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Preface

Hawassa University Journal of Law (HUJL) is an endeavour of the School of Law at Hawassa University, established to provide a platform for expanding legal scholarship. The journal publishes double-blind peer-reviewed articles, notes, case comments, and book reviews on legal issues, policies, theories, and challenges relevant to Ethiopia in local, national, regional, and international contexts. HUJL is dedicated to advancing legal scholarship through rigorous research and inquiry, offering a forum for academicians, researchers, lawmakers, judges, practitioners, and policymakers to share their work freely. In its past seven volumes, the journal has published numerous contributions from these diverse stakeholders; these contributions are accessible freely.

Similarly, this volume features seven articles and a book review contributed to HUJL in 2024. These peer-reviewed articles offer diverse insights into the legal, socio-legal and business law issues that reflect the dynamics and evolving landscape of laws, policies and practices in Ethiopia. The socio-legal contributions cover critical issues ranging from the intricacies of intimate partner violence survivors in the criminal justice system and the implications of BITs on sustainable development to the accessibility of civil justice for deaf persons in Ethiopia. These contributions offer several valuable insights into the existing gaps and required reforms in the Ethiopian legal framework, including a more survivor-centred criminal justice system, sustainable development-friendly domestication of BITs and enhancing inclusivity of deaf persons in the civil justice system.

In addition, the business law-related articles offer a broader discourse on how Ethiopian business laws and institutions, such as regulatory agencies, courts, banks and CSOs, are adapting to the current challenges and economic opportunities, by unearthing the legal nature, understandings, experiences and implications on different themes, mainly on compromise agreements, mortgaged properties, CSOs income generations and telecom consumer protections. Therefore, in this volume, these contributions provide valuable insights into specific legal issues in Ethiopia by drawing national and international experiences as well as highlighting the need for legal reforms and adaptations to meet the pursuit of equitable and sustainable justice, development and inclusivity.

At this end, I would like to extend my appreciation and gratefulness to all the contributors, internal and external reviewers and language editors in addition to the dedicated members of the Editorial Board. Your collective efforts have been instrumental in bringing this volume to reality and ensuring the quality and success of the scholarly contributions made in this publication.

Yidneckachew Ayele Zikargie (PhD)
Editor-in-Chief

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Intimate Partner Violence Survivors and the Criminal Justice System: A Case Study of Addis Ababa City Administration

Helen Abelle Melesse ♣

Abstract

The Ethiopian criminal justice system fails to recognize intimate partner violence against women (IPVAW) survivors as active participants in their cases, treating these crimes solely as offenses against society and neglecting survivors' rights and agency. This oversight and the lack of adequate guidelines for handling IPVAW cases leave actors unsure of how best to support survivors. This article aims to explore the rights and treatments of IPVAW survivors throughout their interaction with the criminal justice system, focusing on their roles, struggles, needs, and concerns. Employing a qualitative research approach, the study utilizes semi-structured in-depth interviews, focus group discussions, courtroom observations, and case analysis. Data was gathered from purposively selected survivors and actors within selected sub-cities of Addis Ababa. The findings reveal that the lack of adequate legal provisions, which require regular updates, leaves many survivors uninformed about their cases and the legal process. Additionally, survivors' input is rarely sought during adjudication or sentencing, further marginalizing their agency within the system. Furthermore, interactions with actors and the courtroom environment, among other factors, significantly shape survivors' experiences. Based on these findings, this article proposes comprehensive recommendations to ensure survivors' meaningful participation and improvement of their treatment throughout the criminal justice process.

Keywords: Criminal Justice System, Human Rights, Intimate Partner Violence, Survivors, Women

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Note: The author used the following acronyms: HJ: Honourable Judge; IPVAW: Intimate partner violence against women, and PP: Public prosecutor.

1. Introduction

Due to socio-cultural, legal, economic, and political factors, the realization of women's human rights has not always been a priority.[1] One of the main challenges obstructing women's full enjoyment of their fundamental human rights and freedoms is violence against women (VAW).[2] While the nature of violence inflicted against women may vary from one society to another due to socio-cultural and religious factors, VAW is a widely prevalent act that emerges in all societies throughout the world.[3] Nearly one-third of women worldwide experience physical and/or sexual violence in their lifetime.[4] Among the various forms of violence endured by women globally, intimate partner violence (IPV) is the most common.[5]

IPV refers to any "behaviour by an intimate partner or ex-partner that causes physical, sexual, or psychological harm, including physical aggression, sexual coercion, psychological abuse, and controlling behaviours."[6] It occurs across all settings and socio-economic, religious, and cultural groups.[7] Globally, around one-third of women who have ever been in intimate relationships reported experiencing physical and/or sexual violence from their partners.[8] Additionally, 38% of global murders of women are committed by their male intimate partners.[9]

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[1] United Nations Human Rights Office of the High Commissioner, Women's Rights are Human Rights, (2014). Available at: https://www.ohchr.org/documents/events/whrd/womenrightsarehr.pdf Accessed at 7 December 2023

[2]Alfredsson Gudmundur & Tomasevski Katarina, *A Thematic Guide to Documentation on the Human rights of Women; Global and Regional Standards*, (Vol.1, Raoul Wallenberg Institute Human Rights Guides, Netherlands, 1995) p.51

[3]Karen M. Devries et al., 'The global prevalence of intimate partner violence against women', (2013), PubMed. Available at: https://www.researchgate.net/publication/240310056_The_Global_Prevalence_of_Intimate_Partner_Violence_Against_Women/link/53d1f1300cf2a7fbb2e957cf/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19 Accessed on 1 December 2023

[4]World Health Organization, Violence against Women, (2021), available at: https://www.who.int/news-room/fact-sheets/detail/violence-against-women 15 September 2023

[5]United Nations Office on Drugs and Crime, Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls, (2019), p. XI, available at: https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf Accessed on 19 November 2023

[6] World Health Organization, *supra* note 4

[7]Karen M. Devries et al., *supra* note 3

[8]World Health Organization, Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non- partner sexual violence, (2013), p.2, available at: https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf?sequence=1 Accessed on 7 December 2023

[9]ibid

Despite the lack of complete data due to underreporting, Ethiopia grapples with a high prevalence of IPVAW.[10] Statistics show that among women aged 15 to 49 who experienced physical violence, 68% reported their husband or partner as the perpetrator, 25% reported a former husband or partner, and 2.5% reported a current or former boyfriend.[11] For sexual violence, 69% reported their current husband or partner, 30% reported their former husband or partner, and 2% reported their current or former boyfriend as the perpetrator.[12] It is important to note that some women identified multiple perpetrators. Moreover, 34% of ever-married women aged 15 to 49 have experienced spousal violence in the form of emotional, physical, and/or sexual abuse by their current or most recent husband/partner.[13]

As with many other legal systems, navigating the criminal justice system in Ethiopia presents substantial challenges for survivors[14] of violence.[15] It often lacks the capacity to address their specific needs and vulnerabilities.[16] The system can be insensitive and unwelcoming, with personnel displaying poor reception and treatment, insensitivity to the issue, and slow responses to reports.[17] Scarce psychosocial, medical, and legal support and poor communication regarding case progress further compound the trauma the survivors face.[18]

Although considerable research has been conducted concerning the rights and roles of survivors in criminal proceedings in Ethiopia, studies assessing the lived experiences of IPVAW survivors are highly limited. Thus, by employing a feminist approach to prioritize the inclusion of women's voices and perspectives, the main objective of this research is to explore the experiences of IPVAW survivors from the initial contact with the police to court proceedings. Accordingly, the study investigates the rights, roles, and treatment of survivors within criminal proceedings.

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[10]Sileshi Garoma, Meseganaw Fantahun, & Alemayehu Worku. 'Intimate partner violence against women in western Ethiopia: a qualitative study on attitudes, woman's response, and suggested measures as perceived by community members, BMC Reproductive Health Journal', Vol. 9, No.14, Aug. 2012, P.1

[11]Central Statistical Agency [Ethiopia] and ICF, *Ethiopia Demographic and Health Survey 2016.* (Addis Ababa, Ethiopia, and Rockville, Maryland, USA, 2016), p. 301

[12]Id, p. 303

[13]Id, p. 294

[14]This article uses the term 'survivor' instead of 'victim' when referring to individuals who have experienced IPVAW. This is because the term 'survivor' emphasizes their strength and agency in overcoming the crime.

