gaz, proc. no.414/2004 (2004),article 629.

to reduce such illegal activities, Ethiopia must take a lesson from Canada and Pakistan and give clear recognition to conjugal visits of the prisoners.

The second reason that necessitates recognizing conjugal visits for the prisoner is related to the prisoner's rehabilitation. One of the primary purposes of Ethiopian criminal law is rehabilitation. The reformation and rehabilitation objective of the criminal law is best provided under the preface of the FDRE Criminal code of 2004.[127] Allowing conjugal visits has multidimensional advantages for the prisoners in particular and society in general. If the conjugal relationships between the spouses remain intact, it will make the reintegration of the prisoners easy. By allowing conjugal visits, Canada and Pakistan have achieved rehabilitation of the prisoners.

It is a truism that homosexuality is immoral and punishable in Ethiopia.[128] Accordingly, the reaction of the society against such a practice is not favorable. Such negative perception of the community toward the prisoner's behavior could inevitably lead to the social exclusion of the prisoners when they are released from the prison centers. This would, in turn, affect the "reintegration of the prisoners into the society"[129], which is the primary purpose of the criminal law of Ethiopia. Besides, conjugal visits can serve as an incentive for good conduct in prison since inmates strive to avoid any misconduct which might disqualify them from having a conjugal visit.[130] Accordingly, Ethiopia and other countries claiming to have embraced rehabilitation need to seriously consider conjugal visits as a social support program activity.

The third reason that necessitates allowing conjugal visits in Ethiopia is related to the protection of the human rights of the spouses. If a conjugal visit is not allowed for the prisoners, it negatively affects the rights of the spouses of the prisoners. It is

[127] Ibid,preface,paragraph 8.
[128] Federal Democratic Republic of Ethiopia Criminal Code 2004,article 629.
[129] Ibid, preface,paragraph 8.
[130] Shruti Goyal (n 5).

just punishing one of the spouses for the crime committed by their wives or husbands. Besides, procreation is one of the constitutionally guaranteed rights of every person. This right may not be realized unless we allow conjugal visits for the prisoners. What makes things cumbersome in Ethiopia is that the pardon and parole system serving as an alternative for ensuring the right to procreation is unsuccessful. Studies have proved that Ethiopia's pardon and parole law is the most neglected area of law. Its implementation is stumbled due to the absence of pertinent organs that work on its implementation.

Moreover, artificial insemination that could be serving as an alternative for allowing conjugal visits may not be successful. The country's awareness and economic status may not qualify for using artificial insemination in all prison centers of Ethiopia.

Finally, allowing conjugal visits can be justified from a psychological dimension. Those scholars who argued infavor of allowing conjugal visits advocate that the practice has both emotional and biological benefits. Accordingly, they propose that conjugal visitation could be instituted in many prison settings without disruption of proper procedures and with a lessening of tension and frustration.[131] They went on to say that it is utterly unreasonable to forbid men and women from engaging in societally accepted sexual practices; for doing so leads to hostile, aggressive, and occasionally dangerous behavior toward other convicts and staff members. Additionally, they revealed that the high rate of divorces that follows a spouse's imprisonment would be significantly reduced, if the inmate was present with his wife and children and maintained some level of family communication and

[131] Ronald G .Turner, 'Sex In Prison' (2000) 36 Tennessee Bar Journal 6.

integrity.[132] Hence, nothing will make it an exception for Ethiopia and there is a need for Ethiopia to recognize conjugal visits for legal spouses.

6. Conclusion

Prisoners' conjugal rights exist when their spouses or family makes conjugal visits to their places of confinement. There are fierce arguments in favor of and against allowing conjugal visits for prisoners. Despite the debates, the international community has tended to support conjugal visits for inmates by enshrining it in constitutions and other subsidiary legislation. This is attributed to the advantages of allowing conjugal visits in detering homosexual orientation and managing physical violence in prisons. Its role is to achieve the rehabilitation of the prisoners, and it has favorable implication on other human rights concerns including the right to procreation. Therefore, the international community has come to the conclusion that allowing legally married convicts and their spouses to have conjugal visits cannot harm anyone. Countries claiming to have embraced rehabilitation need to seriously consider conjugal visits as a social support program activity . If properly provided, conjugal visits can serve as an incentive for good conduct in prison since inmates strive to avoid any misconduct, which might disqualify them from having a conjugal visit. The experiences of Canada and Pakistan are good in this respect. Both countries have allowed conjugal visits and shared from the chalices of allowing the practice. These countries found it important that allowing conjugal visits contribute to prevent homosexuality and promote rehabilitation of the prisoners .

In the Ethiopian context, the FDRE constitution has not conferred conjugal visits for the prisoners. The same is true for other subsidiary laws of Ethiopia. Despite this, the studies reviewed revealed that homosexuality, rape, and physical violence have been obsereved rampant in Ethiopia's prison centers. Besides, the major goal of Ethiopian criminal law, which is prisoner rehabilitation, is at its crossroads. Further,

[132] Ibid.

though the criminal justice system of Ethiopia has recognized the pardon and parole system, which may be used as an alternative for conjugal visits, its implementation has limitations. Studies have shown that Ethiopia's pardon and parole system is the most neglected area of law and its implementation was futile due to the absence of organs that works on its implementation. Hence, there is a need for Ethiopia to take a lesson from Canada and Pakistan and use Conjugal visitation as the rehabilitation option and prevention of homosexuality in prison centers.

Based on the above conclusion, the following way forward could be suggested for Ethiopia. First, the right to conjugal visits and procreation is a component of the right to live with dignity, entrenched in the right to life and liberty as envisaged under articles 15 and 17 of the FDRE constitution. Besides, it could be an option for Ethiopia to manage homosexuality and ensure the rehabilitation of the prisoners. Hence, Ethiopia should recognize the right to conjugal visits for legally married prisoners by introducing it into its domestic laws. Further, the mere existence of a law does not guarantee its implementation. Accordingly, Ethiopia should put the pardon and parole system into effect as it is intended under the criminal code. This could help to ensure the convicts' rehabilitation, which is the principal goal of Ethiopia's criminal code.

Human Rights Focused Regional Police Reform Guidance in Ethiopia

Habib Jemal Zeynu[♣]

Abstract

In Ethiopia, all regions have established military police, commonly named as Special Police Forces, in addition to civil police force and their service is encircled by human rights concerns. The purpose of this study was to investigate police reform measures and principles on the basis of FDRE Constitution that address human rights concerns of the regional police institutions in Ethiopia. The study employed qualitative approach, in particular the doctrinal legal research method. First, the study found that the operation of Regional Special Police Forces has human rights paradoxes. Second, the study has revealed the relevance of introducing human rights-based police reform and its principles viz-a-viz democratic policing, rule of law policing, community-inclusive policing, and impartial policing; since the reform approach and the principles have due recognition under FDRE Constitution. The study has recommended the following. First, the government should take legislative and policy reform measure on the regional Special Forces. Second, the police reform should be guided by the human rights approach and principled on democratic policing, rule of law policing, community-inclusive policing, and impartial policing. Finally, both Federal and Regional Governments legislative and executive organs should take coordinated reform action on the regional police institutions, as they are under obligation to ensure the observance of the principles of FDRE Constitution up on policing service in Ethiopia.

Keywords: Human Rights, Ethiopia, Regional Special Police, Police Reform, FDRE Constitution

1. Introduction

Protecting human rights is an obligation of a state under international law. The international laws on the human rights demand ensuring third parties do not

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negatively interfere with the human rights standards and protect the weakest from the strongest in the horizontal relationship of citizens.[1] In this regard, police institutions are important safety valve for ensuring the protection of human rights,[2] and for the maintenance of public order and the rule of law. [3] Since the police are one of the important state organs entrusted with the protection of the state and its citizens,[4] protection of human rights suffers due to lack of effective performance in the police forces.[5]

The constitutional duties of government in protecting lives and property and maintaining peace and order are also practicable via the institution of the police.[6] Similarly, the police are one of the institutions of government that constitutionally empowered to perform the task of securing lives and property in a defined geographical environment.[7] Thus, the human rights protection obligation of state under international and national law demands the establishment and operation of effective police institutions.[8]

[1] Office of the United Nations High Commissioner for Human Rights, Civil and Political Rights: The Human Rights Committee, (2005) Fact Sheet No. 15 (Rev.1)
[2] Erica Chenoweth et al. Struggles from Below: Literature Review on Human Rights Struggles by Domestic Actors, USAID Research and Innovation Grants Working Papers Series, University of Denver, (2017) 16.
[3] Anneke Osse, Understanding Policing, A resource for human rights activists, Amnesty International, Netherlands, Amsterdam, (2012).
[4] Ebo, A, Security Sector Reform as an Instrument of Sub-Regional Transformation in West Africa, Reform, and Reconciliation of the Security Sector, Bryden, A &Haggi H (eds), (2004).
[5]Gary Haugen and Victor Boutro, And Justice for All: Enforcing Human Rights for the World's Poor, Council on Foreign Relations, (2010) 89(3), 51-62
[6] Nnamdi Akan, Police in Human Rights protection, African Journal of International and Comparative Law, (2019) 3 (3): 189-206
[7]Ola Abegunde, Need for Security Sector Reform: Nigerian Perspective; International Journal of Humanities and Social Science (2013), 3 (9)
[8]Gary Haugen and Victor Boutro, And Justice for All (no 5)

In Ethiopia, the human rights protection role and limitations of the police has been a core agendum of politicians, researchers and human rights institutions, particularly in connection with the prevalence of instabilities and ethnic conflicts since 2018.[9] Accordingly, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has reported that the security situation in Ethiopia is deteriorating.[10] The Ethiopian Human Rights Commission (EHRC) noted that the exploding conflicts throughout the country involve serious human rights' abuses and reported this as a failure of the government to protect citizens from ethnic violence.[11]

Specifically, the cause of such instabilities and ethnic conflicts and the resulted human rights' violation in Ethiopia is associated with regional police institutions.[12]At regional level, all regions have the so-called Special Police Forces.[13] The very nature of special police forces has been encircled with doubts including their military nature constitutional mandate, role, and accountability system.[14]The regional Special Police Forces have been blamed for exacerbating Ethiopia's recent bumps and instigating ethnic conflict and human rights abuses.[15] The Special Police have also been blamed for their direct involvement in human right violation and abusing activities in different parts of the country.[16]

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[9] Human Rights Watch, Ethiopia: Abiy's First Year as Prime Minister, Review of Conflict and Internally Displaced Persons, (2019), https://www.hrw.org/news/2019/04/09/ethiopia

[10] OCHA, Access Snapshot - East and West Wellega (Oromia), Kamashi (Benishangul Gumuz) As of 28 February 2020, (2020)

[11] Ethiopia Government Failing to Protect People from Ethnic Violence: Rights Commission, REUTERS (Oct. 4, 2018, 12:29 PM), https://www.reuters.com/article/us-ethiopia-violence-rightsidUSKCN1ME2AK.

[12] Andinet Adinew, Conditions of Human Rights in Ethiopia in the Aftermath of Political Reform, Northwestern Journal of Human Rights, (2021) 19 (1)

[13] Land info, Ethiopia: The special police (Liyu Police) in the Somali Regional State, 3 JUNE 2016, http://www.landinfo.

[14]European Institute of Peace, Special Police in Ethiopia, (2021) https://www.eip.org/publication/the-special-police-in-ethiopia/

[15] Bereket Tsegay, Regional Special Forces Pose Threat to Peace and Security in Ethiopia; The International Peace Institute, New York and Manama, February 22, 2021

[16] Amnesty International, Ethiopia: "Beyond Law Enforcement" Human Rights Violations by Ethiopian Security Forces in Amhara and Oromia, (2020) May 29, Index Number: AFR 25/2358/2020; also see Relief Ethiopia, conflict displacement situation report April 2018 available at https://reliefweb.int/report/ethiopia/

Thus, in order to improve and enhance human rights' protection role of the regional police institutions, government should take reform measures. In this connection, although, Ethiopia has been undertaken reforms since 2018 that involve comprehensive revisions of laws and restructuring of legal institutions, [17] the police reform activities and programs are not well-articulated and designed in line with protecting the human rights.[18] There is also a human rights centered police reform call in Ethiopia that is principled on rule of law, democratic and impartial policing.[19] Besides, police reform is suggested in states, which experience conflict and instability situations.[20] The police institutions should be created or adapted so as to meet changing security needs as well as the expectations of the communities they serve.[21]

Consequently, the human rights concerns as to the Regional Special police trigger urgent human rights-oriented reform. This assertion is in line with well-established legal principles that all laws should be interpreted and implemented in a way that is in strict accordance with human rights norms.[22] Foremost, due to the presence of strong nexus between police and human rights, there is a suggestion that police reform should be comprehensively tied with human rights' norms and objectives.[23]

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[17] David Kaye, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, U.N. Doc. A/HRC/44/49/Add.1 (Apr. 29, 2020)

[18] Wallelign Zelalem, Security Sector Reform in Ethiopia: A Study On Amhara National Regional State Police Force, *International Journal of Humanities, Art and Social Studies* (IJHAS), (2018) 3 (4).

[19] Semir Yusuf, Drivers of ethnic conflict in contemporary Ethiopia, The Institute for Security Studies monograph (2019) 202

[20]United Nations Institute for Training and Research, Introduction to Security Sector Reform, (2014) https://www.unitar.org/.../introduction-security-sector-reformptp2014

[21]Geneva Centre for Security Sector Governance, Police Reform: SSR Backgrounder Series (2019) Geneva, www.dcaf.ch

[22] United Nation Department of Public Information, Serve and protect to build peace and security, 2016

[23] Ibid

Besides, the aims and goals of regional police reform should be formulated in compatible with the Federal Democratic Republic of Ethiopia Constitution (the FDRE Constitution herein after).[24] Because, police institutions are required to continuously examine their practices and to make sure they "advance the broad constitutional goal of human rights protection.[25] The Constitution is both the basic legal framework within which police institutions operate. [26] Besides, the Constitution is an overarching legal framework that plays important role in forging common identity and creating institutions;[27] and effective law enforcement agencies follow policing methodologies in accordance with the parameters set by the Constitution.[28]

The purpose of this study was to identify constitutional guidance to introduce human rights-oriented police reform on regional police structures in Ethiopia. Since the need of police reform should be justified on the basis of strong theoretical and practical grounds,[29] the study also put justification on the introduction of regional police reform. Besides, the study shows the compatibility of human rights-oriented police reform aim and principle on the basis of constitutional and theoretical grounds; since the practice demands setting the general aim and goal of the reform. [30]

To achieve the purpose, the study has employed a qualitative approach. A doctrinal legal research method is employed in order to analyze a legal doctrine, rule, principle or concept and to identify and suggest correct propositions, statements or principles

[24] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, Negarit Gazeta, 1st year, No.1, 21st August, 1995
[25] Elaine Bonner, Local Policing Data and Best Practices -Tompkins Natalia Carrizosa Office of Legislative Oversight, Report Number 2020-9 July 21, 2020,.Montgomery, Maryland.
[26] Ibid
[27] Martin van Vliet, Winluck Wahiu, Augustine Magolowondo, Constitutional Reform Processes and Political Parties: Principles for Practice, The International Institute for Democracy and Electoral Assistance (NIMD), The Netherlands, The Hague, (2012)
[28]U.S. Department of Justice: Constitutional Policing as a Cornerstone of Community Policing: A Report by the Police Executive Research Forum, April 2015: https://cops.usdoj.gov
[29] David H. Bayley Democratizing the Police Abroad: What to Do and How to Do It. Issues in International Crime; National Institute of Justice, U.S. Department of Justice (2001)
[30] Ola Abegunde, Need for Security Sector Reform: Nigerian Perspective (n 7)

with rationale and reasons.[31] Secondary data were collected from official documents and reports of governmental and non-governmental organizations; from the FDRE constitution, and from review of seminal literature. Finally, these data were analyzed on the basis of logic and reasoning.