[15]WorkuYaze, 'Status and Role of Victims of Crime in the Ethiopian Criminal Justice System, Bahir Dar University Journal of Law', Vol. 2, No.1, 2011, P. 105

[16]Marew Abebe & Alemtsehaye Birhanu. 'The Ethiopian Legal Frameworks for the Protection of Women and Girls from Gender-Based Violence, Journal of Governance and Development' Vol. 2, No. 1, 2021, P.86

[17]Worku, *supra* note 15, P. 124

[18]Id, p.113

To address these objectives, the research utilized both primary and secondary data sources. Primary data included relevant international, regional, and domestic legal frameworks that provide a foundational understanding of the legal frameworks governing IPVAW. It also included information gathered from informants through semi-structured in-depth interviews, focus group discussions, courtroom observations, and court case reviews. Informants included survivors of IPVAW, judges, prosecutors, police officers, defense attorneys, experts from shelters, one-stop centers, Addis Ababa City Administration Bureau of Women, Children, and Social Affairs, Ethiopian Women Lawyers Association (EWLA), as well as family elders and religious leaders.[19] Furthermore, secondary sources such as literature (both published and unpublished), official reports, and websites were consulted. Data analysis involved narration and content analysis techniques.

Purposive sampling was used to select five sub-cities: Arada, Bole, Kolfe-Keranio, Lideta, and Nifas-Silk.[20] This resulted in a sample encompassing five city court divisions, five first-instance court divisions, and one high court. Data was collected from 33 female IPV survivors who had navigated the justice system. Survivors were purposively selected based on factors such as age, socio-economic status, the type of violence they experienced, and the final judgments on their cases. Additionally, key actors were purposively selected based on their positions and experiences (total: 72 participants). Four focus group discussions were conducted, each comprising six participants, including judges, prosecutors, and survivors, facilitated by the author. Furthermore, 97 purposively selected closed IPVAW case files (from 2013 to 2023) adjudicated by the selected courts were reviewed. Data was further enriched through the observation of four court cases (the entire proceeding) involving IPVAW. Since this research employed a qualitative research approach, the sample size was determined by data saturation. The author followed all relevant ethical procedures throughout the study.

This article is divided into three sections. The first section examines how the current legal framework and practices affect survivors' rights to information, to get their voices heard, and to

[19]Data collection was conducted in two rounds. The first round took place from June 1 to November 14, 2022, and the second round occurred from January 25 to March 24, 2023 (These data were gathered for the purpose of the authors' PhD study).

[20]These sub-cities were purposively selected based on the number of VAW cases adjudicated in 2021.

make informed choices. The second section explores the treatment of survivors in their interaction with the police, prosecutors, and judges. Finally, the third section offers concluding remarks.

2. The Rights of Intimate Partner Violence Survivors in Criminal Proceedings

In 1985, the United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration aims to empower survivors of crime by granting them meaningful roles within the criminal justice process. However, this objective often remains unrealized, as survivors are frequently marginalized and reduced to mere tools for prosecution.[21] This marginalization stems from a perception that views crimes solely as transgressions against society and the state, neglecting individual survivors.[22] Within this framework, survivors hold no formal role beyond serving as primary witnesses for the prosecution.[23] They are neither considered clients of the prosecutor nor recognized as parties with a vested interest in the proceedings.[24] As a result, once an incident is reported, the state assumes responsibility for investigating the case, prosecuting the offense if there is sufficient evidence, and punishing the accused if found guilty.[25]

Like in many other legal systems, crime survivors in Ethiopia are explicitly marginalized within the justice system.[26] This marginalization stems, in part, from the failure to incorporate meaningful participatory rights for survivors into the 1961 Criminal Procedure Code.[27] Be that as it may, despite its non-binding nature, the Ethiopian Criminal Justice Policy recognizes survivors' right to participate in the investigation, prosecution, and adjudication of criminal cases, including following the case's progress and receiving updates on the decisions made.[28]

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[21] Worku, *supra* note 15, P.110
[22] Ibid, p. 145
[23] United Nations Office on Drug and Crime Vienna, Handbook on effective prosecution responses to violence against women and girls, (2014), p.47, available at: https://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_effective_prosecution_responses_to_violence_against_women_and_girls.pdf Accessed on 19 November 2023
[24] Ibid
[25] Ibid
[26] Biruk Jemal, 'Victims' Rights to Participation in Criminal Proceedings in Ethiopia: Lessons from Germany and the United States of America' (Master's Thesis, Jimma University, 2012). p.5
[27] ibid
[28] *The Federal Democratic Republic of Ethiopia, Criminal Justice Administration Policy,* available at: <http://www.ethcriminalawnetwork.com/system/files/FDRE%20Criminal%20Justice%20Policy%20%28Amharic%29.pdf> accessed 2 February 2024. Section 6.2.1

Survivors of IPVAW, similar to other survivors of crimes causing physical or mental harm under the Ethiopian Criminal Code, have limited participation in the legal process. The state takes full responsibility for the investigation, prosecution, and adjudication of cases. Informants of the study emphasized the limited role of survivors in criminal proceedings, noting that they are primarily needed to provide testimony as primary witnesses. For instance, PP-2 mentioned that the primary role of survivors in IPVAW proceedings is as witnesses. However, if survivors genuinely wish to see the suspect prosecuted, they may assist the investigative police in gathering evidence or identifying and locating other witnesses.

Survivors may benefit when the state handles the investigation and prosecution, as many burdens and costs are managed by governmental institutions.[29] However, the exclusive recognition of the police, prosecutor, and the suspect as the only parties involved, and the exclusion of survivors from participating in the case, raises concerns about the recognition of survivors' agency and rights. Therefore, this section explores how granting the state complete control over IPVAW cases affects survivors' rights, specifically focusing on three key rights essential for effective participation: the right to be informed, the opportunity to be heard, and the right to make informed choices.

2.1. The Right to Be Informed about the Status of the Case

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emphasizes the significance of keeping survivors well-informed about the developments in their cases.[30] It outlines the need to inform survivors about their rights, their role in formal legal proceedings, the timing and progress of these proceedings, and the disposition of their cases.[31] Additionally, the Updated Model Strategies and Practical Measures call upon member states to guarantee that survivors are notified of the offender's release from detention or imprisonment.[32]

[29] Worku, *supra* note 15

[30] General Assembly Resolution 40/34 (1985), available at: https://www.unicef-irc.org/portfolios/documents/472_un-declaration-crime.htm#:~:text=The%20Declaration%20of%20Basic%20Principles,Treatment%20of%20Offenders%20(Milan%2C%2026 (accesses on 2 September 2023). Article 5 and 6(a)

[31] ibid

[32] General Assembly Resolution 65/228, (2011), available at: https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2010/General_Assembly/A-RES-65-228.pdf (accesses on 19 September 2023). Para 17(c)

The right to be informed extends beyond just receiving information.[33] It also encompasses understanding the impact of court decisions on the survivor's well-being.[34] As such, when a survivor reports an incident to the police, it is imperative to ensure that she understands the consequences of her actions and that the criminal justice system's response is predictable, clear, and transparent.[35] Therefore, the right to be informed encompasses a survivor's entitlement to receive information throughout the criminal justice process about her rights, role, the legal process, case progress, and the outcome of criminal proceedings.

In Ethiopia, there is a lack of adequate criminal legal provisions that obligate actors to update survivors about the status of their cases.[36] Only a few provisions within the Criminal Procedure Code, such as Articles 39 and 43, can be considered exceptions to this norm.

According to the Criminal Procedure Code of Ethiopia, upon receiving an investigation report from the police, the public prosecutor decides whether to take action under Article 38[37] or close the case file according to Article 39.[38] If the public prosecutor chooses to close the investigation file, she/he is required to send a copy of her/his decision to the Attorney General, the survivor, if any, and the investigating police officer.[39]

Furthermore, a public prosecutor may also refuse to institute proceedings under specific circumstances.[40] In these cases, such refusal must be in writing, clearly indicating the reasons for the decision.[41] A copy of the decision shall be sent to the investigating police officer, the survivor or her legal representative, or other appropriate persons stated under Article 47 of the Criminal

[33] Emma E. Forbes, 'Perception and reality: an exploration of domestic abuse victims' experiences of the criminal justice process in Scotland' (PhD Thesis, University of Glasgow, 2019). p. 183

[34] ibid

[35] Id, p. 181

[36] To address this shortcoming, the draft Criminal Procedure Code mandates that the investigating police, upon request, must inform the complainant about the steps taken and the progress of the investigation, unless such disclosure jeopardizes the safety of individuals or obstructs the investigation process, as stipulated in Article 70.

[37] This encompasses decisions to prosecute the accused, order a preliminary inquiry, request further investigation, or refuse to institute proceedings.

[38] According to Article 39(1. A, b & c) of the Criminal Procedure Code, the justifications for closing an IPVAW police investigation file could be: if the accused is deceased and prosecution is no longer possible, or if the accused enjoys legal immunity under special laws or public international law, the suspect is under nine years of age.

[39] The Criminal Procedure Code of Ethiopia, 1961, Article 39(3), Proc No. 185/1961, *Fed. Neg. Gaz. Year 32nd*

[40] As stated under Article 42(1.a, b & c) of the Criminal Procedure Code, these include if she/he believes there is not enough evidence to secure a conviction or if the accused cannot be located and the case cannot be tried in his absence or if "the prosecution is barred by limitation and or the offense has been made the subject of a pardon or amnesty." However, sub-article 1(d) is not incorporated because it has been repealed by Proclamation No. 39/1993

[41] Criminal Procedure Code, *supra* note 39, Article 43

Procedure Code.[42] Although the prosecutors' obligation to provide information about case status to survivors is limited to sending copies of their decisions, this system partly satisfies the information needs of survivors by offering updates without requiring them to expend unnecessary time, energy, or money.[43]

This research explored how survivors of IPVAW accessed information about their cases in the study area. Findings revealed inconsistencies in communication practices. According to PP-13, when a court delivers a final judgment, prosecutors who have survivors' contact information would reach out to inform them of such a decision. PP-15 noted that survivors could independently attend court sessions, but if they fail to do so, prosecutors would provide them with updates about their cases and the final decisions made.

However, PP-2 emphasized that prosecutors are not obligated to proactively update survivors. He argued that prosecutors only require survivors' presence for testimony, but following the case afterward is optional. The informant suggested that survivors then contact the prosecutor handling the case or access archives for updates, if desired. This view was shared by many participants who believe survivors could get information about case progress through court attendance or archives. However, they described direct updates from prosecutors as uncommon and entirely dependent on the individual prosecutor handling the case.

These concerns were mirrored in survivors' experiences. Some reported not being informed about final sentences passed on their cases or the release of perpetrators from detention or prison, highlighting a concerning information gap. S-31 recounted reporting the violence to the police but was puzzled when they released the perpetrator after three days. She mentioned that the actors did not inform her about his release, nor did they explain the reasons behind it or why they ceased the investigation.

S-23 expressed that she had not had the opportunity to properly meet the prosecutor handling her case and felt uninformed about its status. She found out about the perpetrator's release from prison only when he returned home one day, which caught her off guard. S-26 shared a similar story of feeling left in the dark by the actors involved in her case. She stated that she had no idea about the final judgment and only heard rumors about the perpetrator's release. She highlighted that she

[42] Ibid
[43] Worku. *Supra* note 15, p 110

never received any updates from the prosecutor handling her case. The data suggested that survivors were often not informed about the release of the accused on bail, probation, parole, and amnesty as well as the undertaking of such proceedings.

The research also revealed instances where survivors were made to feel unwelcome and intrusive when seeking information about their cases from actors handling them. Some survivors reported facing ridicule and mistreatment when inquiring about the progress of their cases. S-31 recounted how she repeatedly visited the police station to seek information on whether the perpetrator, who had escaped after committing the crime, had been captured. However, she was met with dismissive and unhelpful responses from the officer, making her feel like a burden and nearly causing her to lose hope. S-24 reported experiencing mistreatment and insults from the police officer handling her case when she inquired about its progress, highlighting the challenges survivors face when seeking information.

Despite the importance of being kept informed about their case, most survivors in the study area reported that they were not adequately informed about the investigation, prosecution, adjudication processes, and final judgment. This lack of information often left them navigating the criminal justice system without fully understanding it.

2.2. The Right to Be Heard in Criminal Proceedings

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires states to empower survivors of crime to express their views and concerns during relevant stages of proceedings that affect their interests.[44] This right must be balanced with the rights of the accused and operate within the framework of each nation's criminal justice system.[45]

The effectiveness of providing survivors with a voice extends beyond simply acknowledging their right to express their views.[46] Their voices must be given due weight and consideration throughout the proceedings.[47] Thus, it is vital to provide survivors with a timely and meaningful opportunity to speak, ensuring that their voices are genuinely heard.[48] Recognizing survivors' voices in the

[44] UN General Assembly Declaration A/RES/40/34. *Supra* note 30, Article 6(b)
[45] ibid
[46] Kristin L. Anderson, 'Victims' Voices and Victims' Choices in Three IPV Courts, Violence Against Women Journal', Vol. 21, No.1, 2014, pp. 105–124. p.108
[47] Ibid
[48] Ibid

adjudication process can impact case outcomes by validating the harm caused by the crime, enhancing survivor safety, and allowing for some degree of choice in terms of victim-centered and case-specific outcomes.[49]

2.2.1. Survivors' Voices at the Pre-Trial Stage

One instance in which survivors' voices could be heard is when they report the violence they have encountered to the police. According to the Ethiopian Criminal Procedure Code, "any person has the right to report any offense, whether or not he has witnessed the commission of the offense, with a view to criminal proceedings being instituted."[50] As such, like other members of the public and as injured parties, survivors have the right to report the violence they have undergone to the appropriate authorities. Furthermore, regarding crimes punishable upon complaint, only survivors or their legal representatives can file complaints.[51]

The Criminal Procedure Code of Ethiopia grants the police the authority to investigate crimes.[52] During this initial investigation, survivors undergo interviews, and their testimonies are documented. However, the Code does not specify a role for survivors during the investigation stage. Consequently, survivors' voices may only be heard by the investigative police when they provide their testimony as witnesses. As a result, survivors lack the legal right to request or advise investigative officers on specific actions during the investigation.[53] They also cannot inspect the investigation file, be present during interrogations, or examine witnesses.[54]

Once the police investigation is complete, the Criminal Procedure Code grants the public prosecutor the authority to determine the case's fate.[55] The prosecutor can either choose to prosecute the case or decide not to prosecute.

In cases where the prosecutor chooses to proceed with prosecution, the survivor has no formal say in determining the specific charges filed.[56] However, if the prosecutor decides against prosecution for a crime punishable upon accusation, a survivor can file a grievance for administrative review

[49] Id., p.116
[50] Criminal Procedure Code, *supra* note 39, Article 11(1)
[51] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, Article 212, Proc No. 414/2004, *Fed. Neg.Gaz*
[52] Criminal Procedure Code, *supra* note 39, Article 9
[53] Worku, *supra* note 15, P.131
[54] Ibid
[55] Criminal Procedure Code, *supra* note 39. Article 38
[56] Worku, *supra* note 15, P.135

if she disagrees with the decision.[57] Unfortunately, Proclamation No. 39/1993[58] repealed Article 44(2) and Article 45 of the Criminal Procedure Code. This eliminated the survivor's previous right to appeal a prosecutor's refusal to initiate a lawsuit under Article 42(l)(a). Consequently, survivors have significantly less recourse and voice within the criminal justice process.

However, for offenses punishable upon complaint, if the public prosecutor's refusal aligns with Article 42(1)(a), the survivor can pursue private prosecution.[59] The Criminal Justice Policy also allows private prosecution for crimes punishable upon complaint, at the survivor's expense.[60] In such cases, the prosecutor must issue written authorization for the appropriate person mentioned under Article 47 of the Criminal Procedure Code to conduct the private prosecution, and a copy of this authorization shall be sent to the court with jurisdiction.[61]

If the survivor successfully institutes private prosecution, the case shall proceed in accordance with Article 123-149 of the Criminal Procedure Code, with the parties having the same rights and duties as in public proceedings.[62] Essentially, the survivor becomes a party to the case by replacing the public prosecutor, and judgment will be rendered in the same manner as in ordinary cases.[63] However, there are instances in which the court may require the private prosecutor to provide security for costs.[64]

2.2.2. Survivors' Voices during Trial

The recognition of the right to be heard when courts make decisions regarding bail and sentencing significantly impacts survivors of IPVAW. Therefore, without compromising the rights of the accused, survivors should be given the opportunity to express their views and concerns on such matters.[65]

[57] Id, P.136
[58] Office of the Central Attorney General of the Transitional Government of Ethiopia Establishment Proclamation, 1993, Article 24, Proc No. 39/1993, *Fed. Neg. Gaz.*, Year 52nd, No. 24
[59] Criminal Procedure Code, *supra* note 39, Article 44(1)
[60] The Ethiopian Criminal Justice Policy, *supra* note 28, Section 3.10
[61] Criminal Procedure Code, *supra* note 39, Article 44(1)
[62] Id, Article 153(1)
[63] Id, Article 153(2)
[64] Id, Article 152
[65] UN General Assembly Declaration A/RES/40/34. *Supra* note 30, Article 6(b)

Generally, arrested individuals have the right to be released on bail.[66] However, in certain exceptional circumstances outlined by law, the court may deny bail or require a sufficient guarantee for the person's conditional release.[67] There are two main scenarios where the right to bail is recognized: when the offense does not carry the death penalty or rigorous imprisonment for fifteen years or more, or when there is no imminent risk of death for the victim.[68] However, bail may be denied if the applicant is unlikely to comply with bail conditions, is a danger to the community and might commit further offenses, or could tamper with evidence or intimidate witnesses.[69] Although the possibility of further offenses is a valid reason to deny bail, survivors cannot directly express their fear of the accused to the court.[70] They must communicate their concerns to the public prosecutor or police, who then decide whether to present these facts and object to the defendant's release.[71]

In most IPVAW cases, the prosecutor or police present objections to bail. However, in a case[72] observed for this research, deviating from the usual practice, the judges directly asked the survivor for her opinion on the request for bail. She informed the court that the defendant continued to harass her from prison by calling, texting, and sending photos. She also presented printouts of the texts and photos as evidence and expressed her fear for her safety and that of her children if the accused were to be released on bail. The court accepted her plea and denied bail.