The article is organized in six sections. Section one and two, respectively introduces the notion of human rights focused police reform approach and the guiding principles of the approach. It also provides justification for the need for reforming the regional police in Ethiopia. Section three looks into the extent of recognition to human rights focused police reform approach and principles under the FDRE Constitution. Section four provides justification on the relevance of the principle and approach to regional police institutions of Ethiopia. Section five summarizes the previous sections and shows the applicability of the reform approach on the regional police. Finally, the sixth section provides conclusion and recommendations.

2. Human Rights' Focused Police Reform Approach

The human-rights perspective of police reform is concerned with the protection of internationally recognized human rights.[32] On the other hand, the law-enforcement perspective emphasizes a need to strengthen capabilities in order to immediately control local crime, and the democratization perspective that emphasizes the rule of law and long-term justice and security. [33] Peacekeeping/military perspective is relevant in post-conflict settings and immediately following the termination of war; and its main concern is to ensure order and prevent a reversion to conflict. The

[31] George D Braden, Legal Research: A Variation on an Old Lament, *Journal of the Indian Law Institute*, (1982) 23 (2/3).
[32]International Peace Academy, Challenges in Police Reform: Promoting Effectiveness and Accountability, Report, 2003.
[33]Ibid

economic-development perspective reflects interest in enhancing the environment for economic development, removing impediments to foreign investment, and reducing the costs of crime and violence. [34]

The human rights perspective of police reform embraces an overarching aim that would bring the goal of securing human rights to the forefront of the reform agenda and suffuse Human rights principles in the police reform model.[35] The human rights-oriented police reform approach is also important, as a well-established constitutional principle in public affairs.[36] The human right principle is considered the important guiding principle to police forces and agents than for other civil servants, by bearing in mind the fact that police powers and police actions are by definition limitative of liberties.[37]

Human rights-based approach involves policing obligations beyond the tripartite obligation (obligation to respect, protect and fulfil). That includes police service principled on participation, accountability, non-discrimination and attention to vulnerability, and it is linked with human rights standards, access to public officials and equality.[38]The human rights centered police reform requires works that are contextualized within democracy, human rights, good governance accountability transparency and local ownership.[39]

Besides, the human rights police reform encompasses a reform effort to revamp police doctrines and establish internal and external mechanisms for accountability.[40]

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[34] Id

[35]Nicholas Galletti et. al, Securing Human Rights: Shifting The Security Sector Reform Paradigm: The Future Of Security Sector Reform Mark Sedra, Ed. The Centre for International Governance Innovation, Ontario Canada (2010)

[36] United Nations Department of Public Information (n 22)

[37] Ibid

[38] United Nations Office on Drugs and Crime (UNODC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), HR/PUB/17/6 (OHCHR), (2017) 24

[39] Williams R, Africa and the Challenges of Security-sector Reform, in "Building Stability in Africa: Challenges for the New Millennium", ISS Monograph Series, No 46, Pretoria, (2000)

[40] International Peace Academy "Challenges in Police Reform" (n 32)

Moreover, human rights police reform needs works that bring a significant impact on public trust and confidence in the police, and increase the public's willingness to cooperate with the police.[41]Further, the human rights approach demands tackling poor policing functions characterized by weak organizational structure, poor accountability, impartiality, low professionalism, and low exposure and committeemen to human rights.[42]

Furthermore, the overall aims of police reform are to transform the values, culture, policies and practices of police organizations so that police can perform their duties with respect to democratic values, human rights and the rule of law.[43] Finally, the human rights reform approach, among other things demands reform efforts enabling to purge human-rights violators from police ranks and provide training that emphasizes human-rights standards.[44]

3. The Guiding Principles of Human Rights Focused Police Reform

From the previous section, it can be inferred that the human rights focused police reform encompasses reform efforts principled on the democratic policing, the rule of law, practices of community-inclusive policing, and impartial policing exercises. The following sub-section is devoted to discuss further each of the principles of human rights focused reform.

[41] Ronald Weitzer, Steven A. Tuch, Race and Perceptions of Police Misconduct, Social Problems, (2004), 51 (3) 305–325. ISSN: 0037-7791; online ISSN: 1533-8533
[42] Geneva Centre for Security Sector Governance (2019). Police Reform: SSR Backgrounder Series. Geneva, retrieved from www.dcaf.ch, accessed on May 18, 2020
[43] Ibid
[44] International Peace Academy "Challenges in Police Reform" (n 32)

3.1. Democratic Policing

Democratic policing is a participatory delivery of police service and it involves the primary role of police in democratic societies is protecting the fundamental rights of citizens.[45] Democratic policing embed crime prevention and community safety approach in day to day policing activity,[46] and requires the police to perform the most obvious, immediate and intrusive tasks to ensure the well-being of individuals and communities alike.[47] Democratic policing is the use of police authority in the people's interest to provide responsive police service in line with public needs and expectations.[48]

Further, democratic policing is principled on the idea that the power of police is derived from the people; and propagate police institutions openness to the public and the police forces and service are not insular, self-contained, or cut off from the communities.[49]Consequently, democratic policing demands the police authorities to develop effective police service plan and execution in line with the needs of the people and not only focus on those of the government.[50] It also demands an astute leadership that strives to build legitimacy and trust,[51] and constant work to ensure that the public encourages police work.[52]

[45] Trevor Jone, Tin Newburn and David Smith, Democracy and policing, policy studies Institute (1994) 208
[46] Geneva Centre for the Democratic Control of Armed Forces, Federalism and Police Systems 2011 (23).
[47] David H. Bayley "Democratizing the Police Abroad" (n 29)
[48] The Organization for Security and Co-operation in Europe (OSCE), Guidebook on Democratic Policing, 2nd Edition, Vienna, 2008.
[49] Jerome H. Skolnick, Ideas in American Policing (August 1999)2
[50] Nnamdi Akan, Police in Human Rights protection (n 6)
[51] Ibid
[52] Bayley D. and Shearing, The future of police. Law and Society Review, (1996) 56

3.2. Rule of Law

Rule of law is defined as a system in which all authority and power of police is exercised in accordance with public laws.[53]Rule of law requires the police operation and commitment in accordance with the domestic law and the international law enforcement standards and practice.[54] The principle provides that the police must obey the ordinary law of the land and should, like anybody else be punished for any misuse of powers, or for any act done in excess of his authority while regulation[55]

Rule of law is policing service principled on accountability and transparency.[56] Accountability is system of ensuring that police carry out their duties properly and are held responsible if they fail to do so.[57]This can be done via mechanisms like internal accountability; accountability to the state; accountability to the public; and independent external oversight.[58] Transparency is also key, and in order to enhance public support and understanding on policing, it is essential to establish mechanisms that support public crime reporting about police operations, the public to access to the police service, the creation of open-ended forums for discussion and the introduction of community-based policing. [59]

Article 1 of UN Law Enforcement officials code of conduct provides that law enforcement officials shall at all times fulfill the duty imposed upon them by law, by

[53] Geneva Center for the Democratic Control of Armed Forces, International Police Standards Guidebook, 2009 20
[54] The Organization for Security and Co-operation in Europe (OSCE), Guidebook on Democratic Policing (n 48)
[55] Nnamdi Akan, Police in Human Rights protection (n 6)
[56] Sumit Bisarya and Sujit Choudhry, Security Sector Reform in Constitutional Transitions: International IDEA Policy Paper, (2020) No. 23, DOI: <https://doi.org/10.31752/idea.2020.53>
[57]United Nations Office On Drugs and Crime, criminal Justice Handbook Series (no 38)
[58] Democratic Policing Series, Police Accountability: A Comprehensive Framework (2017) 9
[59] Jerome H. Skolnick, Ideas in American Policing (August 1999)2

serving the community and protecting all persons against illegal acts, consistent with the high degree of responsibility that required by their profession. [60] The legislation and policies govern the work and conduct of the police, in particular those define the role of the police, the values, goals, priorities and the ethics that they abide by, should also be clear, precise and accessible to the public.[61]

Consequently, rule of law demands legislative works to ensure that the police are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards.[62] It also demands police legislation and the policies should appear in a clear precise manner and should be accessible to the public.[63]Police organization must provide for a clear chain of command and allotment of competencies within the police.[64]

3.3. Impartial Policing

Impartial policing is unbiased or fair policing that treats citizen's equally regardless of race, ethnicity, gender identity, age, religion, sexual orientation, or other qualifiers.[65] This requires making the police immune from political and other extra influences and acts in consonance with the law of the land and the Constitution.[66] The political interference on police institution is considered as undesirable and major factor negatively affecting police institutions activities and programs.[67] The police

[60] UN General Assembly resolution 34/169 of 17 December 1979, Code of Conduct for Law Enforcement Officials, available at http://bit.ly/2jd2vfP
[61] Geneva Center for the Democratic Control of Armed Forces, International Police Standards Guidebook, (n 53)
[62] United Nations "Serve and protect to build peace and security" (n 28)
[63]The Organization for Security and Co-operation in Europe (OSCE), Guidebook on Democratic Policing (n 48)
[64] Geneva Centre for the Democratic Control of Armed Forces "Federalism and Police Systems" (n 46)
[65]Elaine Bonner "Local Policing Data and Best Practices" (n 25)
[66]Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs Dr. Justice V.S. Malimath INDIA March 2003.
[67] Wallelign Zelalem "Security Sector Reform in Ethiopia" (n 18)

services must be loyal to the constitution and its institutions and be under civilian control. At the same time, it should be protected from partisan abuse by civilian authorities.[68] The civilian governments should have 'authority over decisions concerning the missions, organization, and employment' of a state's security apparatus.[69]

3.4. Community Policing

The modernization of the police mission, the adoption of approaches directed towards partnership and problem resolution and effective modes of operation which respect human rights and favor positive interactions between police forces and the public.[70]The UN Code of Conduct, which states: "Every law enforcement agency should be representative of, and responsive and accountable to, the community as a whole."[71] This implies that police ought to engage with those they are supposed to serve – members of the public – so as to establish their objectives in a joint process together with those in whose interests they are to act. This is the only way to prevent police from becoming technocratic maintainers of public order, or worse.

The participation of people in public decision making is associated with principle of decentralization, which is transferring decision-making governance to the people and citizen.[72] Decentralization provides institutional mechanisms for extending the

[68]Sumit Bisarya Security Sector Reform in Constitutional Transitions (n 56)
[69]Trinkunas, H. A., Crafting Civilian Control of the Military in Venezuela: A Comparative Perspective, University of North Carolina, (2005) P 5
[70] Maurice Chalom et. al, Urban Safety and Good Governance: The role of the police International Centre for the Prevention of Crime. International Centre For The Prevention Of Crime (ICPC), (2001) Montreal (Quebec), Canada.
[71] General Assembly Resolution 34/169 adopting the UN Code of Conduct, 17 Dec. 1979.
[72]Hans F.W. Duboisab and Giovanni Fattore, "Definitions and Typologies in Public Administration Research: The Case of Decentralization," International Journal of Public Administration 32:8 (2009): 704–27.

participation to democracy.[73] In particular, human rights protection roles of the police in society are indispensable, noble and deserving of the support of all the community.[74]In diverse communities with unique safety and security challenges demands responsive police service on the consent, cooperation and support of the people being policed and communities.[75]

Hence, local community inclusive policing is important to access adequate and timely information to reassure and allay community fears and concerns. In support of community-based policing there are also similar police doctrines. For example, many governments (central or local) have decided to implement community oriented policing doctrines (CoP) or proximity policing (PP), the former being mostly found in the United States and the United Kingdom but also in Latin American, the latter in continental Europe. [76]

4. Relevance of the Reform Approach on Regional Police Institutions

In Ethiopia, the cause of human rights violation problem, in post-reform periods-since 2017, is associated with the weak performance of regional police institutions.[77] The regional Special Police Forces have been blamed for exacerbating Ethiopia's recent bumps and human rights abuses.[78] The Special police have also been blamed for their direct involvement in human right violation and abuse activities in different parts of the country.[79] The regional Special Forces have been involved in major conflicts in Ethiopia, and engaged in a pattern of instigating ethnic conflict and human rights.[80]

[73] Seymour Martin Lipset, "The Indispensability of Political Parties," Journal of Democracy 11:1 (January 2000): 48–55.
[74] Nnamdi Akan, Police in Human Rights protection (n 6)
[75] Civilian Secretariat for Police Service: White Paper on policing, Government Gazette, Republic of South Africa, 1 September 2017 No. 41082
[76] Geneva Centre for the Democratic Control of Armed Forces "Federalism and Police Systems" (n 46)
[77] Andinet Adinew, Conditions of Human Rights in Ethiopia (n 12)
[78] Bereket Tsegay, Regional Special Forces Pose Threat to Peace and Security in Ethiopia (n 15)
[79] Amnesty International, Ethiopia: "Beyond Law Enforcement", (n 16)
[80] Bereket Tsegay, Regional Special Forces Pose Threat to Peace and Security in Ethiopia (n 15)

In particular, Ethiopia's National Disaster Risk Management Commission and the UN Office for the Coordination of Humanitarian Affairs have reported that the incursions of Somalia Regional Special police into Oromiya Regional State in 2017 that resulted in the deaths of hundreds of people and the displacement of more than 1 million people.[81]The 2018 Human Rights practices report of United States Department of State explained that police officer's impunity and limited exposure to human rights as a problem.[82] Ethiopian Human Rights Commission has reported that "in some cases, the regional security officials deliberately avoided stepping in" and further, "there is also a lack of accountability" for the deliberate involvements.[83]