Once again, the court asked the survivor's opinion regarding bail on the day it was scheduled to rule on whether to open the case for defense. Both the survivor and her children cried in court, demonstrating their fear of the accused and their opposition to his release. Taking this into account, the court again denied bail.

Giving weight to a survivor's voice regarding whether she faces a risk of violence is crucial, particularly in IPVAW cases. This is because the defendant may have easy physical access to the survivor, often sharing a residence. As a result, if he is released on bail, the survivor may be subjected to retaliation or renewed abuse.

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[66] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 19(6), Proc No. 1/1995, *Fed. Neg. Gaz., Year 1st, No. 1*
[67] ibid
[68] Criminal Procedure Code, *supra* note 39, Article 63
[69] Id, Article 67
[70] Worku, *supra* note 15, P.133
[71] ibid
[72] Public Prosecutor v. Mohammod Fereja, Federal High Court, Lideta Division, File Number 305080, 2024

Similar to most bail proceedings, survivors typically have no opportunity to express their views on sentencing. There is also no legal provision that allows them to make statements about the impact of the sentence on their lives.[73] Instead, the court considers aggravating and mitigating circumstances presented by the prosecution and the defense, respectively.

This lack of voice was exemplified in a case[74] observed for this study. After both the prosecutor and the defendant presented aggravating and mitigating circumstances, the survivor requested to be heard in court before sentencing. This request was conveyed to the court through the prosecutor, who argued its benefit to the case. However, the court ultimately denied the request, citing a lack of such a procedure.

HJ-12 echoed this sentiment, stating, "Survivors do not have any role in sentencing in our courts; we do not ask their opinion." He noted that there is no procedure in place that allows survivors to provide input on sentencing. Instead, the prosecutor presents her/his comments based on the law and may not necessarily seek the survivor's opinion in this regard. He explained that criminal proceedings are often complex and beyond the understanding of most survivors, making it difficult for them to provide informed comments on sentencing, which requires legal expertise. Nevertheless, he emphasized the value of creating a space for survivors to share their views with the court on some matters, allowing the court to balance public interest with survivors' rights. The data gathered for this study revealed that none of the survivors interviewed were consulted about the sentences imposed on perpetrators. Additionally, in none of the cases reviewed did the court seek the survivors' opinions before the final decision.

Furthermore, within the Ethiopian criminal justice system, survivors of crime, unless acting as private prosecutors, lack legal standing to appeal judgment of acquittal, discharge, or sentences deemed inadequate.[75] This means prosecutors are not obligated to consult with or inform survivors about decisions unfavourable to their case. Even in cases with potential legal or factual errors, survivors have no say in the prosecutors' decision to appeal.[76] As a result, since they lack the legal

[73] One of the significant improvements made in the draft Criminal Procedure Code is under Article 310(2), this provision allows the court, during the submission on sentence, on its own initiative or upon a request from the prosecutor or the victim, to grant the victim the opportunity to share their views on the extent of the harm they have suffered.
[74] Public Prosecutor v. Mohammod Fereja, *supra* note 72
[75] Biruk, *supra* note 26, p.67
[76] ibid

standing to appeal and express their dissatisfaction with the outcome of proceedings or the sentence themselves, their only recourse may be to use administrative channels to pressure public prosecutors to appeal.[77]

The study revealed a limited recognition of survivors' right to be heard in criminal proceedings. While some informants identified situations where survivors might have a voice, these opportunities were rare. For example, PP-13 mentioned that survivors, primarily serving as witnesses, could be called upon to provide additional case-related information, such as details about ongoing violence, potential threats from the defendant's release, or his past criminal history.

HJ-10 stated that if the defendant and the survivor had mediated, and the defense presents the mediation document as evidence for mitigating punishment, the court might call the survivor to confirm that she signed the document willingly. HJ-16 added that survivors may be asked to verify if they have received compensation, if this issue arises. HJ-17 noted that although the prosecutor is the owner of the case in criminal cases, the court may call the survivor when argumentative mitigating circumstances are raised.

However, these scenarios were rare. According to most of the survivors interviewed for this research, their roles were limited to being witnesses, and the court did not seek their input on any matters. As a result, a considerable number of survivors expressed dissatisfaction with the adjudication process and the final judgments given in their cases, as they felt alienated and their concerns ignored.

2.2.3. The Right to Join Civil Claims in Criminal Proceedings

Even though survivors' involvement in criminal cases is considerably restricted, both the Criminal Code and the Criminal Procedure Code entitle survivors to join their civil claims in criminal proceedings. According to Article 101 of the Criminal Code:

> Where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation. To this end, they may join their civil claim with the criminal suit.

[77] Worku, *supra* note 15, P.141

Accordingly, under the law, survivors have an active role in the adjudication of their civil claims. Survivors may present their application to the court adjudicating the case to grant them an order of compensation for the injury sustained.[78] This claim must be submitted in writing and should clearly state the type and amount of compensation being sought, and in filling such an application, the survivor is not required to pay court fees.[79] If the application is accepted, the survivor shall be granted the right to actively participate in the proceedings and shall enjoy the same evidentiary rights as any other party involved.[80] At the close of the case for the defense, the court shall allow the survivor or her representative to address the court directly or through legal counsel regarding the appropriate compensation amount.[81] If the application is dismissed, the survivor may initiate a civil proceeding in a court having jurisdiction.[82]

However, in the cases analysed for this research, none of the survivors instituted civil claims for the violence they encountered. According to a considerable number of survivors interviewed, they did not institute civil claims because they were unaware of their rights, as no one informed them. Others did not want to engage in another prolonged court proceeding. As a result, the author was unable to assess the adjudication process of cases where survivors joined their civil claims with criminal suits.

2.3. The Right to Make Informed Choices

The concept of informed choice is presumed to empower survivors to participate in decisions about the progression of their case and potential outcomes.[83] However, allowing IPV survivors to make these choices is a subject of controversy.

Some scholars argue that excluding survivors' choice is essential, particularly in IPVAW cases, to protect them from potential blame for having their partners prosecuted and from pressures by their partners to drop charges.[84] Due to the pervasive coercive control within IPV relationships, the survivors' genuine fear of retaliation from their abusive partners, and the economic dependence of

[78] Criminal Procedure Code, *supra* note 39, Article 154(1)
[79] Ibid
[80] Id, Article 156(1)
[81] Id, Article 156(2)
[82] Id, Article 155(3)
[83] Anderson, *supra* note 46, P. 107
[84] Ibid

many survivors on their perpetrators, their ability to make a genuine 'choice' is severely constrained.[85]

According to this view, survivors may be unwilling or unable to seek justice for the violence they encountered due to love, fear and shame, economic dependence, etc., resulting in no punishment for the perpetrator.[86] Opponents of survivor choice also express concerns that allowing survivors to choose the outcome of the case could lead to varying treatment of similar crimes based on survivors' wishes, potentially infringing on defendants' rights to equality before the law.[87]

Under the Ethiopian Criminal Procedure Code, a survivor's ability to make informed choices is protected in crimes punishable upon complaint, as the case can only be instituted against the accused if the survivor or her legal representative files a complaint.[88] Accordingly, the survivor has full autonomy to decide whether the case proceeds.