Besides, Amnesty International's report reveals that Regional security forces committed horrendous human rights violations including burning homes to the ground, extrajudicial executions, rape, arbitrary arrests and detentions in Amhara and Oromia.[84]Somali and Oromia Region's Special police has been committing serious human rights violations like executions, rape and forced displacement.[85]Somali Special police, on 23 and 24 may 2018, attacked four localities in Chinaksen District of East Oromiya Zone, killing five farmers and burning down about 50 homes.[86] Further, it is reported that the late President of Amhara regional state, Dr. Ambachew Mekonnen and other two senior regional state

[81]Relief Ethiopia, conflict displacement situation report April 2018 available at https://reliefweb.int/report/ethiopia/
[82]United States Department of State Bureau of Democracy, Report (2018), available at https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/ethiopia/
[83] Reuters Report on Ethiopian Violence (n 11)
[84] Amnesty International, Ethiopia: "Beyond Law Enforcement", (n 16)
[85]https://www.africanews.com/2018/06/01/amnesty-asks-ethiopia-to-disband-controversial-liyu-police-unit//
[86] Amnesty International, Ethiopia: "Beyond Law Enforcement", (n 16)

officials were killed on June 22, 2019 while in a meeting in his own office in Bahir Dar, by members of the regional Liyu police.[87]

Consequently, the human rights concerns as to the Regional Special police triggers urgent human rights-oriented reform. In support of this, Action against Hunger has underlined the importance of addressing contributory factors for human rights violation in Ethiopia including lack of law enforcement, and poor integration and coordination in police institutions management.[88] The 2018 Human Rights practices report of United States Department of State also underlined the need of addressing police officers' impunity and limited exposure to human rights.[89]

Finally, the human rights-oriented police reform is in line with the well-established legal principle that all laws should be interpreted and implemented in a way that is in strict accordance with human rights norms.[90] Foremost, due to the presence of strong nexus between police and human rights, there is a suggestion that police reform should be comprehensively tied with human rights norms and objectives.[91]

5. Constitutional Relevance of Human Rights Focused Reform Approach

The human rights focused police reform approach has due recognition under FDRE Constitution. Accordingly, first, the entrenchment of the approach can be understood from the presence of a strong linkage between human rights and the grand constitutional aim provided under the preamble of FDRE Constitution, which put the aim of building one political economy in Ethiopia and its achievement is made conditional on the prevalence of rule of law and respect and protection of human rights.

[87] Borkena Ethiopian News, 2019/06/23, available at https://borkena.com, accessed on Nov 9, 2019
[88]Action against Hunger (2019) BenishangulGumuz Region (Kemashi Zone) Multi-sectoral Rapid Assessment Report on Returnees/IDPs MAY 2019
[89] United States Department of State Bureau of Democracy (n 82)
[90] United Nations Department of Public Information (n 22)
[91] Ibid

Besides, the principle of human rights under Article 10 of the FDRE constitution amplifies the importance of human rights for all public services- including police institutions. Article 13(1) of the Constitution also imposes an obligation on all state organs to protect, respect and enforce human rights. Article 13 (2) of the FDRE Constitution provides that all laws should be interpreted and implemented in a way that is in strict accordance with human rights norms. These provisions clearly recognize the human rights to be the guiding principle for all public services including the police.

Thus, the amplification of human rights under the preamble of the constitution cumulative reading of Article 52 (2(g) of the constitution with Article 9(1), 10, and 13(1) confirms that human rights to be the very purpose of the regional police institutions. In other words, the aim of all regional police institutions reform should be human rights focused.

On the other hand, the FDRE Constitution has human rights focused police reform principles like democratic policing, rule of law, community-inclusive policing, and impartial policing. These are discussed in the following paragraphs.

First, FDRE constitution has supportive framework for the formulation and implementation of polices enabling to introduce democratic policing service in Ethiopia. The principle has adequate recognition under FDRE Constitution; as it is primarily inferred from the value of democratic order stated under the preamble of the Constitution. The same can be inferred from the Nomenclature of the State under Article 1of the constitution, which formally name Ethiopia as the Federal Democratic Republic of Ethiopia.

Foremost, the principle of democracy under Article 10 of the FDRE Constitution and the principle of popular sovereignty under Article 8 of the same magnify the role of the public in the affairs of government institutions, including the police. The need of enhancing the role of the people in police service can be inferred from the political objective of Article 88 of FDRE Constitution and amplification of public participation under Article 89 of the same. Finally, the duty of government to devolve power to local people under Article 50(4) also supports the need of government commitment to enhance participation of the people in the affair of police service. Thus, upholding democratic policing principle is important constitutional obligation on the part of the regional states.

Second, FDRE constitution has also supportive framework to introduce the rule of law policing in Ethiopia. The principle is recognized under preamble of the FDRE Constitution; which assert it has aimed at building a political community founded on rule of law. Article 12 of the constitution provides a supportive framework of the rule of law by introducing principle of transparency and accountability. Thus, principle of rule of law has adequate recognition under the constitution. And upholding this principle is an important constitutional obligation on the part of the regional states in the process of formulating the regional police reform policies.

Third, FDRE constitution has supportive framework for the formulation and implementation of polices principled on impartial policing. Unlike the police, Article 87 of the Constitution provides that the armed forces of Ethiopia should be free of any partisanship to political parties or organizations. This principle can be extended to the police, as police institutions have similar function on maintaining public law and order.[92] Hence, even if principle of impartiality of police is not explicit, the establishment and operation of police institution that is partial from any political (party), ethnic and religious influence is far from the spirit of human rights and other

[92] Geneva Centre for the Democratic Control of Armed Forces "Federalism and Police Systems" (n 46)

principle of the FDRE constitution. Thus, principle of impartiality is an important constitutional reform concern relevant with reference to the regional police institutional reform.

Finally, the principle of community policing is recognized under Article 50(4) of FDRE Constitution. The federal constitution stipulates that "State (i.e., sub-regional) government shall be established at State and other administrative levels that they (i.e., the regions) find necessary." This is important constitutional limitation on the power of the regional state on determination of their police/ security forces. This refers to the mandate that described "Adequate power shall be granted to the lowest units of government to enable the people to participate directly in the administration of such units." This constitutional prohibits regional states to organize and operate police forces by excluding the people found at local government structure. Thus, upholding community policing principle is important obligation on regional police reform.

6. Summation

Though there is a reform in Ethiopia since 2018, the police reform activities and programs are not well-articulated and designed in line with protecting the human rights.[93] In order to fill the police reform gap in Ethiopia, there is a human right centered police reform call that is principled on rule of law, democratic and impartial policing.[94]

Most importantly, human right centered police reform is relevant to regional police institutions of Ethiopia. This has many reasons. There are a number of reports that

[93] Wallelign Zelalem "Security Sector Reform in Ethiopia" (n 18)
[94] Semir Yusuf, Drivers of ethnic conflict in contemporary Ethiopia (n 19)

confirm the presence of human rights challenges associated with regional special police including their role and contribution for ethnic conflict instigation and human rights abuse.[95] Regional police is complained of deliberate avoidance to step-in in order to prevent, overcome and control conflicts, and this has negative human rights implication, and lack of accountability for the deliberate involvements,[96] as well as impunity and limited exposure to human rights[97]

Thus, it is essential to introduce reform aimed and directed at rectifying regional Special Forces poor policing functions like poor accountability, partiality, low professionalism, and low commitment to human rights. As provided under section one, this reform is typically human rights focused, which demands police reform works principled on democratic policing, rule of law, community-inclusive policing, and impartial policing.

As provided under section four above, FDRE Constitution accords due recognition for human rights focused police reform approach as well as its guiding principles. The principle of supremacy of constitution under Article 9 of FDRE Constitution underlines that the constitutional norms are the source and method of public activities and actions, including police reform. Besides, Article 51(1) and Article 52(2)(a) of the same, respectively underlined that protecting and defending the Constitution to be the top most powers and function of Federal Government and Regional States.

Thus, in line with their duty under FDRE Constitution, all regional states of Ethiopia are under obligation to undertake human rights focused regional police reform. Particularly, the regional police should introduce democratic policing principle. This principle demands the regional police authorities to develop effective police service

[95] Bereket Tsegay, Regional Special Forces Pose Threat to Peace and Security in Ethiopia (n 15)
[96] Reuters Report on Ethiopian Violence, (n 11)
[97] United States Department of State Bureau of Democracy (n 82)

plan and execution in line with the needs of the people and not only focus on those of the government.[98] Besides, the regional police should strive to build popular legitimacy and trust,[99] and constant work to ensure that the public encourages police work.[100] Hence, one of the principles of the regional police reform should be opening their doors for the public upon the formation police service planning and its execution.

Second, the regional police should introduce rule of law policing principle. This principle demands the regional governments to take legislative measure that ensure the police officers are accountable to laws, which is equally enforced and independently adjudicated.[101] This demands the regional states to enact police legislation and policies in clear precise manner and that is accessible to the public.[102] Besides, Police organization must provide for a clear chain of command and allotment of competencies within the police.[103]

Third, the regional police should introduce impartial policing principle. This principle demands the regional governments to take legislative measure enabling to provide unbiased or fair policing that treats citizen's equally regardless of race, ethnicity, religion, or other qualifiers.[104] This in turn requires enactment of clear

[98] Nnamdi Akan, Police in Human Rights protection (n 6)
[99] Ibid
[100] Bayley D. and Shearing, The future of police (no 52)
[101] United Nations "Serve and protect to build peace and security" (n 28)
[102]The Organization for Security and Co-operation in Europe (OSCE), Guidebook on Democratic Policing (n 48)
[103] Geneva Centre for the Democratic Control of Armed Forces "Federalism and Police Systems" (n 46)
[104]Elaine Bonner "Local Policing Data and Best Practices" (n 25)

legislation that make the police immune from political and other extra influences and acts in consonance with the law of the land and the Constitution.[105]

Forth, the regional police should involve community policing principle. This principle demands the regional governments to take legislative measures that enhance and secure adequate information and cooperation from the local community in order to provide responsive regional police service. Particularly, unique safety and security challenges in diverse communities demands responsive police service on the consent, cooperation and support of the people being policed and communities.[106] The local community inclusive policing is important to access adequate and timely information to reassure and allay community fears and concerns. Hence, in areas where there is a diverse community, the core policy concern should be accommodating such diversity on the basis of community policing principle.

Conclusion

The purpose of this study was to identify human rights-oriented police reform approaches under the FDRE Constitution. To achieve the objectives, the study has employed a qualitative approach, the doctrinal legal research method in particular. The main findings of the study are following. The study has revealed that the human rights focused police reform approach is the most dominant and comprehensive police reform approach that encompasses reform components (efforts) principled on democratic policing, rule of law, community-inclusive policing, and impartial policing. Second, the study has revealed the relevance of human rights-based police reform approach in order to tackle ineffective regional policing functions characterized by poor accountability, partiality, low professionalism, and low commitment to human rights.

[105]Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs Dr. Justice V.S. Malimath INDIA March 2003.
[106] Civilian Secretariat for Police Service (n 75)

Third, the FDRE Constitution has encompassed important provisions that support human rights-based police service and reform. The Constitution has also incorporated supportive principles enabling for the introduction of human rights focused police reform like principle of democratic policing, rule of law, community-inclusive policing, and impartial policing. Thus, the government is under obligation to reform the regional police institution that aimed at human rights approach and principled on democratic policing, rule of law, community-inclusive policing, and impartial policing.

The study suggests the following, in order to improve human rights protection role of regional police in Ethiopia. Primarily, in line with their constitutional obligation, regional states formulate human rights centered regional police reform policy and legislative measures that alter regional police organizational structures. Importantly, the regional states should formulate polices and legislations, which gear their respective police institutions to undertake and run human rights focused police service principled on democratic, rule of law, community-inclusive, and impartial policing.

Besides, to improve the human rights protection role of the police, it is not enough to simply legislate and alter structures or framework on which they run, it is also necessary to transform police officers' attitude and commitment on human rights concepts, norms, values, attitudes, practices and skills via trainings and other intervention. On implementation of the reform, both federal and regional governments should work together, as both are under obligation to ensure the observance of the FDRE constitution principles under Article 9, 51, and 52 of the FDRE Constitution. Finally, Non-Governmental Organizations and research institutions should support the formulation of the regional reform process.

COMPARATIVE ANALYSIS ON OWNERSHIP OF IMMOVABLE PROPERTY BY FOREIGNERS AND ITS IMPLICATION ON FDI: THE CASE OF ETHIOPIA AND KENYA'S LAND POLICY

Jara Samuel Tura[♣]

Abstract

Land is a highly prized property in most African states, and it is governed by a complex set of rules and ceremonies. Many African countries have diverse property ownership arrangements for their lands. The modalities of ownership arrangements range from freehold to customary or state ownership. It is witnessed that many African countries, except for a few have one common salient feature regarding land ownership; that is, land is technically under the ownership of the states However, foreigners' ownership of land is banned in many African states, with the rationale that the restriction is in place to defend sovereignty and national resources. This commentary delves into the substantive content of the land policies of Ethiopia and Kenya. particularly on the ownership of land by foreigners. Under this backdrop, it examines the implication of awarding ownership of land to foreigners on investment. Moreover, it provides legal options available for dealing with foreign ownership of land in Ethiopia through comparatively evaluating and reviewing the Kenyan land policies and relevant laws. Being awarded to foreigners, land ownership has the potential to benefit Ethiopia's economic development. However, it is required to restrict the adverse effects that it entails. On the contrary, Ethiopian land ownership policy is rigid and strict. This has substantially affected the economic gains from foreign investors and the positive output they could generate in employment opportunities and technology transfer. As to this end, Ethiopian law makers might re-consider amending the land policy including the FDRE constitution by revisiting the stumbles in the legal regimes, with the aim to retain foreign investors. Thus, this paper recommends the state to inculcate intermediate restriction on ownership of land and Kenyan land policies as springboard for reference.

Keywords: Foreigners, Land ownership, Land Policy, FDI, Ethiopia, Kenya

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1. Introduction

Persons who consider themselves to be foreigners are subject to the rules and restrictions imposed on them by the Ethiopian state concerned if they wish to acquire immovable property in the territory of their sovereignty and where foreigners can acquire immovable property in the country of the immovable property.[1] African states are not exceptions to this pragmatic reality regarding the ownership of land by foreigners.

It is a fact that land is a fundamental resource of a nation state. Without land, without territory, there can be no nation state.[2] Housing, agriculture, natural resource, and national security concerns are all based upon land use and management. Moreover, land is the source of all material wealth; it provides the needs to sustain on. In many developing countries, land has been considered as an important economic and social asset in which the status and prestige of people is determined.[3] Because of such high importance, as compared to other properties, the legal protection accorded to land is always strict in nature.

Given the importance of land, many countries around the world have enacted a range of laws governing who can own and use land, as well as supporting their justification by developing an autonomous and comprehensive land policy. The ownership of land by foreigners also sparks contentious policy debates between nations.

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[1] Ayhan Dolunay and Fevzi Kasap, 'Foreigners Acquisition of Immovable property in the Framework of Legal Basis, sociological Risks and Suggestions' (2021) 2 Revista Gênero e Interdisciplinaridade <https://www.periodicojs.com.br/index.php/gei/article/view/147> accessed 9 May 2022.

[2] Robert Jennings and Arthur watts, '*Oppenheim's International Law*' (9th edn vol.1 OUP 2008)

[3] ibid

As modern states emerged, those who were not citizens were classified as foreigners or aliens who, by their very status as such, were deemed not to be appropriate recipients of full rights of land ownership and use.[4] Over time, in an ever more interdependent world, many attitudes towards "foreigners" have changed, as a process assisted by global communication increases in foreign investment and the international trade grows of. In many areas, states have mutually accepted the rights of foreign investors and each other's citizens to receive the same treatment as their own citizens, and this trend is likely to continue. However as regards to land, many states still put restrictions about its ownership and use by foreigners.

Since 1995, it has become increasingly clear that the issue of foreign ownership of land remains high on the agenda of many nations around the world.[5] Indeed, as the pace of economic integration and globalization accelerates, it is expected that many existing regulatory approaches will be re-examined. New techniques that are designed to strike a better balance between a country's perceived interests in regulating foreign investment in land, and the modern imperatives of an international economy will be sought. Under this background, the Sub-Saharan countries, Ethiopia and Kenya have separate laws and interest about foreigner's land ownership.

The Federal Democratic Republic of Ethiopia (FDRE) Constitution has established a non-flexible land policy.[6] It affirms that, the right of ownership of rural and urban land as well as all natural resources is exclusively vested in the state and the peoples of Ethiopia.[7] Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange (Article 40 (3) of FDRE Constitution, 1995. In addition, it has implemented a land policy that is

[4] Sandra Passinhas, 'Dimensions of property under European law' (PhD thesis, European university institute 2010)
[5] ibid
[6]Temesgen Solomon Wabelo, 'Legal and Institutional Frameworks Regulating Rural Land Governance in Ethiopia: Towards a Comparative Analysis on the Best Practices of Other African Countries' (2020) vol.11. No.1. Beijing Law Review 64
[7] FDRE Constitution (1995) Art.40

based on state ownership of land (where only usufruct rights are given to land holders). Many agricultural economists and international donor agencies have propagated some form of privatized land ownership.

Conversely, the 2010 Kenyan constitution and subsidiary laws allow foreigners to own property in Kenya in their name. The Constitution (2010), the Lands Act (6/2012) and the Land Registration Act (3/2012), subject to certain limitations, grant the right to any person, either individually or in association with others, to acquire and own land in Kenya.[8] In other words, foreigners may own land through owning shares in a public company that owns agricultural land, or a foreign investor may apply for an exemption from the President and if they lack the access, then an investor may obtain ownership or other rights through ownership of a public company.

There are two competing interests and policy consideration behind ownership of land by foreigners.[9] First, constitutional prohibition of land ownership by foreigners might adversely affect investment and subsequent benefits. second, complete elimination of all restrictions on foreign ownership would result in a loss of control by the nation over its own territory.

The objective of this article is to provide the legal options available for dealing with the sensitive issue of foreign investors ownership of land in Ethiopia through comparatively evaluating the Kenya land policy. Kenya was chosen because of its similarities to Ethiopian geographic position, economic stand, and overall cultural issues. It is unusual to see repeated comparisons between these two countries in

[8] 'Foreigners and Property Ownership in Kenya' (International Society of Primerus Law Firms (2012) https://www.primerus.comaccessed 25 December 2021.
[9] Wabelo (n 6)

numerous news outlets though these two countries may be competitors in terms of attracting FDI. Foreign ownership of real estate is currently a hot topic in Kenya. On October 29, 2021, a Kenyan court found out that a law barring foreigner from purchasing land is unconstitutional. In fact, it is noted that Kenya was under the umbrella of British colony, unlike Ethiopia. Putting the differences at the side, it is important to compare the two governments' land policies through the lenses land ownership by natural or legal persons.

Therefore, in order to explore and appraise the implication of awarding ownership of land to foreigners on investment particularly, in case of Ethiopia; the article inculcates three sections. Section one discusses the international law perspectives on land ownership by foreigners and lists policy considerations. Section two enumerates, the Kenyan and Ethiopian land policy regarding ownership of lands by foreigners. Section three appraises, the implication of land ownership by foreigners on investment in case of Ethiopia, and it suggests key notes on reforming the Ethiopian land policy, by pinpointing potential approach that helps to increase the gains from FDI without compromising national interest.

2. International Law and Land Law

International law recognizes territory as portion of the earth's surface and its resources, including land, internal waters and other resources located above and below the surface as a constitutive element of statehood.[10] Given the importance of land in social, economic and political relations, it is perhaps not surprising that land has featured prominently throughout the historical development of international law from its early localized manifestations to juristic efforts to legitimize land acquisition during successive waves of European colonization in the America, Africa, Asia and

[10] R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University press 1963), 9-10

Oceania. [11] Land claims and international law continue to intersect in a wide range of situations.

In fact, land law is the unregulated corpus of international law. The range of approaches to regulate foreign land ownership around the world is very striking.[12] Actually this should not be surprising given that the issue is largely unregulated by the international law that leaves the states to legislate in accordance with their own policies and requirements.

Similarly, customary international law places no restriction on the right of states to restrict or regulate foreign ownership of land within their territories. States have sovereignty over their natural resources including land.[13] Equally states are entitled to prevent the entry of foreigners or allow entry only on terms including restrictions on the ownership and use of land regulating its use.[14] International law is primarily concerned with the issue of the expropriation of land already lawfully owned by foreigners. While expropriation itself is not unlawful under international law, the manner in which it takes place is subject to rules of international law.[15]Although the right of a foreigner to decide whether or not to purchase land in a particular state is influenced by that state's attitude to the issue of expropriation, this cannot in itself be considered to constitute a legal restriction. Thus, there are no global multilateral treaties on the issue of foreign land ownership or use.

[11] Matthew Craven, 'Colonialism and Domination'(2012) Oxford handbook of the history of international law OUP 862
[12] Ayhan Dolunay and Fevzi Kasap (n 1), 4
[13]Thaddeus Chukwuka Eze, 'RE- APPRAISING THE RIGHT OF FOREIGN NATIONALS UNDER THE NIGERIAN LAND USE ACT' (2020) Vol.11. 3
[14] Ayhan Dolunay and Fevzi Kasap (n 1)
[15] ibid

The instrument which comes closest to regulations in this area is the Organization for Economic Cooperation and Development (OECD) Code of Liberalization of Capital Movements which imposes a general obligation on each signatory states to liberalize their policies towards transactions and money transfers necessary for direct investment. The OECD instrument on capital movement undertaking incorporated liberalization measures adopted by contracting countries. The instrument indicated its position on capital movement liberalization that: Members will gradually remove capital flow restrictions between themselves, as required by Article 2, to the extent necessary for effective cooperation.[16] As a result, governments that restricted the ownership of land to the government merely needed to make it easier for foreigners to participate. As the document states, there are some exceptions to this responsibility. State parties may suspend their commitments under the guise of maintaining public order or protecting public health, morals, and safety safeguarding their essential security interests; or fulfilling their international peace and security obligations.[17] Moreover, if any liberalization measures taken or maintained in accordance with Article 2(a) resulted a significant consequence the contracting parties can derogate their obligation.[18]

Other related instruments are the draft United Nations Conduct of Transnational Corporations Code, and the draft Multilateral Agreement on Investment, currently being negotiated through the OECD. The former is designed to regulate the conduct of multinational corporations, and the latter to minimize trade barriers to foreign investment.[19]

Similar potential restrictions in international law on state's right to regulate or restrict foreign ownership of land are bilateral Friendship, Commerce and Navigation

[16] 'Code-Capital-Movements'<https://www.oecd.org/investment/investment-policy/Code-capital-movements-EN.pdf> accessed 9 May 2022.
[17] ibid. Art.3.
[18] ibid. Art.6(2).
[19] M. Sornorajah, 'The International Law on Foreign Investment' (1994) 187.

Treaties or their modern cousins, Bilateral Investment Treaties. However, few treaties provide foreign nationals the right to own property in the host country. While most treaties say that each state "must" accept investments from the other, such commitments are commonly modified by a phrase that states that the investments must be accepted "in line with the host state's legislation." As a result, laws prohibiting foreign ownership of land would continue to apply. In fact, according to the 1976 review of the thirty-six similar treaties signed by the United States, just three guaranteed foreigners the same treatment as citizens in terms of land acquisition in general, and six in terms of land acquisition through inheritance. The vast majority of people allowed time for the disposal of their items.

For example, under the BIT negotiated between the United States and Rwanda, U.S. direct investment overseas and foreign investment in the United States should be treated equally. The parties also agree to international law criteria for expropriation and compensation, free financial transactions, and mechanisms for resolving investment disputes, including international arbitration.[20]

In another BIT signed between the US and Senegal, the US government expressed its concerns as follows: Foreign investors must be treated in accordance with international law, with no less favorable treatment than domestic investors and no less favorable treatment than foreign investors from third countries, whichever is the most favorable treatment ("national" and "most-favored-nation" treatment), subject to certain exceptions.[21]

[20] 'Bilateral Investment Treaties' <https://www.trade.gov/bilateral-investment-treaties> accessed 10 May 2022..
[21] ibid

As the latter's name suggests, such treaties are more concerned with investment regulation in general, and the grant of national treatment whereby foreign investors are accorded the same treatment as national investors, or "most favored nation" status in particular whereby all foreign investors, regardless of nationality, are treated equally.

Most investment treaties allow states to regulate foreign investors' acquisition of land rights. However, depending on how they are written, "pre-establishment" investment treaties may force states to remove restrictions on the purchase of land rights that discriminate against foreign investors. This could encourage the commercialization of land relations in areas where land has significant social, cultural, and spiritual significance. Investment treaties may potentially expose governments to liability for actions taken as a result of insufficient administrative or judicial capability.

In many African countries, land ownership is vested in the state, though private use or occupancy rights based on statute or customary law are recognized in one form or another as existing over land that is technically owned by the state.[22]

2.1. Policy Considerations in the ownership of Lands by Foreigners

A number of possible policy reasons exist for restricting and regulating ownership and use of land by foreigners and for adopting different techniques. An understanding of the various policy rationales will better inform our consideration of the techniques for controlling foreigners land ownership. The potential policy consideration on ownership of land by foreigners are listed below.

2.1.1. Protect National Security.

Land is a social institution that confers authority not merely over goods, but also over people. Possession of land as a property implies control over others. It has

[22]See for Example Eritrea, Land Proclamation, 1994; Tanzania, Land Act, 199 -

served as a tool for those who hold it to exert control over the lives and labor of others who do not. Foreigners land ownership restrictions in border areas, as well as limitations in areas around military bases in nation state borders appear to have been implemented as part of nations' military security strategies. This category might theoretically cover actions to safeguard food security and prevent economic dominance.

In a similar vein, land is the source of many protracted violent clashes in African nation states. Allowing foreigners to acquire land also entails forsaking the country's sole source of revenue and allowing foreign investors to act as the final arbiters of national security. Because of this, states seek to grant property ownership to governments only, presumably for national security reasons.

2.1.2. Prevent General Economic Domination by Foreigners.

Preventing foreigners from owning land would limit foreigners' dominance. When the local economy is poor and the host state's economy is constrained, allowing foreigners to own land through investment would create a monopoly for those with vast sums of money, knowledge, and experience. Besides, domestic investors would be readily absorbed shortly. Similarly, it will also make the domestic economy reliant on a small number of large foreign investors. To this end, states deterimine to prevent ownership of land by foreigners to oust the dominance of the economy.

2.1.3. Prevent or Restrict Foreign-Based Speculation on Land.

Allowing foreigners to own land would create an inclusion of the foreign investors' interest in the policy that would affect and applies to all property. This would make the host sates policymakers consider a foreigner interest leaving aside the interests of their own people, as long as foreign ownership of land is allowed. To this end,

sates opt to restrict ownership of land by foreigners in order to avoid such foreign-based speculation.

2.1.4. Preserve the Social Fabric of the Nation

Land is a crucial property in establishing nation's identity, integrity, unity, and culture. However, when foreigners are allowed to own land, the culture and social fabric of the host state may be ruined and influenced. Foreigners may not come into a host state with mere capital, but also with their identity and culture, and this could have an impact on the host countries' cultures. Hence, prohibiting foreigners from owning land would protect the nation's social fabric and cultures from being ruined by the new and unlearned culture of the foreign investors. In addition to that, the investment activities engaged by the foreigners may produce products that are culturally and religiously condemned. This may eventually cascade in to the cultures and traditions of the native people.

2.2. The Perceived Benefits of Allowing Foreigners to Own Land in the Host State

The fundamental policy goal of total deregulation of foreign land ownership is to create a favorable climate for foreign investment. These policies may be implemented voluntarily or in reaction to external demands to liberalize the foreign investment system. They may strive to stimulate land investment directly, but land ownership is often a byproduct of industrial or agricultural investment. In this situation, it may be critical for a foreign investor to own the land on which their investment is located, not only to gain the benefits of ownership, but also to use the land. Some of the perceived advantages of total deregulation of foreigner land ownership are listed below:

2.2.1. Increases the Transfer of Technological Know-how

Foreigners may not enter in to the host countries solely on the basis of their capital, but also, with new technology and expertise. A foreign investor may introduce new technologies, the latest technological tools, modern and scientific production processes that promote economic development of the host state. The introduction of these newer and improved technologies leads to increased firm distribution in the local economy, resulting in increased industry efficiency and effectiveness. Furthermore, if foreigners are allowed to own land, an ideal atmosphere will be created for host countries to transfer technological knowledge and information related to the products and services they provide.

2.2.2. Boost the Domestic Economy of the Host State.

At it is mentioned elsewhere in this article, and is a natural resource that plays an important role in country's economic development. Land investment might result in knowledge transfer and a deeper integration of the local economy into value chains. Foreign investment may provide additional revenue which will be expected to stimulate the host state economic growth. Increased commodity export output generates foreign currency and raises taxes, allowing national governments to invest in programs that benefit the people. On the same vein, it will improve living conditions and promote long-term growth through increased income opportunities, which can be directly linked to the employment choice within the investment project or indirectly through a rise in other business options. On the same note, the ownership of land by the foreigners would stimulate the manufacturing and service sectors, resulting in job creation and reduction in the country's unemployment rate. Then, the increased employment leads to increased wages and more purchasing power for the populace, strengthening the country's overall economy.