PP-2 affirmed that the current practice for cases punishable upon complaint grants survivors the right to withdraw[89] their claim at any stage before a judgment is delivered. PP-12 added that survivors can present mediation documents to the prosecutor and request the termination of the suit before it reaches the court. She highlighted that survivors can withdraw their complaint at any stage, even after the case has reached the court, as long as a judgment has not been issued. However, for crimes punishable upon accusation, the survivor's consent is less relevant, and her reporting the crime is not a compulsory criterion for the police to initiate investigations. [90]

When it comes to sentencing, the Updated Model Strategies and Practical Measures emphasize that laws, policies, procedures, and practices governing decisions related to the arrest, detention, and terms of any form of release for the perpetrator should prioritize the safety of survivors and others close to them and should strive to prevent further acts of violence.[91] The instrument further stipulates that sentencing should take into account the impact of these decisions on survivors and their families.[92] Moreover, the safety needs of survivors should be considered when making decisions regarding non-custodial or quasi-custodial sentences, granting bail, conditional release,

[85] Ibid
[86] Ibid
[87] Id, P. 108
[88] Criminal Code, s*upra* note 51, Article 212
[89] This practice is in line with Article 221 of the 1957 Penal Code of Ethiopia
[90] Criminal Procedure Code, *supra* note 39, Article 11
[91] UN General Assembly Resolution No. A/RES/65/228, *supra* note 32, para 16(g)
[92] Id, para 17. a.(v)

parole, or probation.[93] Ultimately, achieving this requires recognizing the agency and voice of survivors as they possess the most intimate knowledge of how the decision will impact their lives.

In Ethiopia, judges consider various factors when determining appropriate punishment for crimes. However, survivors' perspectives are often missing from these decisions.[94] This exclusion extends to decisions on probation, parole, and amnesty, as survivor input is not considered a prerequisite for these post-trial measures.[95] An exception to this is Proclamation No. 840/2014, which outlines considerations for granting pardon.[96] Article 20(7) specifies that the court should, if possible, consider the survivors' or their family's opinion on a pardon request. However, the proclamation fails to provide detailed provisions guaranteeing the survivor's right to be 'reasonably, accurately, and timely' notified of the proceeding.[97] It also lacks specifics on how survivors can participate and the weight given to their opinions.[98] According to the data collected for this research, in most cases, survivors' inputs are neither consistently sought during criminal proceedings nor considered a precondition for ordering post-trial measures.

Having established the rights and roles of IPVAW survivors in criminal proceedings in the study area, the next section will explore their treatment while navigating the criminal justice system.

3. The Treatment of Intimate Partner Violence Survivors in the Criminal Justice System

Internationally, the concerns of survivors have been recognized and addressed through various human rights instruments and general recommendations. For example, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power guarantees survivors the right to access the criminal justice system, receive prompt redress, and be treated with compassion and respect for their dignity.[99] This declaration emphasizes the importance of providing survivors with appropriate assistance throughout the legal process and avoiding unnecessary delays in case disposition.[100]

[93] Id, para 15(j)
[94] Worku, *supra* note 15, P.143
[95] Ibid
[96] Procedure of Granting and Executing Pardon Proclamation, 2014, Article 20, Proc No. 840/2014, *Fed. Neg. Gaz.*, Year 20th, No. 68
[97] Biruk, *supra* note 26, P.70
[98] Ibid
[99] UN General Assembly Declaration A/RES/40/34. *Supra* note 30, Article 4
[100] Id, Article 6

Furthermore, the UN General Assembly has adopted a resolution[101] specifically crafted to address issues of domestic violence against women. This resolution calls upon states to take measures to protect survivors and prevent domestic violence.[102] These measures include adopting, strengthening, and implementing legislation that prohibits domestic violence, ensuring proper investigation, prosecution, and punishment of perpetrators, and providing legal and social assistance to survivors.[103] Additionally, the resolution emphasizes on protecting survivors from double victimization due to gender-insensitive laws or practices and ensuring proper access to justice and remedies.[104]

Another instrument that could be used as a standard for the treatment of survivors of IPVAW is the Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice. This instrument calls upon member states to provide proper protection to survivors before, during, and after criminal proceedings.[105] It further emphasizes protecting the privacy, dignity, and safety of survivors to enable them to testify in criminal proceedings and avoid secondary victimization.[106]

While the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not have provisions specifically addressing VAW, its General Recommendation No. 35 calls upon states to take various actions for the elimination of gender-based violence against women. These measures encompass prevention, protection, prosecution, punishment, redress, data collection, and monitoring.[107] The recommendation emphasizes a victim-centered approach throughout this process.[108] It also asks states to guarantee the privacy and safety of survivors and witnesses of gender-based violence and ensure their access to financial aid, legal assistance, medical, psychological, and other services.[109]

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[101] General Assembly Resolution 58/147 (2003), available at: https://documents.un.org/doc/undoc/gen/n03/503/40/pdf/n0350340.pdf?token=V5IIbjbs50cRlSiSxL&fe=true (accessed on 7 February 2024)
[102] Id, para 5 & 7
[103] Ibid
[104] Ibid
[105] Id, para 17.i
[106] Ibid para 15.c
[107] CEDAW General Recommendation on Gender-Based Violence against Women, updating General Recommendation No. 19, No. 35 (2017), available at: https://www.vn-vrouwenverdrag.nl/wp-content/uploads/General-Recommendation-35-update-van-19.pdf, (accessed on 7 February 2024). para 28
[108] Ibid
[109] Id, para 40(c)

At the regional level, the Maputo Protocol obligates states to take legislative, administrative, social, and economic measures to prevent, punish, and eradicate VAW.[110] Under this instrument, member states have the obligation to punish perpetrators of VAW and provide "accessible services for effective information, rehabilitation, and reparation for victims."[111]

Domestically, the Ethiopian Criminal Justice Administration Policy addresses issues related to the treatment of survivors. The policy demands the adoption of legislation that incorporates the special handling of survivors of gender-based violence.[112] It has also guided the establishment of special units within the police, prosecutor's office, and courts to support crime prevention, investigation, prosecution, and the provision of other support services in cases concerning women, children, persons with disabilities, etc.[113] Even though many of the instruments mentioned above are non-binding (except for the Maputo Protocol), they set standards for how states should treat survivors of crime who interact with the justice system.

This section explores the treatment of IPVAW survivors who have navigated the criminal justice system in Addis Ababa City Administration. It assesses their experiences from initial contact with the police to court proceedings, examining their struggles, needs, and concerns throughout their journey.

3.1. Reporting to the Police

The criminal justice process begins when law enforcement receives information about a crime, which can come through various channels, triggering an investigation to gather evidence and build a case.[114] In Ethiopia, Article 9 of the Criminal Procedure Code grants the police the mandate to investigate crimes.

Similar to that of Ethiopia, many legal systems designate the police as the initial point of contact for reporting crimes, making reporting the case to the police a crucial first step for survivors

[110] Id, Article 4.2(b)
[111] Id, Article 4.2(e, f)
[112]The Ethiopian Criminal Justice Policy, *supra* note 28, Section 6.2.1
[113] Id, Section 6.5
[114] Aderajew Teklu and Kedir Mohammed, 'Ethiopian Criminal Procedure Teaching Material' (2009), Justice and Legal System Research Institute available at: https://www.lawethiopia.com/images/teaching_materials/CRIMINAL%20PROCEDURE.pdf accessed on 12 February 2024. p.78

seeking justice.[115] Thus, police interventions grounded in empathy, practical support, and appreciation of pivotal moments play a significant role in empowering women to break free from violence and move toward a safer environment.[116] In contrast, police who fail to acknowledge the seriousness of the violence and downplay its severity unintentionally place women's lives at greater risk.[117] Therefore, it is vital for police to take official measures to prevent violence against women and ensure they are not re-victimized due to police inaction and insensitive enforcement practices.[118] However, police officers in Ethiopia currently lack clear guidelines on how to interact with and assist survivors of violence, potentially resulting in variations in the treatment of survivors by different officers.[119]

Many study participants reported negative experiences with the police, describing them as unwelcoming and unhelpful. Several survivors recounted pressure from police to resolve their issues through mediation, even in cases involving severe injuries.

For example, S-4 shared her experience, stating, "When I went to the police, they told me they do not want to get involved because it is a husband-and-wife matter. They told me to go home and apologize to my husband. They did not take my case seriously at all." S-14 shared a similar story: "My partner beat me and kicked me out of the house in the middle of the night. I went to the police to report it, but they sent me away, saying they do not get involved in domestic issues and I should resolve it through mediation."

Several survivors expressed feelings of frustration and hopelessness. S-6 stated that she has given up on getting justice because she believed the system disrespects and abuses women everywhere they turn for help. She felt no one understood her experience and believed the police's inaction made her more vulnerable. She believed that when women encounter violence, the police would stand aside and watch. S-31 echoed this sentiment, criticizing the disparity between how the media portrays police protecting women and the reality of her experience. She stated that despite her

[115] Yvonne I Crichton-Hill, 'Stories of Resistance: Women Moving Away from Intimate Partner Violence. University of Canterbury.' (PhD Thesis, University of Canterbury, 2016). p.352
[116] Ibid
[117] Ibid
[118] Office of the United Nations High Commissioner for Human Rights, Human Rights Standards and Practice for the Police, (2004), p.42, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/training5Add3en.pdf accessed on 21 January 2024.
[119] Abiyou Girma, *The police and human rights in Ethiopia*, available at: https://www.abyssinialaw.com/blog/the-police-and-human-rights-in-ethiopia accessed on 12 December 2023.

injuries, the police did not offer her assistance or make any effort to apprehend the perpetrator. They claimed they lacked transportation and required her to hire a taxi for them. Even then, they showed no willingness to investigate the case properly.