2.2.3. Provides Foreign Investors with Ownership Security

Allowing ownership of land by the foreigners could also have a considerable impact on security. When complete ownership is granted, the owner becomes more devoted in the company's growth. For example, a cultivator with full land ownership rights puts forth more effort, and output rises as a result. However, the prohibition on the other hand, may led in to insecurity stems from fear of eviction. An investor who makes sure that his/her property is not withdrawn by the host states, under the pretext of the land is not owned by the foreigners, would create security. This indeed builds confidence on foreigners. Many international bilateral investment treaties inculcate the duty on the host states to respect due process of laws on compensations and expropriation. Thus, allowing foreigners to own land would create unreserved security on the foreigner's security against dispossession.

Having seen, the status of international law on the ownership of lands by foreigners and the policy considerations, the upcoming parts of this article enumerates the land policies of Ethiopia and Kenya on ownership of lands by foreigners.

3. Kenya and Ethiopian Land Policies on Ownership of Land by Foreigners

Ownership and use rights in relation to land in some legal systems including most common law systems are based on a distinction between real property and personal property[23]. In other legal systems, particularly civil law systems, rights in respect of land are based on distinctions firstly, between immovable things (land and buildings) and movables and secondly, between real rights enforceable against the world and personal rights which are only enforceable against specific parties. In some legal systems, land ownership rights are described as permanent use rights although for practical purposes the effect of such a right often appears to be much the same as

[23] Jennings and watts (n 2)

ownership.[24]. However, there are many variations among countries, even between the same legal systems.

3.1. Kenya Land Policies and Laws on Ownership of Land by Foreigners

The 2010 Kenyan constitution, the 2012 no. 6 of 2012 land act, and the 2014 land control act of Kenya are the pertinent sources of land law in Kenya. The 2010 Constitution of Kenya under article 65 provides that non-citizen may only own land on a leasehold basis for a term not exceeding 99 years.[25] Anon-citizen who owned freehold land or leasehold land before the 2010 constitution for a term exceeding 99 years then the Constitution provides that their interest in the land will be reduced to a 99-year leasehold interest.[26] Nonetheless, a non-citizen can apply for an extension or renewal of the lease at the expiry of the 99-year term.

The Land Control Act of Kenya restricts the ownership by non-citizens of agricultural land or land within land control areas.[27] This land, in general terms, is land that is situated outside a municipality, a township, or a market or land that the Minister of Land designates as being controlled and subject to the protections in the act. The Act in section 9 as read with section 6 provides that any dealing in agricultural land or controlled land the purported effect of which is to sell, transfer, lease, charge, partition or exchange land with a non-citizen is void for all intents and purposes.[28] A non-citizen for the purpose of the Act is one who is not a citizen either by birth or registration, and for a private company or co-operative society, it is the

[24] ibid
[25] Kenyan Constitution.(2010) Art.65
[26] ibid
[27] The Land Control Act of Kenya(2012) sec.6
[28] ibid

one whose shareholders or members are not all citizens. A non-citizen may however be exempted from the provisions of this Act by the President of Kenya.

The ramifications of the restrictions placed by the Land Control Act are more far reaching than those in the Constitution. Unless, a foreign investor is exempted by the President of the Republic of Kenya, he or she is confined to owning land within or within the vicinity of Kenya. A practice has however developed to try exploit a certain loophole in the Land Control Act to enable the sale, transfer, lease, charge, partition or exchange of agricultural land to non-citizens.

A close reading of the Act reveals that it does not restrict dealings in shares in public companies which own agricultural land. A foreign investor may therefore own agricultural land indirectly through owning shares in a public company that owns agricultural land.

As has been mentioned above, at the expiry of the leasehold terms, non-citizens may apply for renewal or extension of their leases. So far as agricultural land is concerned, a foreign investor may apply for an exemption from the President and if they lack the access, then an investor may obtain ownership or other rights through ownership of a public company.

3.2. Ethiopian Land and Investment Laws on Ownership of Lands by Foreigners

The 1960 Civil Code of Ethiopia on Article 390 clearly state that foreigners may not own immovable property situated in Ethiopia except in accordance with an Imperial Order.[29] Such a stance has not been changed when the Imperial Era investment Proclamation No 242/1966 came out. On the same manner, the Dergue regime's

[29] Civil Code of the Empire of Ethiopia, Proclamation No.165/1960. Negarit Gazeta. year 19, No.2 Art..390

investment Proclamation No 17/1990 did not change the situation, neither does the Transitional Government Proclamation No 15/1992.[30]

At present in Ethiopia, land is exclusively owned by the state.[31] When it proclaimed the ownership of land by the state in 1995, the Constitution also prohibited the sale or exchange of land.[32] Thus, the Constitution entitles people, both citizens and non-citizens of Ethiopia, only usufructuary rights. Under the Constitution and the Rural Land Administration Proclamation, peasants.[33] and pastoralists are entitled to access private as well as communal land for free.[34] After gaining access, peasants and pastoralists can exercise use rights over their land for an unlimited period of time. Investment Proclamation No 37/1996 incorporated no specific law regarding ownership of immovable by foreigners as well.

The first investment proclamation to introduce the shift was Proclamation No 280/2002. Under Article 38 of this Proclamation, it states that notwithstanding the provisions of Article 390-393 of the Civil Code, a foreign national taken for domestic investor or a foreign investor is granted the right to own a dwelling house and other immovable property requisite for his investment.[35] This right of ownership of an immovable covers those investors who have invested prior to the issuance of the proclamation. Then similar provisions allowing foreign investors ownership right of

[30] Wabelo (n 6)
[31] Klaus Deininger et el.., 'Tenure security and land related investment: Evidence from Ethiopia' (2003).Policy research working paper 2991. 9
[32] ibid
[33] 'Rural Land Administration and Land Use Proc. No. 456/2005, Federal Negarit Gazeta, Art. 2(7).
[34] Klaus Deininger (n 31)
[35] Investment Regulation No 474/2020 Ethiopian investment regulation No.474/2020. Negarit Gazeta. Art.17.

immovable has been included in Investment Proclamation No 769/2012 and the latest Investment Proclamation No 1180/2020 and its Regulation No 474/2020.

A foreign national or foreign enterprise will be treated as a domestic investor by making application as per the relevant law or international treaty ratified by Ethiopia and, upon being issued with a permit, will have the right to own immovable property necessary for his investment. Immovable property as used in this provision does not include land. The reason land is excluded is because of the FDRE Constitution. Under Article 40, Sub-Article 3 of the Constitution, the ownership rights of land in Ethiopia are assigned to the Nations, Nationalities, and Peoples of Ethiopia.

A foreign investor or a foreign national treated as domestic investor who owns large investment may be allowed to own one dwelling house.[36] Article 17 of the Investment Regulation No 474/2020 state that a foreign investor or foreign national considered as a domestic investor may own a dwelling house if he has invested a minimum of USD10 million.[37] Comparing the latest proclamation with the earlier investment proclamations show strict conditions that are set in this latest investment proclamation for ownership of dwelling house. For instance, the previous investment proclamations namely Investment Proclamation No 769/2012 and 280/2002 provide those foreign investors or a foreign national treated as a domestic investor the right to own a dwelling house and other immovable property requisite for his/her investment. There was no capital requirement for owning dwelling house.

4. The Implication of Ethiopian Land and Investment Laws on Ownership of Land by Foreigners on Attracting Foreign Direct Investment

It is true that, in their attempt to attract Foreign Direct Investment (FDI), most African countries have liberalized trade and attempted to create enabling

[36] ibid
[37] ibid

environment in recent decades. Ethiopia, like many African countries, took some steps towards liberalizing trade and the macroeconomic regime as well as, introducing some measures aimed at improving the FDI regulatory framework. The justification for loosening the regulatory framework stems from the will to increase revenue and domestic production.

The contribution of FDI to economic development and therefore poverty reduction comes through its role as a conduit for transferring advanced technology and organizational forms to the host country, and triggering technological and other spillovers to domestically owned enterprises. Most indeed, it helps, in assisting human capital formation domestically and trade integration globally.[38] However, the maximum attainment of gains from FDI is affected by unsuitable policy frameworks.

The Federal Government of Ethiopia is duty bound to ensure that all Ethiopians are given equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them and the Constitution grants the House of Peoples' Representatives the power to legislate law on the utilization of land and other natural resources. Granting the power to enact law on how to use natural resources, at least by implication, means granting power to regulate investment.

Ethiopian land policy on ownership of land by foreigners is strict and rigid, and it has no room for ownership of land by Ethiopian citizens, let alone foreigners. Ethiopia is among the few African countries where foreigners or even citizens do not own land.

[38] 'OECD', Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs (2002) <https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-for-development_9789264199286-en> accessed 10 May 2022.

The land is often leased out by the government for a specified period of time to the foreigner. Ethiopian land and investment policies have provided certain benefits to the lessee foreigners that fall short of according full ownership, which is not free from dispossession. From the touchstones of implication, this land policy has potentially affected the economic gain of Ethiopia from foreign direct investment without reservation, and it has been a factor for making many foreign investors to leave, in to, other neighboring countries where their land policies are accommodated and extends maximum security. Kenya is the epitome of this fact and the beneficiary of Ethiopian land law drawbacks. As to this end, Ethiopian law makers should re-consider the possible way out on how to retain foreign investors by revisiting stumbles in the 1995 FDRE constitution particularly regarding ownership of lands.

Foreign investors should be given the opportunity to own land in Ethiopia on which their investment is located, not only to enjoy the benefits of ownership, but also to use the land as security to raise capital for receiving credit from financial institutions. In return such advantages to foreigners will benefit the country's entire economy.

In addition, it makes available capital to Ethiopia from capital sending country. The capital, then, is used to promote the development of the economy of the country. Furthermore, increased FDI boosts the manufacturing as well as the services sector. This in turn creates jobs, and helps to reduce unemployment among the educated youth as well as skilled and unskilled labor in the country. Then, the increased employment translates to increased incomes, and equips the population with enhanced buying power. This again boosts the economy of the country. Therefore, limiting the ownership of lands by foreigners is a one strand of obstacle to investment which Ethiopia is beholding badly.

In Kenya, foreigners can own land indirectly as it is stipulated in the above paragraphs. Currently, this had contributed much to the sustained economic growth, social development, and political stability gains over the past decade. However, Kenya’s key development challenges still include poverty, inequality, climate

change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.[39] Including the land liberalization and other factors, over 2015-2019, Kenya's economic growth averaged 5.7%, making it one of the fastest growing economies in Sub-Saharan Africa.[40] The performance of the economy has been boosted by a stable macroeconomic environment, positive investor confidence and a resilient services sector. On the top of that, Kenya has the potential to be one of Africa's success stories, given its dynamic private sector, skilled workforce, improved infrastructure, new constitution, and its pivotal role in East Africa.

4.1. Ethiopian Land Policy Reforming Regarding Ownership by Foreigners

Since 2018, Ethiopian government has taken a firm stand towards improving the country's economic performance by amending laws that had affected the investment in the country. The measures include but not limited to measures of privatizing state-owned companies, a hotbed of inefficiency, while reallocating people, goods, and money to the manufacturing industry, where further growth potential is expected**.** On top of that, a gradual process of private-sector led liberalization has begun in some sectors, including in logistics and telecommunications, marking an important shift away from the largely state-led development pursued in recent decades.[41]

As stipulated in the above paragraphs, giving foreign investors land ownership provides maximal protection against arbitrary eviction and opens investment doors

[39] 'Kenya Economic Update: Unbundling the Slack in Private Sector Investment – Transforming Agriculture Sector Productivity and Linkages to Poverty Reduction' <https://openknowledge.worldbank.org/handle/10986/31515> accessed 26 December 2021

[40] ibid

[41] 'Six Things to Know about Ethiopia's New Program' <https://www.imf.org/en/News/Articlesngs accessed 26 December 2021.

with a bundle of ensuing technological know-how to the domestic economy. Further, it will open the market for the domestic investors suffering from the shortage of routes, variety in production. As a result, the aggregate result would be boosting and increasing the economy of the host state economic gains. However, such an economic reform regarding land in Ethiopia, needs to be undertaken with maximum protection. Since land is so important to Ethiopians' socioeconomic well-being, land ownership is more than just a policy issue.

Therefore, reforming land policy from the very beginning is mandatory, and that should commence from amending the 1995 FDRE constitution. Nonetheless that is unattainable, within short period of time given the internal unregulated politics and the rigidity of the constitution itself for amendment. However, when the time comes to amend the constitutions, it is plausible to consider the upcoming proposal regarding foreigner's land ownership.

As detailed above, land ownership issue is a very sensitive case that requires maximum attention. Though, awarding land ownership for foreigners has a potential benefit for the economic development of Ethiopia, it is again reasonable to protect the adverse effects it will come up with. Thus, this article proposes an intermediate restriction on ownership of land by foreigners. In addition, it should be noted that the objective of the ownership has to be solely for investment purpose. In other words, when the object of the investment is changed, the ownership needs to be ousted early. Otherwise, it would lead to foreign economic domination and lose control of the amount of direct foreign investment. The Australian Foreign Takeovers Act of 1975, which prohibits foreigners from purchasing urban land, serves as an example.[42] Therefore, it is recommended that the government should employ the intermediate restrictions approach for land reform in Ethiopia.

[42] Sornorajah, (n 19)

Intermediate restriction approach should take the policy frameworks of Ethiopian land law, regarding ownership of land by foreigners. Intermediate restriction allows foreign land ownership, in that foreign land use is permitted, but subject to regulation and various restrictions. The restriction serves to avoid the federal government imposing an inappropriate lease period for a political aim, which is open to rent seeking. Similarly, by bypassing government consent, it will provide farmers with an ultimate decision making on their land. Foreign nationals can also lease land from the government and farmers under the current land ownership regime. The leased property must be used for its intended purpose. The federal government, with the approval of the regional states, has the ability to decide on the fate of the land. Unless, the security of the lessor, is secured in terms of decision making on his/her land, it would amount to migration of the farming population, as poor farmers are forced to sell their plots to unscrupulous urban speculators, particularly during periods of hardship.[43]

For large-scale modern farms, there is an abundant idle arable land in the low lands, both for rain fed and irrigation farming. Most of the farmers, on the other hand, live in the highlands where there is scarcity of land but large amount of accumulated human power due to high population density. Allowing the farmer to sell land here, would lead either to displacing the farmers or converting them to tenants. Therefore, the intermediate restriction approach helps to consider the real background. The foreign national leased the land can use the lease right as collateral for credits from Banks.

[43] 'MOIPAD (Ministry of Information, Press and Audiovisual Department) (2001). Federal Democratic Republic of Ethiopia, Rural Development Policies, Strategies and Instruments (Amharic). Addis Ababa 21.