Some survivors reported mistreatment and harassment by police officers. S-26 described experiencing secondary victimization, stating, "I went to the police because my ex-partner distributed pornographic videos of me to my colleagues. But some of the officers I met asked me for sexual favours. It was very disappointing. The people who were supposed to protect me were trying to take advantage of me." S-33 claimed some officers demanded payment or sexual favors in exchange for help.

S-4 recounted her experience: "I went to the police to report being beaten and thrown out of my house. The officer did not believe me. She called me an ill-mannered woman and said she felt sorry for my husband because he had a wife like me. She said he is a good man and I am the problem."

Moreover, despite Article 37 of the Criminal Procedure Code mandating that police officers complete investigations promptly and refer cases to the prosecutor without unnecessary delay, many survivors reported excessive delays in their cases. For instance, S-32 stated,

> When my partner beat me up, threatened to kill me, and threw me out of the house, I was terrified. So, I went to the police fearing for my life, expecting swift justice. Instead, they just kept giving me long appointments. They made me believe that there is no justice. I did not get the protection I expected from them. Such failure of the police, I believe, is one of the reasons why violence against women is escalating.

S-23 also stated,

> Despite witnessing the severity of the violence, the police offered no immediate remedy. They suggested mediation, which I refused, as the situation was not suitable. Then they recommended suing, but the process dragged on with minimal support. Finally, a new investigator took over, finalizing the investigation within a few months. It was pure luck. In her opinion justice depends on getting a good officer, not the merit of the case, and reporting violence does not guarantee justice.

Data for this study was gathered from police stations under the Addis Ababa Police Commission. These stations have special units dedicated to responding to violence against women and children (Women and Child Protection Unit). However, these units do not handle IPVAW cases. Instead, any police officer investigates them like other crimes, and survivors receive no special treatment. Accordingly, the investigation process lacks support from psychologists and social workers.

Furthermore, the interview rooms where survivors of IPVAW were often interviewed were also observed for this study. Survivors were often interviewed within the offices of the investigative officers. These offices were often shared by multiple officers, creating crowded spaces with officers and other clients coming and going. Such an environment raises concerns about the privacy and comfort of survivors during these sensitive interviews.

3.2. Survivors' Experience with Public Prosecutors

One of the key activities in the criminal procedure is prosecution.[120] After completing the investigation, the investigating officer submits a report regarding the results of the investigation to the public prosecutor.[121] Upon receiving the report, the prosecutor decides whether to pursue charges or close the case. In the cases reviewed for this study, if the prosecutor chooses to proceed under Article 38(a), they typically contact survivors, who are often the primary witnesses.

Prosecutors are expected to treat survivors with courtesy, respect, and sensitivity to their trauma.[122] Unfortunately, the prosecution of crimes against women is often hindered by stereotypes that diminish the severity of these offenses.[123] Consequently, certain charging patterns tend to prefer less serious charges and alternative dispute resolution methods, such as mediation.[124] Additionally, the absence of empathy from such professionals increases the risk of survivors being re-victimized throughout the legal process.[125]

Some survivors reported that prosecutors initially advised them to resolve their cases through mediation because the offense was committed by an intimate partner and was considered minor.

[120] Aderajew Teklu and Kedir Mohammed, *supra* note 114, p. 167
[121] Criminal Procedure Code, *supra* note 39, Article 37(2).
[122] United Nations Office on Drug and Crime Vienna, *supra* note 23, p.50
[123] Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/23/49 (2013), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/AHRC234 English.pdf, accessed on 12 December 2023, paras. 53-56.
[124] ibid
[125] United Nations Office on Drug and Crime Vienna, *supra* note 23, p.60

This sentiment was echoed by some interviewee prosecutors, who cited various reasons for recommending mediation in IPVAW cases. These reasons included a desire to protect the family, lack of evidence, or concerns that survivors might change their minds later.

Survivors also reported limited interaction with prosecutors after their initial meeting. Many only received a few minutes to discuss procedures before trial. This lack of communication left them feeling uninformed about the court process and unable to ask questions. Most of the interviewee survivors expressed that prosecutors did not keep them updated on their cases. S-33 mentioned that the prosecutors handling her case did not provide any information about the process or the status of the case. She revealed that the case had been prolonged for reasons she did not know. Since the prosecutors did not inform her about the progress of the case, she became scared and doubtful of their impartiality and competence. She added that the frequent changes of the prosecutors handling her case also concerned her and made her doubt how well the new prosecutors knew her case.

Some of the prosecutors indicated that IPVAW cases are handled the same way as other crimes, with no special procedures followed or support offered to survivors. Even when survivors express fear of further attacks from perpetrators, prosecutors often fail to offer solutions beyond requesting bail denial (if applicable) due to a lack of shelters. As PP-5 mentioned, survivors are sometimes advised to hide with relatives or friends for temporary safety. This lack of communication and support from prosecutors leaves many survivors feeling frustrated.

3.3. Survivors' Experiences throughout the Trial Process

Testifying at trial can be a daunting and intimidating experience, especially for survivors who are unfamiliar with court procedures. The lack of familiarity can lead to anxiety and fear. Court proceedings are inherently confrontational, placing survivors in a position of limited control and direct exposure to the offender.[126] Survivors are compelled to recount their traumatic experiences in an environment less supportive and safe than a therapy session, having to do so in front of a defense attorney and the defendant whose role is to question their credibility, challenge their memory, and even dispute the truth of their account.[127]

[126] Carol E. Jordan, 'Intimate Partner Violence and the Justice System: An Examination of the Interface, Journal of Interpersonal Violence', Vol. 19, No. 12, 2004, P. 2
[127] Ibid

In Ethiopia, there is a lack of established rules or laws governing survivors' treatment and protection during criminal hearings and trials, particularly when they attend cases or appear as witnesses before courts.[128] The only exceptions are cases where in-camera sessions are permitted when the survivor's interests are deemed to be at risk.[129] Therefore, it is crucial to evaluate how survivors perceive the court environment and the trial process by exploring their lived experiences.

3.3.1. Courtroom Environment

The courtroom environment can be intimidating for many survivors of gender-based violence due to its formal and traditional nature, including the attire of legal professionals, seating arrangements, speech, and spectators.[130] This formality, akin to a theatrical performance, may contribute to secondary victimization for survivors, exacerbating their distress.[131]

In the study area, courtrooms typically have two doors: one for judges and other court officers, and another for defendants, survivors, witnesses, other clients, and observers. Survivors testify in close proximity to the accused, just a few feet away. The courtrooms are often filled with judges, prosecutors, and defense attorneys, all dressed in black. Judges usually sit behind an elevated bench at the front and center, overseeing the proceedings. Armed federal police escort prisoners, while uniformed and armed police officers monitor the courts. Other attendees include court facilitators, detainees from various prisons, other clients, observers (such as experts from different institutions, relatives of both survivors and defendants, and other interested parties), and other court staff. Throughout the cases observed for this study, the courtrooms consistently reached full capacity with no available seats.

Survivors were not provided with separate entrances, toilets, or waiting areas. They waited alongside other clients, including friends and relatives of the accused, for their appointments. Security in the courtrooms was stringent, with officers from the Addis Ababa city police and fully armed federal police officers present. However, there were no escorts for survivors from the court, and witnesses waited outside the courtroom until their names were called by a court facilitator.

[128] Worku, *supra* note 15, P. 143
[129] Ibid
[130] United Nations Office on Drug and Crime, *supra* note 5, P. 142
[131] Ibid

The impact of this environment on survivors is profound. S-1 mentioned that she was afraid to testify in court and found herself unable to articulate everything she wanted to say. She expressed her disappointment in herself, attributing it to her own fears rather than any restriction from the judge who allowed her to testify freely. She described the courtroom as intimidating, especially since it was her first time testifying. S-26 echoed these sentiments, emphasizing the fear and unfamiliarity associated with her initial court appearance. According to most of the interviewees for this study, the court environment significantly affects survivors, with many finding it intimidating and hindering their ability to express themselves confidently.