In general, given the benefits of investment on Ethiopia's socioeconomic development and in stimulating the local community, the Ethiopian government should allow foreign investors to own land subject to strict conditions.

Concluding Remark

Land is fundamental to people's social, political, and economic life on the planet. It provides the means of agriculture, natural resources, and other land-based activities essential to livelihoods through providing food security, income, and employment. Given the value of land, nation-states have adopted wide arrays of land laws and policies to ensure that it is used properly. Furthermore, states use a variety of policy considerations to determine who can own land in order to maximize land utilization and other factors. Some states either give the government sole control of land or allow private ownership. Nonetheless, international law regulates land in a passive manner. State ownership of land is thought to impede investment, which could jeopardize output, food security, and economic progress. On the other side, it is believed that foreigners land ownership will lead to mass land sales by poor rural people, who will then migrate to metropolitan areas, exacerbating the urban issue and worsening poverty.

Ethiopia's prevailing sociopolitical realities has led to a policy of granting Ethiopian government and people customary land ownership. In contrast to Ethiopian land policy, Kenyan land policy permits private individuals and foreigners to own land through public companies.

It has been justified that allowing foreigners to own land would boost the economy, create more revenue, and speed up the transfer of technology and knowledge. As a result, it is proposed that foreigners shall be allowed to own land. When the time comes to rewrite the FDRE constitution, Ethiopia should change its land policy on

ownership by applying intermediate restriction approaches, taking into account the benefits of foreign land ownership.

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በጌታሁን ወርቁ♣

መግቢያ

በሕገ መንግስታዊ ሥርዓት የሕግ አውጭውና የሕግ ተርጓሚው ስራ ለየቅል ነው። የመጀመሪያው ሕግ ይሰራል፣ሁለተኛው የወጣውን ይተረጉማል።ሕግ ሰሪው ችሎት ተሰይሞ አይተረጉምም፣ሕግ ተርጓሚውም በትርጉም ሰበብ ሕግ አይሰራም። በንድፈ ሃሳብ ደረጃ ይህ ነገር ግልጽ ቢመስልም በተግባር የሁለቱ ልዩነት ሰፊ ላይሆን ይችላል። ሕግ ተርጓሚው በተጨባጭ ለቀረቡለት ጉዳዮች ዳኝነት ሲሰጥ የሕጉን ግልጽ/ጥሬ/ ትርጉም በመሳት፣ በማስፋት፣በመለጠጥ፣በመተው ወዘተ· የተለየ መልእክት ያለው ሕግ እንደቀረጸ የሚያሳይ ፍርድ ሊሰጥ ይችላል። በዚህ ጊዜ ሕግ የማውጣትና የመተርጎሙ ስራ መካከል የምናሰምረው መስመር ሊጠብ ይችላል። በዚህ ጽሁፍ የምንመለከተው ጭብጥ ለዚህ ዓቢይ ማሳያ ነው። ፍርዱ ከመያዣ ምዝገባ ጋር በተያያዘ የተሰጠ ሲሆን የሚያጠነጥነው የፍትሐ ብሔር ሕግ ቁጥር 3058(1) በመተርጎም ዙሪያ ነው። ይህ ድንጋጌ **“የማይንቀሳቀስ ንብረት የመያዣ መብት ዉጤት የሚኖረው ከተጻፈበት ቀን አንስቶ እስከ አስር ዓመት**

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ድረስ ነው” ይላል። የድንጋጌው ጥሬ ትርጉም እና ይዘቱ ግልጽ ቢመስልም/ቢሆንም ሰበር ችሎት ግን በገሸው ፍርዶቹ ከይዘቱ የራቁ፣ከሕግ አውጭውም መንፈስ የተፋቱ ፍርዶች ሰጥቷል። በቀጣዩ የጽሑፉ ክፍል የፍርዶቹን አመጣጥ በመግለጽ የመያዣ ባህርያት፣ አመዘጋገብ፣ የማብቂያ ጊዜ፣ ውሉን ስለማደስና ያለማደስ ውጤትን በመቃኘት የሰበር አቋምን ፍትሐዊነት እንመለከታለን።

1. የጉዳዩ አመጣጥ

ለዚህ ጽሑፍ የተመረጡት የሰበር ፍርዶች በሰ/መ/ቁ 44800 ጥቅምት 05 ቀን 2002 ዓ.ም. እና በሰ/መ/ቁ 40109 ጥቅምት 1 ቀን 2003 ዓ.ም. የተሰጡት ናቸው።[1] በመጀመርያው ጉዳይ አመልካች አቶ አብዱራዛቅ ሐሚድ ሲሆኑ ተጠሪው የኢትዮጵያ ንግድ ባንክ ነው። በሁለተኛው ጉዳይ ደግሞ አመልካች የኢትዮጵያ ልማት ባንክ ሲሆን ተጠሪው ደግሞ አቶ ተክሌ ዋከኔ ናቸው። በሁለቱም ጉዳዮች ግለሰቦች ተከራካሪዎች ሦስተኛ ወገን መያዣ ሰጪዎች ሲሆኑ የመያዣ ውሉ ከተቋቋመ አሥር ዓመት ያለፈ በመሆኑ መያዣው እንዲፈርስላቸው ጠይቀዋል። ችሎቱ የተለያዩ ምክንያቶችን በመጥቀስ የመያዣ ውል ከተቋቋም ከ10 ዓመታትም በኋላ የፀና ስለመሆኑ በመተንተን ለባንኮቹ ፍርዱን ሰጥቷል።

[1] መዛግብቱ እንደቅደምተከተላቸው ቮልዩም 10 እና ቮልዩም 12 ላይ ይገኛሉ።

በመጀመርያው መዝገብ ሐሚድና ቤተሰቡ የግብርና ውጤቶች ኃ/የተ/የግ/ማኅበር ከባንኩ ብድር ሲወስድ አቶ ሐሚድ እና አመልካች ሁለት ቤቶቻቸውን በመያዣ የሰጡ ሲሆን ባንኩ የአቶ ሃሚድን ቤት በሐራጅ ሽጦ ዕዳውን መልሷል። አመልካች በሰጡት ቤት የተገባው የመያዣ ውል ደግሞ 10 ዓመት ያለፈው በመሆኑ ቀሪ ነው። ባንኩ ካርታውን እንዲመልስና ያልተከፈለ ዕዳ ካለም እንዲከፍል ብጠይቀውም ፈቃደኛ ባለመሆኑ በፍርድ ቤት መያዣው ፈራሽ እንዲሆንልኝ ሲሉ ጠይቀዋል። የፌዴራል ከፍተኛ ፍርድ ቤቱ ባፀደቀው የመጀመርያ ደረጃ ፍርድ ቤት ውሳኔ ዕዳው ያልተጠናቀቀ በመሆኑና ባንኩ በፍ/ሕ/ቁ 3058(1) የተመለከተው የ10 ዓመት ጊዜ ከማለፉ በፊት በመያዣ ንብረቱ ላይ እንቅስቃሴ የጀመረ በመሆኑ ክሱ ተቀባይነት የለውም ተብሏል። ሰበር ችሎቱ በግለሰቡ አመልካችነት የቀረበውን ማመልከቻ ባለገንዘቡ የመያዣ ውሉ ከተመዘገበበት ቀን ጀምሮ 10 ዓመት በመብቱ መገልገል ጀምሯል ሊባል የሚችለው መቼ ነው? የሚል ጥያቄ በማንሳት ባንኩ የ10 ዓመቱ ጊዜ ሳያልፍ ለመያዣ ሰጪው ማስጠንቀቂያ ከሰጠ በመብቱ መገልገል ጀምሯል በማለት የቤቱ ሽያጭ ሳይጠናቀቅ 10 ዓመት ማለፉ ብቻውን የመያዣ ውሉን ቀሪ አያደርገውም በማለት የአመልካችን ጥያቄ ውድቅ አድርጓል።

በሁለተኛው መዝገብ አቶ ሽፈራው ቡሌ ከባንኩ ብድር ሲወስዱ ተጠሪ ቤታቸውን በመያዣ መስጠታቸውን በመግለጽ የብድር ውሉም ሆነ የመያዣ ውሉ ሳይታደስ አሥራ ሦስት ዓመት ያለፈው በመሆኑ የመያዣ ውሉ በፍ/ብ/ሕ/ቁ 3058 መሠረት ቀሪ ሆኖ ባንኩ

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የያዘውን የቤቱን ካርታና ፕላን እንዲመለስላቸው ዳኝነት ጠየቁ። ባንኩ በሰጠው መልስ ታህሳስ 14 ቀን 1988 ዓ.ም. የተፈረመው የመያዣ ውል ጥቅምት 9 ቀን 1988 ዓ.ም. ለክፍሉ ክፍለ ከተማ አስተዳደር በተጻፈ ደብዳቤ ለቀጣይ 10 ዓመት እንዲታደስ የተደረገ መሆኑን ጠቅሶ ክሱ ውድቅ እንዲደረግ ጠየቀ። ጉዳዩን በመጀመርያ ደረጃ የተመለከተው የምሥራቅ ወለጋ ዞን ከፍተኛ ፍርድ ቤት ውሉ የታደሰውና የዋሱን ኃላፊነት የሰጠው ያለመያዣ ሰጪው ዕውቅና እና ፈቃድ በመሆኑ የመያዣ ውሉ እንደታደሰ አይቆጠርም በማለት ሳይታደስ 10 ዓመት ያለፈውን የመያዣ ውሉ ቀሪ አድርጎታል። አመልካች ለኦሮሚያ ጠቅላይ ፍርድ ቤት ይግባኝ ያቀረበ ቢሆንም ጠቅላይ ፍርድ ቤቱ ይግባኙን ሰርዞታል። የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አመልካች ያቀረበውን ማመልከቻ ተቀብሎ የስር ፍርድ ቤቶችን ፍርድ ገልብጦታል። ሰበር ችሎቱ ለፍርዱ በሰጠው ምክንያት የፍ/ብ/ሕ/ቁ 3058/2/ እና 1632/2/ ተገናዝበው ሲታዩ የመያዣ ውሉ ከተመዘገበ አሥር ዓመት ሳይሞላው በመብቱ ተጠቃሚ የሆነው ወገን እንዲታደስለት ከጠየቀ ውሉ የሚታደስ መሆኑን የገለጸ ሲሆን፣ “ከድንጋጌዎቹ አቀራረጽና ይዘት መረዳት የሚቻለው የማይንቀሳቀስ ንብረት መያዣ ውሉ አንዴ ከተመዘገበ ይህንኑ ውሉ የማደስ ተግባር ለመፈጸም የአስያዡ ፈቃድ እንደገና መረጋገጥ ያለበት ስለመሆኑ የሚያሳይ አንቀጽ

አለመሆኑን ነው”[2] በሚል ያለ አስያዡ ፈቃደ የታደሰውን መያዣ የሥር ፍርድ ቤቶች ውድቅ ማድረጋቸው አግባብነት የለውም በማለት ሽሮታል።

2· ስለመያዣ ውል አጠቃላይ ነጥቦች

በባለገንዘብና በባለዕዳ መካከል በሚመሠረት ግዴታ ባለዕዳው ግዴታውን ያልተወጣ እንደሆነ ይህንን ግዴታ ለመወጣት ማረጋገጫ የሚሰጥ ሰው ዋስ ይባላል። በሕግ ዋስትናው የሰዉና የንብረት በሚል በሁለት የሚከፈል ሲሆን፣ በንብረት ላይ የሚመሠረት ዋስትና ተንቀሳቃሽ መያዣ (Pledge) ወይም በዚህ ጽሑፍ የምንመለከተው የማይንቀሳቀስ ንብረት መያዣ (Mortgage) ሊሆን ይችላል።[3] ለዚህ ጽሑፍ እንዲረዳ የማይንቀሳቀስ ንብረት መያዣን ‹‹መያዣ›› በሚለው የወል አጠራር እንጠቀምበታለን። እንደማንኛውም ዋስትና መያዣ ደባል ግዴታ እንደመሆኑ መጠን በልዩ ሁኔታ ካልሆነ በቀር በዋናው ግዴታ መኖርና ቅቡልነት (Validity) ላይ መሠረት ያደረገ ነው።[4] የፍ/ብ/ሕ/ቁ 1926/ እና 1923 መያዣ በውል ሲመሠረት ግልጽና የማያሻማ ፣የግንዘብ መጠኑን የሚገልጽ፣[5] ከዋናው ግዴታ ያልከበደ፣ በጽሑፍ የተደረገና በምስክር የተረጋገጠ ሊሆን ይገባዋል።[6] የፍ/ብ/ሕ/ቁ 1928 በግልጽ

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[2] በሰ/መ/ቁ 40109 ገጽ 6 ላይ 2ኛው አንቀጽ ይመልከቱ።

[3] አቶ ጥላሁን ተሾመ፣ የኢትዮጵያ የውል ሕግ መሰረታዊ ሃሳቦች፣የአዲስ አበባ ዩኒቨርስቲ መጻሕፍት ማዕከል፣ 1995 ዓ·ም ገጽ 242 እና 243

[4] የፍትሐ ብሔር ሕጉን ቁጥር 1926 እና 3090 ይመልከቱ። በተጨማሪም የኢትዮጵያ የውል ሕግ መሰረታዊ ሐሳቦች፣ ገጽ 247

[5]የፍትሐ ብሔር ሕግ ቁጥር3045 (2) እና 1924። በተጨማሪም የኢትዮጵያ የውል ሕግ መሰረታዊ ሐሳቦች፣ ገጽ 246-257 ይመልከቱ።

[6] የፍትሐ ብሔር ሕጉ ቁጥር 3045 እና 1723

እንደሚያስቀምጠው ውሉ ከተደረገ በኋላ በባለገንዘቡና በባለዕዳው መካከል የሚደረግ ሌላ ውል የዋሱን ግዴታ ሊያብስበት አይችልም። ለዕዳ መክፈያ ጊዜ አራዝሞ የመስጠትን ጉዳይ በተለይ ዋሱን ሳያስፈቅድ ባለገንዘቡ ለባለዕዳው የመክፈያ ጊዜ አራዝሞ የሰጠ እንደሆነ ዋሱ ነፃ ይሆናል።[7]

በማይንቀሳቀስ ንብረት ላይ የሚመሠረት የመያዣ መብት ከተፈጸመበት ቀን አንስቶ ካልተመዘገበ በህግ ፊት ውጤት እንደማይኖረው በፍ/ብ/ሕ/ቁ 3052 ተደንግጓል። ምዝገባው የሚደረገው በማይንቀቀቀስ ርስት መዝገብ ሲሆን፣ የአመዘጋገቡ ሥርዓት የማይንቀቀሱ ንብረቶች አመዘጋገብ ሥርዓትን ይከተላል። የማይንቀሳቀስ ንብረት አመዘጋገብ ከፍ/ብ/ሕ/ቁ 1553 እና ተከታዮቹ ቁጥሮች በዝርዝር በሕጉ የተደነገገ ሲሆን መያዣን በተመለከተ ስለአመዘጋገቡ ፣ስለጊዜው ቆይታ፣ ስለሚመዘገቡት ነገሮችና ስለሚሰረዝበት ሁኔታ የተወሰኑ ድንጋጌዎችን አስቀምጧል።