3.3.2. The Trial Process

Courts apply the same trial process to IPVAW cases as they do to other ordinary crimes. Upon receiving a formally filed charge from the prosecutor, the court with jurisdiction schedules a trial date.[132] Subsequently, based on lists provided by both the accused and the prosecutor, the registrar issues summonses to all relevant parties.[133] On the designated day and time for the hearing, the court convenes, witnesses and the accused are presented, and the case is called.[134]

The trial begins with the presiding judge reading the charges to the accused and addressing any potential objections.[135] After dealing with objections, if the accused pleads not guilty or pleads guilty but the court requires evidence to corroborate the plea, the public prosecutor outlines the charges and intended evidence in a neutral and unbiased manner.[136] The prosecutor then calls witnesses and experts, who are sworn or affirmed before providing their testimony.[137] Each witness undergoes examination by the prosecutor, cross-examination by the accused or their advocate, and re-examination by the prosecutor.[138] Throughout this process, the court reserves the right to pose additional questions to witnesses as necessary for a fair judgment.[139]

[132] Criminal Procedure Code, *supra* note 39, Article 123
[133] Id, Article 124.1
[134] Id, Article 126.1&3
[135] Id, Article 129
[136] Id, Article 131, 132, 133.1, 134.2, 136.1 & 136.2
[137] Id, Article 136.2
[138] Id, Article 136.3
[139] Id, Article 136.4

3.3.2.1. Examination-in-Chief, Cross Examination, and Re-examination

Survivors called as witnesses have the opportunity to recount their stories in court. However, the examination process is controlled by the involved parties, who frame questions to serve their interests.[140] Witnesses are compelled to answer these questions as presented, often unable to convey their experiences as they would prefer.[141] They frequently face interruptions before fully explaining the harm they have suffered.[142]

While the Criminal Procedure Code of Ethiopia specifies the types of questions permissible in examination-in-chief, cross-examination, and re-examination, it does not provide special procedures for the adjudicating of sensitive cases like IPVAW. As a result, survivors of IPVAW are treated similarly to witnesses in other ordinary crimes.

In the cases observed for this study, cross-examinations were marked by prolonged questioning, repetitive queries demanding precise recollection of minor details, and questions designed to pressure survivors into providing answers favoured by the defense. During cross-examination, prosecutors play a crucial role in shielding survivors from defense attorneys by objecting to irrelevant or inappropriate questions. However, in one of the cases observed for this study, the prosecutor failed to protect the survivor in this manner. Interestingly, the presiding judge did a better job than the prosecutor in curbing repetitive questions and preventing the defense from introducing new issues not raised during the examination-in-chief.[143]

In this case, a survivor of a violent crime testified without psychological support while facing questioning from prosecutors, judges, defense attorneys, and the defendant. She was repeatedly instructed to raise her voice, respond in a specific manner, answer swiftly, etc., which could be traumatic experiences in themselves. Throughout her testimony, she trembled and cried. Afterwards, she informed the author that she had been shaking the whole time and it had taken her a while to adjust. However, she expressed that the judge's rejection of some of the questions posed by the defense made her feel supported and encouraged her to continue.

[140] Worku, *supra* note 15, P.112
[141] Id., P.113
[142] Ibid
[143] Public Prosecutor v. Mohammod Fereja, *supra* note 72

Despite the potential benefits of implementing victim-friendly benches to mitigate the anxiety and trauma survivors often face while testifying in open courts, such benches were not utilized in any of the observed cases or files reviewed in this research, leaving a considerable number of survivors vulnerable.

4. Concluding Remarks

Survivors of intimate partner violence in Ethiopia play a limited role in criminal proceedings. Their involvement is restricted to reporting the incident, particularly in crimes punishable upon complaint, and serving as witnesses. Since the state assumes complete responsibility for investigating, prosecuting, and adjudicating the case, survivors are often left uninformed, unheard, and without a sense of agency.

One major challenge in this regard is lack of updates on the progress of a case. Many survivors remain uninformed about the adjudication process and the final judgment, leading them to feelings of isolation, frustration, and further victimization. The draft Criminal Procedure Code partially addresses this issue by granting survivors the right to request updates on the investigation, a positive step towards better communication.

Survivor participation should be considered in decisions that affect their safety. This includes the right to express their views and concerns during bail proceedings, probation, parole, and amnesty decisions. However, this right must be balanced with the right of the accused. Thus, legal frameworks that guarantee survivor participation without infringing upon the rights of the accused are essential to achieving this balance.

The Ethiopian criminal justice system lacks clear guidelines for treating survivors, leaving them vulnerable to bias, discrimination, and inadequate support. Deep-rooted patriarchal attitudes further hinder access to justice, manifesting through victim-blaming, disbelief, secondary victimization, and inadequate services.

To address these challenges, clear standards are needed for receiving, treating, and protecting IPVAW survivors throughout the process. Additionally, training is necessary for police officers, prosecutors, judges, and other actors on trauma-informed care, gender sensitivity, and survivor needs. Increasing the use of specialized benches equipped to handle IPVAW cases with sensitivity and establishing referral mechanisms that help survivors access services from trained

professionals offering psychological, medical, legal, and social support are also crucial steps forward.

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Ethiopia and Its FDI: Towards Domesticating BITs for Sustainable Development

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Abstract

The main objective of this article is to explore rooms for sustainable development friendly domestication of BITs in Ethiopia. It employed a doctrinal research approach and examined a range of policy documents, legal frameworks, interview data and scholarly literature. Bilateral Investment Treaties (BITs) are used as a tool for the promotion and attraction of FDI. However, the implementation of BITs without tailoring to the Ethiopian context would contravene the constitution and many international conventions to which Ethiopia is a party. Domesticating the BITs in support of Ethiopia's sustainable development agenda is desirable amid there is limited understanding of how the BITs could be domesticated and implemented in line with sustainable development within the Ethiopian context. Though Ethiopia's BITs lack alignment with the sustainable development agenda, customizing for alignment is required. As BITs require domestication for their domestic implementation, such a process opens a room for recalibrating rights and obligations in line with the sustainable development agenda. Both national and international policies for sustainable development agenda together with continued calls for reform to the BITs regime nurture customized domestications. In addition, BITs ratification in Ethiopia should go beyond the declaration of ratification and reproduce treaty provisions together with the interpretation of vague sustainable development impeding provisions.

Keywords: Bilateral Investment Treaty, Foreign Direct Investment, Sustainable Development, Sustainable Development–Friendly, Treaty Domestication

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1. Introduction

Economic globalization together with investment and trade liberalization is bringing new challenges to environmental and social well-being. Multinational corporations are one of the players and drivers in the economic globalization process.[1] As they are mainly profit-motivated, they tend to be profiteering and pose challenges to the sustainability agenda, especially in least-developed countries where law enforcement and regulatory institutions are weak.

Taking dangers posed by unregulated FDI and the profiteering nature of MNCs into consideration, sticking to principles that curve and mitigate problems like sustainable development is of paramount importance. As it has been sensed that unfettered FDI and globalization need reconsideration, some call this reconsideration and globalization slowdown as 'deglobalization' or 'slobalization'.[2] From an international investment regulation perspective, deglobalization refers to the trend of countries adopting policies and measures that restrict or limit foreign investments and the activities of MNCs within their borders.[3]

Hence, debatably, deglobalization in the context of international investment regulation can manifest itself in the trend of current rethinking in the BITs-making process and ISDS process.[4] As there are legitimacy concerns with regard to the unbalanced nature of BITs and ISDS mechanisms as they were found to be contrary

[1] Jeffrey A. Hart, Globalization and Multinational Corporations, 2017, pp 332-333 https://hartj.pages.iu.edu/documents/harris.pdf. Accessed June 21, 2024

[2] Julien Chaisse and Georgios Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', World Trade Review, Volume 22, Special Issue 1 p.2, 2023 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/BDF63F6BFCA83A91584538103CA26EC3/S1474745622000404a.pdf/domestic-investment-laws-and-international-economic-law-in-the-liberal-international-order.pdf.> accessed Dec. 10, 2023

[3] Gong and et al, 'Globalization in reverse? Reconfiguring the geographies of value chains and production networks', Cambridge Journal of Regions, Economy and Society 2022, 15, 165–181, p166, <https://doi.org/10.1093/cjres/rsac012. > accessed Nov. 12, 2023

[4] Georgios Dimitropoulo, 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform', The Journal of World Investment & Trade 21(1):71-103, February, 2020, p71

to the police power of host states, call for governments to reconsider or terminate their BITs are intense.[5] There are also calls for restricting the scope of ISDS mechanisms, which allow foreign investors to bring claims against host countries for alleged breaches of investment protection.[6]These calls for revisions, if implemented, could relax policy spaces for host states and enable them to regulate in line with sustainable development issues.