የማይንቀሳቀስ ንብረት የመያዣ መብት የቆይታ ጊዜ አሥር ዓመት ነው።[8] በዚህ መሠረት የፍ/ብ/ሕ/ቁ 1632 መያዣ ከተመዘገበ አሥር ዓመት ሆኖት እንደሆነና እንዲታደስ ካልተጠየቀ ዓቃቤ መዝገቡ በሥልጣኑ ምዝገባውን እንደሚሰርዘው ይደነግጋል። የአሥር

[7] ዝኒ ከማሁ ቁጥር 1928(2)

[8] የፍ/ብ/ሕ/ቁ 3058(1) የማይንቀሳቀስ ንብረት የመያዣ መብት ውጤት የሚኖረው ከተጻፈበት ቀን አንስቶ እስከ አሥር ዓመት ድረስ ነው።

ዓመቱ ጊዜ ከማለፉ በፊት ይህ ውል እንዲታደስ አዲስ የመዝገብ ማጸፍ ጉዳይ የተፈጸመ እንደሆነ ፀንቶ የሚቆይበት ዘመን ይራዘማል። የመያዣ ውሉ ከ10 ዓመት በኋላ ያልታደሰ ከሆነ ግን የመያዣ ምዝገባው ስለሚሰረዝ ንብረቱን በመያዣ የሰጠ ሦስተኛ ወገን ካለበት ኃላፊነት ነፃ ይሆናል።[9]

3. በሰበር ፍርዱ ላይ አጭር ምልከታ

የሰበር ችሎቱ በጽሑፉ መግቢያ ላይ በገለጽናቸው ሁለት መዛግብት የሰጣቸው ፍርዶች የመያዣ ምዝገባ የሚቆይበትን ዘመን ፣ይህ ጊዜ ሲያልፍ ስለሚኖረው ውጤትና የመያዣ መብቱ ስለሚታደስበት ሁኔታ የተመለከተ ነው።[10] እነዚህን ነጥቦች ሕጉን መሠረት አድርገን በፍርዱ የተሰጡትን ትንታኔዎች ለመቃኘት እንሞክር።

ቀዳሚው ነጥብ የመያዣ ዉል ምዝገባ የቆይታ ጊዜ ነው። ሕጉ የመያዣ ምዝገባ ከተጸፈበት ጊዜ አንስቶ ለ10 ዓመታት የፀና እንደሆነና ምዝገባው ካልታደሰ እንደሚሰረዝ ይደነግጋል።

[11] የ10 ዓመቱ የጊዜ ቆይታ አቆጣጠር ለአገራችን ሕግ ባዕድ አይደለም። በፍትሐ ብሄር በውል ወይም ከውል ውጭ ግዴታዎች የመፈጸሚያ ረዥም ጊዜያት በሌላ መልኩም የይርጋ ደንብ 10 ዓመት እንደሆነ የፍ/ብ/ሕ/ቁ 1845 እና 1677 የጣምራ ንባብ ያሳያሉ። ሰበር ችሎትም ይህንኑ ጊዜ በብዙ አስገዳጅ ትርጓሜዎች አረጋግጦታል። የመያዣ ምዝገባን

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[9] የፍትሐ ብሔር ሕግ ቁጥር 1632(2)

[10] የሰ/መ/ቁ 44800, ገጽ 109 የመጀመሪያው አንቀጽ፣ እንዲሁም የሰ/መ/ቁ 40109 ገጽ 5 3ና አንቀጽ ይመልከቱ።

[11] የፍትሐ ብሔር ሕግ ቁጥር 3058(1) እና and 1632(2)

በተመለከተ በመጀመርያው ፍርድ አከራካሪ የሆነው የአሥር ዓመቱ ጊዜ እንዴት ይቆጠራል፣ የአሥር ዓመቱ የጊዜ ገደብ ዓላማስ ምንድን ነው? የሚለው ነው። ሕጉ የአሥር ዓመቱ ጊዜ ከተጸፈበት ጊዜ ጀምሮ የሚቆጠር መሆኑንና ጊዜው ሲጠናቀቅ መያዣውን እንደሚሰረዝ እንጂ[12] በመሀከል ይህ ጊዜ ስለሚቋረጥበት ወይም ስለሚራዘምበት ደንብ አይገልጹም። ድንጋጌው የይርጋ ደንብም ባለመሆኑ ይርጋ የሚቋረጥባቸው የፍትሐ ብሔሩ ድንጋጌዎች ከዚህ ጋር ፈጽሞ አይገናኙም። ሰበር ችሎቱ ባንኮች በመያዣ የያዙት ንብረት ላይ ብድርን በፍርድ ቤት ለማስመለስ የአሥር ዓመት ጊዜው ከመጠናቀቁ በፊት ዕርምጃ የሚወስዱ ከሆነ (ማስጠንቀቂያ ሲሰጡ፣ ሐራጅ ሽያጭ ማስታወቂያ ካወጡ ወዘተ.) ዕዳቸውን ሳይመልሱ ጊዜው ቢያልፍ እንኳን የመያዣ መብቱ እንደማይሰረዝ ገልጿል።[13] ይህ የሰበር አቋም የ10 ዓመቱ ጊዜ ባለገንዘቡ መብቱን ለመጠቀም የመጀመርያ/የመንደርደርያ/ ጊዜ እንደሆነ አመላካች ነው።

ይህ የሰበር ትንታኔ በሕጉ ከተቀመጠው ደንብ ጋር የሚጣጣም አይደለም። በሕጉ የጊዜ ገደብ ሲቀመጥ ሕግ አውጭው የራሱ ዓላማ አለው። የመያዣ መብት የቆይታ ጊዜን ሕጉ 10 ዓመት ብሎ መወሰኑ ይህ ጊዜ ሳይጠናቀቅ ባለገንዘቡ መብቱን ተጠቅሞ እንዲጨርስ

[12] ዝኒ ከማሁ

[13] የሰ/መ/ቁ 44800 ገጽ 110

ለማድረግ ነው።[14] በዚህ ረገድ ባለገንዘቡ የሚገባው ግዴታ ይህንኑ የጊዜ ዘመን ካላገናዘበ መያዣው አሥር ዓመት ካለፈው የሚሰረዝ መሆኑ አጠያያቂ አይደለም። የፍትሐ ብሔር ሕግ ቁጥር 3058 መያዣ ተቀባዩ መብቱን መገልገል የጀመረው መቼ ነዉ የሚል ጥያቄ እንድናነሳ ክፍተት አይሰጠንም። ድንጋጌው ለአቆጣጠር አያስቸግርም። መያዣው ከተጻፈበት ቀን ጀምሮ 10 ዓመት አልፎታል ወይም አላለፈውም? የሚለውን ጥያቄ ማጣራት ብቻ የሚጠይቅ ነው። ከዚህ አንጻር ሰበር ችሎቱ መብትን ለመገልገል የተጀመረበት ጊዜ የሚለውን መስፈርት ከሕጉ እንዳላገኘው ግልጽ ነው። ባንኩ ምንም ዓይነት ጥረት እያደረገም ቢሆን የ10 ዓመት ጊዜ በመሀል ካለፈ ዓቃቤ መዝገቡ መያዣውን ሊሰርዘው ይገባል። የባንኩ መከራከርያ ቅቡልነት የሚኖረው በ10 ዓመት ጊዜ ውስጥ መብቱን ተጠቅሞ ዕዳውን ከሰበሰበ ወይም ዕዳውን ሳይሰበስብ መያዣው አስር ዓመት ሳያልፈው ምዝገባው መታደሱን በማስረዳት ብቻ ነው።

ማስጠንቀቂያ በመስጠት የአሥር ዓመቱን ጊዜ ማራዘም ከተቻለ ግን የመያዣ ውሉን ምዝገባ በጊዜ ገደብ መወሰንም አያስፈልግም። ማንም ሰው ከአሥር ዓመት በፊት ማስጠንቀቂያ በመስጠት ጊዜውን ትርጉም ማሳጣት ይችላል ማለት ነው። ማስጠንቀቂያ መስጠት እንኳን በሕግ የተቀመጠን የምዝገባ ጊዜ ለማራዘም የይርጋ ጊዜ እንኳን ለማቋረጥ

[14] የመጨረሻ የጊዜ ገደብ የሚቀመጠው ግዴታ ከተቀመጠው ቀነ ገደብ በፊት እንዲፈጸም ለማስቻል ስለመሆኑ የሕሊና ሕግ (commen sense) ይነግረናል። ካልሆነ የጊዜ ገደብ ማስቀመጡ ትርጉም አይኖረውም።

ምክንያት አይሆንም።[15] ማስጠንቀቂያ መስጠቱ በባንኮች የፎርክሎዠር ሥልጣን መሠረት የተሰጠ መሆኑም የተለየ ውጤት የለውም። በሕግ የሚቀመጥ የጊዜ ገደብ ባለመብቱ በጥንቃቄ በተቀመጠው ጊዜ መብቱን በትክክል እንዲጠቀም ባለዕዳውም (በዚህ ጊዜ መያዣ ሰጪው) ያለበትን ኃላፊነት ዝንተ ዓለም ሳይጠብቅ በተወሰነው ጊዜ ኃላፊነቱን እንዲወጣ ወይም ባለገንዘቡ በቸልተኝነት ጊዜዉን ካሳለፉ የመብቱ ገደብ እንዲመለስለት ማስቻል ነው።[16]

አቶ አስቻለው አሻግሬ በኢትዮጵያ የሕግ ጆርናል በፃፉት ትችትም የሰበር ችሎቱ ከሕጉ ግልፅ ንባብ በመውጣት ፍርድ መስጠቱን ተችተዋል።[17]እንደ እርሳቸው አመለካከት ሰበር ችሎቱ በፍርዱ በግልፅ ባያሰፍረውም ጉዳዩን ይርጋ ማቋረጥን ከሚደነግገው የፍ/ብ/ህ/ቁ 1851 አንፃር ተመልክቶታል።[18] አቶ አስቻለው የፍ/ብ/ህ/ቁ 1851 ዋናውን ግዴታ

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[15] በፍትሐ ብሔር ሕግ ቁጥር 1851(2) መሰረት ይርጋን ለማቋረጥ ባለገንዘቡ መብቱ እንዲታወቅለት በፍ/ቤት ክስ ማቅረብ ይጠበቅበታል። የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎትም ይርጋ የሚቋረጠው በፍ/ቤት ክስ ከቀረበ ስለመሆኑ፤ የመብት ጥያቄን ክፍ/ቤት ውጪ ላሉ አካላት ማቅረብ እንኳን ይርጋ ጊዜን የማያቋርጥ ስለመሆኑ አስገዳጅ የሕግ ትርጉም ሰጥቷል። ቮልዩም 6 የሰ/መ/ቁ 28997፣ ቮልዩም 10 የሰ/መ/ቁ 43636፣ ቮልዩም 9 የሰ/መ/ቁ 36730ን ይመለከቷል።

[16] የኢትዮጵያ የውል ሕግ መሰረታዊ ሃሳቦች፣ ገጽ 181

[17] Effect of Non-renewal of Registration of a Contract of Mortgage under the Ethiopian Civil Code: A Case Comment,' Journal of Ethiopian Law, Vol. 24,number 1,July 2010.

[18] ዝኒ ከማሁ

በተመለከተ እንጅ የመያዣ ግዴታውን በተመለከተ ጠቃሚ አለመሆኑን ገልፀው ፤ ለባንኮች የተሰጠው የፎርክሎዣር ስልጣንም የፍ/ብ/ህ/ቁ 3058 ያልሻረ በመሆኑ ችሎቱ የደረሰበት መደምደሚያ የተሳሳተ መሆኑን ገልፀዋል።[19]

ሁለተኛው ነጥብ 10 ዓመት ሊያልፈው የተቃረበ የመያዣ ውል ምዝገባ እንዴት ይራዘማል የሚለው ነው። የመያዣው ዕድሳት በማን አመልካችነት ይከናወናል? የአስያዡስ ፈቃድ ለእድሳቱ አስፈላጊ ነው ወይስ አያስፈልግም? የሚለው ነጥብ መታየት ይኖርበታል። የፍ/ብ/ሕ/ቁ 3058(2) ‹‹ይህ የተወሰነ ጊዜ ከማለፉ በፊት ይህ ውል እንዲታደስ አዲስ የመዝገብ ማጻፍ ጉዳይ የተፈጸመ እንደሆነ ፀንቶ የሚቆይባት ዘመን ይራዘማል›› በማለት ይደነግጋል። ድንጋጌው ማን ለማሳደስ እንደሚያመለክት ከመግለጽ ይልቅ አዲስ የመዝገብ ማጻፍ እንደሚከናወን ብቻ ይገልጻል። ስለዚህ ባለገንዘቡም ይጠይቀው ባለዕዳው አዲስ ምዝገባ የሚከናወንበት ሥርዓት ግን መፈጸም ይኖርበታል። አዲስ የምዝገባ ሥርዓትን በተመለከተ ደግሞ ሕጉ በፍ/ብ/ሕ/ቁ 1602 እና 1605 ላይ እንዲሚሉ የሚጠይቃቸው ሰነዶችና መረጃዎች አሉ። ከነዚህ ውስጥ ከምዝገባ ጥያቄው ጋር የተያያዙ ተጨማሪ ወይም አስረጅ ሰነዶች ብዛት፣ ዓይነት፣ የማጣቀሻ ቁጥር ይገኝበታል። ከዚህ አንፃር የመያዣ ውል ሲታደስ ለመታደስ መነሻ የሆኑት የመያዣ ውል አስፈላጊነት አያጠያይቅም። ይህ ደግሞ የባለገንዘቡንና የመያዣ ሰጪውን ስምምነት የሚጠይቅ ይሆናል። የመያዣ ውል

[19] ዝኒ ከማሁ

ተዋዋይ ወገኖች ቀደም ሲል የነበረውን ግዴታቸውን ለማራዘም በዚህ መነሻነት የእድሳቱ ጥያቄ በማንም ይቅረብ በማን የተዋዋዮቹ ስምምነት በሌለበት ሁኔታ የመያዣ ውል ዕድሳትን ማከናወን አይቻልም።

የመያዣ ምዝገባውን ማንም መብት አለኝ የሚል አካል ያለበቂ አስረጅና ተገቢ ሰነድ የማያራዝመው ከሆነ የምዝገባውንና የምዝገባ ጊዜውን ቆይታ ትርጉም ያሳጣዋል። መመዝገብ የሚያስፈልገው ባለገንዘቡን ከሌሎች ገንዘብ ጠያቂዎች የቀዳሚነት መብት ለመስጠት ሲሆን፣ ባለገንዘቡ በፈለገ ሰዓት ያለመያዣ ሰጪው ስምምነት መያዣውን የሚያራዝም ከሆነ የባለመያዣ ሰጩውን ኃላፊነት ዘለዓለማዊ ያደርገዋል። ሌሎች ባለገንዘቦችም በቀዳሚነት በምዝገባው ሽፋን ከባለመያዣ ሰጪው ጋር የሚያደርጉትን ግብይት የሚያጣብበው ይሆናል። የጊዜውም ወሰን ትርጉም አይኖረውም። ባለገንዘቡ በፈለገ ጊዜ እያራዘመ የአሥር ዓመቱን ገደብ በሰፊው ይለጥጠዋል።

ከውል መሠረታውያን መርሆዎችም በመነሳት የመያዣ ውል ምዝገባ መራዘም የመያዣ ሰጪውን ፈቃድ እንደሚጠይቅ መከራከር አሳማኝነት አለው።[20] በውል ሕግ ውል ተዋዋዮቹ በገቡባቸው ግዴታዎች እነዚሁም አስገዳጅ እንዲሆኑ የተሰማሙበትን በሚገልጸው የፈቃድ መስጠት ላይ የተመሠረተ ነው። በዚህ መነሻነት ማንኛውም ውል ሲመሠረትና ሲለወጥ

[20] የፍ/ሕ/ቁ 1675 በውል ለሚመሰረት የመያዣ መብት፣ የተዋዋዮች ፈቃድ መሰረት እንደሆነ ተዋዋዮቹ በፈቃዳቸው ግዴታን ለመመስረት፣ ለመለወጥ እና ለማስቀረት ፈቃዳቸውን ሊሰጡ እንደሚገባ በመግለጽ በ ቁጥር 1663 ደግሞ ዳኞች ከተዋዋዮቹ ፈቃድ ውጭ የውልን ቃል መለወጥ እንደማይችሉ በአስገዳጅነት ደንግጓል።

ወይም በተወሰኑ ሁኔታዎች ሲቋረጥ የተዋዋዮቹ ስምምነት አስፈላጊ ነዉ። በተያዘውም ጉዳይ የመያዣው ውል የምዝገባው ጊዜ መራዘሙን በተመለከተ መያዣ ሰጪውና ተቀባዩ ያደረጉት ግልጽ ስምምነት ከሌለ ከ10 ዓመት የበለጠ ተፈጻሚነት ሊኖረው አይችልም። የምሥራቅ ወለጋ ከፍተኛ ፍርድ ቤትም ከዋስትና ውል መሠረታዊያን አንፃር ያለዋሱ ፈቃድ የመያዣ ውል መራዘሙ/መታደሱ ተገቢ አለመሆኑን የገለጹበት ሁኔታ አሳማኝ ነው። የመያዣ ውል ከዋናው ግዴታ ያልከበደ ግዴታ መሆን እንደሚገባውና ውሉ ከተመሠረተ በኋላም በባለገንዘቡና በዋናው ባለዕዳ መካከል የሚደረግ ግዴታውን የማክበድ ስምምነት ከዋስትናው ነፃ እንደሚያደርገው ከሕጉ መረዳት ይቻላል።[21] የሰበር ችሎቱ በፍ/ብ/ሕ/ቁ 1928(2) የዋስትና አጠቃላይ ደንቡ ለመያዣ ውል መታደስ ተፈጻሚ ስለመሆኑ አለመሆኑ ሳይተች ማለፉም የዋስትና መሠረታውያንን እንዲጥስ አድርጎታል። እንደማንኛውም የዋስትና ውል የመያዣ ውል ያለመያዣ ሰጪው ስምምነት የሚታደስ ከሆነና የመያዣ ሰጪን ግዴታ ያከበደ ከሆነ መያዣው ፈራሽ ነው። ባለገንዘብ የዋናውን ባለዕዳ የብድር መጠን ከጨመረ፣ የወለድ አተማመኑን ከጨመረና የመክፈያ ጊዜውን ካራዘመ ፈቃዱን ያልሰጠው መያዣ ሰጪ ከኃላፊነቱ ነፃ ይሆናል።[22] የመያዣ ውል የምዝገባ ጊዜ ሲታደስ ለዋናው ባለዕዳ የመክፈያ ጊዜ ማራዘም መሆኑ ሊዘነጋ አይገባም። የፍ/ብ/ሕ/ቁ 1928/1/ ለዋሱ ጥቅም የተቀረፀ ስለመሆኑ ፕሮፌሰር ጥላሁን ተሾመ

[21] የፍትሐ ብሔር ሕግ ቁጥር 1928(2)

[22] ዝኒ ከማሁ፣ ተጨማሪ ማብራሪያ የኢትዮጵያ የውል ሕግ መሰረታዊ ሃሳቦች፣ ገጽ 251 ይመልከቱ።

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‹‹የኢትዮጵያ የውል ሕግ መሠረታዊ ሐሳቦች›› በሚለው መጽሐፋቸው ይገልጻሉ።[23] እንደርሳቸው አመለካከት ‹‹የጊዜው መራዘም የዋሱን ግዴታ ሊያከብድ የሚችል ጣጣ ስለሚያመጣ ነው። በተራዘመው ጊዜ ውስጥ የዋናው ባለዕዳ የመክፈል ችሎታ ቢቀንስ፣ ንብረቱን በተለያዩ መንገደች ቢያሸሽ ወይም በሌላ ሰው ስም ቢያዛዉር፣ ንብረቱን በአፈጻጸም የሚሸጡ ሌሎች ባለገንዘቦች ቢመጡ፣ ባለዕዳው ቢሰወር ወዘተ የጉዳት ኃላፊነቱን የሚሸከመው የጊዜ መራዘመን ያለዋሱ ስምምነት ለዋናው ባለዕዳ የሰጠው የሥር ባለገንዘቡ ብቻ ይሆናል›› [24] በሚል በአግባቡ ገልጸውታል።

በሌላ በኩል ሰበር ችሎቱ ከማይንቀሳቀስ ንብረት ምዝገባ ጋር በተያያዘም ያቀረበው ትንታኔ አሳማኝ አይደለም። ችሎቱ የፍ/ብ/ሕ/ቁ 1632(2)ን በመጥቀስ በተመዘገበው መብት ተጠቃሚ የሆነው ወገን ይኸው የተወሰነ ጊዜ ከማለፉ በፊት እንዲታደስለት ከጠየቀ ውል እንዲታደስ መመዝገብ የሚችል መሆኑን ገልጿል። ሰበር ችሎቱ የተጠቀሰው ድንጋጌ መያዣው ከተመዘገበ አሥር ዓመት ሆኖት እንደገና እንዲታደስ አልተጠየቀ እንደሆነ የተመዘገበውን ዓቃቤ መዝገቡ በሥልጣኑ ይሰርዘዋል የሚል በመሆኑ ባለገንዘቡ እንዲታደስለት ከጠየቀ መያዣው ያለቅድመ ሁኔታ ይታደሳል የሚል ትርጉም አይሰጥም። ጠያቂው ባለገንዘቡ ሊሆን እንደሚችል ከዚህ ድንጋጌ መረዳት አይቻልም። የሆነ ሆኖ

[23] የኢትዮጵያ የውል ሕግ መሰረታዊ ሃሳቦች፣ ገጽ 251

[24] ዝኒከማሁ

ማንም ይጠይቀው ማን ሊሟሉ የሚገባቸው ሰነዶችና መረጃዎች ካልተሟሉ ግን መያዣው ሊታደስ አይገባም። መያዣው የሚታደሰው በአዲስ የምዝገባ ሥርዓት ስለመሆኑ የፍ/ብ/ሕ/ቁ 3058 ስለሚገልጽ የተሻሻለው የመያዣ ውልና የተሻሻለው የብድር ውል ካልቀረበለት ዓቃቤ መዝገቡ ሊመዘገብ አይችልም። የመያዣ ውል ከተሻሻለ ደግሞ ሦስተኛ ወገን መያዣ ሰጪው ፈቃዱን ስለመስጠቱ አስረጅ መሆኑ አይቀርም።[25]

የሕጉ የማይንቀሳቀስ ንብረት ምዝገባ ድንጋጌዎች የመያዣ ውል መሰረዝን የተመዘገበ ጽሑፍ ማቃናትና መሰረዝ በሚቻለበት ክፍል ውስጥ ይመለከታቸዋል።[26] ከእነዚህ ድንጋጌዎች ለመረዳት እንደሚቻለው በመያዣ ውሉ ላይ የጐደለ ወይም ያልተስተካከለ ነገር ሲኖር በፍርድ ቤት ፈቃድ ካልሆነ በቀር ዓቃቤ መዝገቡ ማቃናት እንደማይችል ነው ።[27] የመያዣ ውሉ መሰረዝም በተመሳሳይ መልኩ በፍርድ ቤት የሚከናወን ሲሆን፣ የባለጉዳዮቹ ስምምነት አስፈላጊ ስለመሆኑ በፍ/ብ/ሕ/ቁ 1631 ተደንግጓል። የመያዣ ውል ሲሰረዝ የመብት ተጠቃሚው ፈቃድ እንደሚያስፈልግ አከራካሪ አይሆንም። ዓቃቤ መዝገቡ ያለ ፍርድ ቤት ፈቃድ የመያዣ ውል ምዝገባን በልዩ ሁኔታ የመሰረዝ ሥልጣን የተሰጠው ምዝገባው አሥር ዓመት ካለፈው ሲሆን፣ ይህም የመያዣ ሰጪው ፈቃድ እንደሚያስፈልገው ከድንጋጌዎቹ አቀራረጽ መረዳት ይቻላል። የመያዣ ምዝገባ ማቃናትና

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[25] ይህም የሚሆነው የመያዣ ውሉ ለመሻሻል የመያዣ ሰጪው ፈቃድ አስፈላጊ በመሆኑ ነው።

[26] የፍትሐ ብሔር ሕግ፣ ሶስተኛ መጽሐፍ፣ አንቀጽ 10፣ ክፍል 3 ፣ ከቁጥር 1621-1636

[27] የፍትሐ ብሔር ቁጥር 1623(1)

መሰረዝ በባለገንዘቡ (በመብት ተጠቃሚው) ጠያቂነት ብቻ እንደሚከናወን አመላካች ድንጋጌ ባለመኖሩ ዓቃቤ መዝገቡ አሥር ዓመት ያለፈውን የመያዣ ዉልም ያለመያዣ ሰጩው ፈቃድ በባለገንዘቡ ጠያቂነት ብቻ ለማከናወን አይችልም።

ማጠቃለያ

በታተሙ የሰበር ችሎት ፍርዶች መጻሕፍት መግቢያ በተደጋጋሚ እንደሚገለጸው የሰበር ችሎቱ ፍርዶች ምንም እንከን የላቸውም የሚባሉ አይደሉም። በሕግ ጆርናሎች፣ መጽሔቶችና ጽሑፎች በተደጋጋሚ ከሚሰጡ ትችቶች በመነሳት በችሎቱ የሚሰጡ አንዳንድ ፍርዶች ችሎቱ ውሳኔዎችን ወጥና ተገማች የማድረግ ዓላማውን ማሳካት እንደሚቸግረው አመላካች ናቸው። አንዳንድ ፍርዶች ከሕጉ ጥሬ ንባብና ከመንፈሱ በተቃረኑ መጠን ተከራካሪዎች በሕጉና በችሎቱ ላይ ያላቸውን መተማመን እንዳያሳጣቸው ሥጋት አለ። ችሎቱ ሕግ ተርጓሚ እንጂ ሕግ አውጭ ባለመሆኑ በተቻለ መጠን ከሕጉ ደረቅ ትርጉም ሳይወጣ ፍርድ ካልሰጠ ተዓማኒነቱ አከራካሪ ይሆናል።

በዚህ ጽሑፍ ከማይንቀሳቀስ ንብረት መያዣ ምዝገባ ጊዜና እድሳት ጋር በተያያዘ የተመለከትናቸው ሁለት ፍርዶች ለዚህ ማሳያ ናቸው። ሕጉ ለማንም በሚገባ ቋንቋ የማይንቀሳቀስ መያዣ ምዝገባ ከ10 ዓመት በኋላ ካልታደሰ እንደሚሰረዝ ደንግጓል። ሕጉ በዚህ ጊዜ ባለገንዘቡ መብቱን መጠቀም ካልቻለ የመያዣ መብቱ እንደሚሰረዝበት የግለጸ በመሆኑ ምንም ዓይነት መብትን ያለመጠቀም ምክንያት መሰረዙን አያስቀረውም። ባንኮችን

በተለየ የሚገዛ ድንጋጌ በሌለበት ሁኔታ ማስጠንቀቂያ መስጠት ጊዜውን ያራዝማል ማለት ሌላ የሕግ ድንጋጌ መቅረጽ ነው። ባንኮች መያዣው እንዲታደስ ያላቸውንም አማራጭ ሲጠቀሙ መያዣ ሰጪው ስምምነቱን ካልገለጸ ምዝገባው ሊሰረዝ ይገባል። የመያዣ ሰጪውን ፈቃድ የመስጠት ግዴታ ከውል ሕግ መሠረታዊያን፣ ከዋስትና ባህርያትና ከማይንቀሳቀስ ንብረት ምዝገባ ድንጋጌዎች መረዳት ይቻላል። በዚህ ረገድ ሰበር ችሎቱ በሁለቱም ጭብጦች የሰጠው ፍርድ የሕጉን መንፈስ ያልተከተለና ከሕጉ ደረቅ ንባብ ጋር የማይጣጣም ነው። ሰበር ችሎት በሌሎች ጉዳዮች እንደሚያደርገው እነዚህን ሁለት ፍርዶች ሰባት ዳኞች በተሰየሙበት ችሎት እንደገና ሊያስተካክላቸው ይገባል።

በሌላ በኩል በየጊዜው የሚጸፉ የሰበር ፍርድ ትችቶችን አሰባስቦ ዳኞችና ባለድርሻ አካላት ምክክር እንዲያደርጉ ካልተመቻቸ የፍትሕ ሥርዓቱን በአግባቡ ማሳደግ አይቻልም። የሕግ ምሁራን፣ ዳኞችና በተለያዩ ዘርፍ የሚገኙ የሕግ ባለሙያዎች በዉይይት፣ በትችት፣ በጥናት ወዘተ· ለፍርዶቹ ጥራት አስተዋጽኦ ካላደረጉ ሌሎች አገሮች የደረሱበትን ዕድገት ማግኘት አስቸጋሪ መሆኑ አይቀርም።

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