In the context of FDI, sustainable development priority to Ethiopia should refer to a range of measures ensuring that FDI benefits are distributed equitably and reach different segments of society, particularly those who are traditionally marginalized or disadvantaged. It recognizes the importance of addressing social, cultural, and environmental concerns as it is evident from the unequivocal incorporation of sustainable development in the FDRE Constitution.[7] The Constitution recognizes not only sustainable development in general terms but also the environmental and social dimensions of sustainable development in particular.

Ethiopia has signed BITs with about 35 counties to promote FDI inflow. Many BITs to which Ethiopia is a party did not embrace a sustainable development agenda.[8] Direct application of these treaties poses problems on public interest objectives like ensuring sustainable development agenda. Hence, the quest for sustainable development-aligned investment treaty implementation needs careful academic scrutiny, and a search for Sustainable development-friendly BIT domestication requires discursive analysis.

[5]Ibid

[6] UNCTAD, Taking Stock of IIAs Reform: Recent Developments, issue 3, 2019, p3

[7] The Constitution of Federal Democratic Republic of Ethiopia, (1995), Art 43(1), Proclamation No.1/1995, Federal Negarit Gazeta, year 1. No 1. FDRE Constitution

[8] See for instance agreements with Major sources of FDI to Ethiopia i.e. Agreement Between the Government 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, 1998; Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, November 2000

One of the mechanisms through which these treaties could be tailored to the host states' context for implementation is treaty domestication.[9] Domestication of investment treaties refers to the process of incorporating and adapting BITs into the domestic legal framework of a country so that it can be implemented.[10] The issue of domesticating BITs into the domestic legal system leads us to the 'Monist' and 'Dualist' conception of the relationship between the domestic legal system and the international legal system.

In Ethiopia, national and international legal systems are independent which would indicate that the Ethiopian legal system has a dualist nature. In dualist systems, whenever conflict arises between the international legal system and national legal system, the latter prevails or at least it is to be solved based on National courts and national laws.[11] Whatever nature the Ethiopian legal system may have in such monist and dualist categorization, host countries should be free to choose ways of domesticating to international treaties. Fortunately, textual analysis of all BITs Ethiopia signed indicates that they did not preclude making reservations and preferring ways of ratification.[12] Had there been any prohibition to that effect, making reservations would have been illegal as per Art 19 of the Vienna Convention on the law of treaties. Fortunately, Ethiopia is not a party to this treaty.

Currently, implementing BITs without tailoring them to the Ethiopian context would endanger the country's interests including the sustainable development agenda. Several studies are indicating that BITs to which Ethiopia is a party need

[9] John H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', AM. J. INT'L L. vol. 86(2), (1992), p324

[10] Hsieh PL, 'New Investment Rulemaking in Asia: Between Regionalism and Domestication.' World Trade Review Vol.22, 2023, P191 < https://doi.org/10.1017/S1474745622000362.> Accessed May 23, 2023

[11] James Crawford, Brownlie's Principles of Public International Law (OUP, 8th ed., 2012), p48

[12] UNCTAD, International Investment Agreements Navigator, available at: < https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia. > Accessed May 20, 2024

reconsidering.[13] However, studies focusing on the implementation of these treaties and their synchronicities with domestic legal frameworks are scarce. This article tries to shed light on how these treaties could be domesticated in line with the sustainable development agenda. It has employed a qualitative research approach and examined a range of policy documents, legal frameworks, scholarly literature and some interview data and attempted to indicate possible ways of implementing BITs in line with the sustainable development agenda.

This article has six sections. This first section embodies an introduction where the background of the research problem is addressed. The second section attempts to conceptualize domestication. The third section deals with the significance of aligning BIT domestication with sustainable development and the place given to sustainable development both nationally and at the global level. The fourth section discusses the need to give protection for public interests. The fifth section is about the importance of subjecting the BIT regime to democratic scrutiny. The final section discusses the challenges and available opportunities in the process of BITs domestication for sustainable development.

2. Domestication of Investment Treaties and the Margin for Embracing Sustainable Development in Host States

Foreign investment treaty domestication refers to the process of incorporating international investment agreements, such as BITs or other treaties, into the domestic legal framework of a state and making them enforceable.[14] 'A rule of international law is domesticated when a state incorporates and weaves it into its domestic

[13] Martha Belete and Tilahun Esmael, 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration', *Mizan Law Review,* Vol. 8, No.1 September 2014, p117; Mekonnen Seid, 'Renegotiating Ethiopian Bilateral Investment Treaties in line with the Constitutional Goal of the Right to Sustainable Development', (City University of Kong Hong, PhD Dissertation, 2021); Desalegn Deresso 'Balancing Interests under Bilateral Investment Treaties of Ethiopia: Focusing on State Regulatory Rights', Hawassa University Journal of Law (HUJL) Volume 6, July 2022

[14] Supra note 10

legislation and rule-making procedures.'[15] In this context, domestication refers to the act of transforming and integrating international investment agreements into a country's national laws.[16] This should give chances for host states to adapt the provisions of these treaties to the specific context and needs of the country in the ratification process. In the context of this article, international investment treaty domestication refers to sustainable development friendly if it recognizes or prioritizes and enhances sustainable development priorities of least developed countries. These sustainable development priorities include social inclusiveness, technology transfer, poverty reduction, environmental protection and economic growth.[17]

In conclusion, the discussion in this section implies those domestic regulatory norms are taking important places along with international orderings. We can take domestication/ratification of international investment treaties in this context. Our understanding of domestication could include the gradual establishment of rules within a domestic context, which may differ from or run alongside the rules of international investment law.[18] Though there are diversities among countries in the process of domestication, ratification and transformation are major components in the domestication process. Ratification refers to the declaration by a state to be bound by a treaty, while transformation is about converting the treaty's provisions into domestic law which refers to giving domestic legal effect to treaty provisions.[19]

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[15] Anthony D'amato, The Coerciveness of International Law, 52 German year book of international law. 437, (2009). (Northwestern University School of Law Public Law And Legal Theory Research Paper Series No. 10–60) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691367.> Accessed Jan 22, 2024

[16] Rommel J. Casis, Domesticating International Law: Resolving the Uncertainty and Incongruence, (Philippine Yearbook of International Law), 2020, p129

[17] OECD, Making Growth Green and Inclusive: The Case of Ethiopia, p5, (OECD Green Growth Papers), 2013

[18] Supra note 2.

[19] Pieter van Dijk & Bahiyyih G. Tahzib, The Parliamentary Participation in the Treaty-Making Process of the Netherlands, 67 Chi.-Kent L. Rev. 413 (1991). P417 Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/7.> Accessed June 1, 2024

3. Importance of Aligning Foreign Investment Treaty Domestication with Sustainable Development Agenda

Aligning foreign investment treaty domestication with a sustainable development agenda is important for countries in general and the least developed countries in particular. Sustainable Development Agenda embraces a global commitment to achieving environmental sustainability, social inclusion and economic prosperity.[20] The agenda enshrines values which are essential to least developed countries. These include addressing vulnerabilities like poverty, inequality, climate change, and other development challenges.[21] By incorporating these values into the domestication process, countries can ensure that foreign investment may not inhibit sustainability but also contributes to social progress, environmental protection, and human rights protection which are also values equally or more importantly competing together with investors' property rights protection.

The need for gearing development activities with sustainable development issues became more evident when the United Nations Member States adopted Sustainable development goals (SDG hereinafter) in 2015. In general, SDGs provide a comprehensive and universally accepted framework for addressing pressing challenges ranging from poverty and hunger to climate change and gender inequality.[22] They particularly cover addressing global challenges such as poverty, inequality, climate change, and environmental degradation.[23]

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[20] UNDP Policy and Programme Brief, 2016, p6. Available at: <https://www.undp.org/sites/g/files/zskgke326/files/publications/SDG%20Implementation%20and%20UNDP_Policy_and_Programme_Brief.pdf. > last accessed 3/30/2024

[21] ____UNSSC Knowledge Centre for Sustainable Development, the 2030 Agenda for Sustainable Development, p1. available at: <https://www.un.org/development/desa/jpo/wp-content/uploads/sites/55/2017/02/2030-Agenda-for-Sustainable-Development-KCSD-Primer-new.pdf. >accessed Jun.28, 2023

[22] J. Robert Basedow, The European Union's New International Investment Policy and the United Nation's Sustainable Development Goals Integration as a Motor of Substantive Policy Change? In Cosimo Beverelli et al (eds) *International Trade, Investment, and the Sustainable Development Goal*, (Cambridge University Press, 2020), pp52-53

[23] ____Together 2030, Balancing the pillars: Eradicating poverty, protecting the planet and promoting shared prosperity (Together 2030 Written Inputs to the UN High-Level Political Forum (HLPF) 2017), April 2017, p2. Available at:

Implementing BITs without making adjustments may exacerbate inequality, poverty and environmental problems. BITs by their inherent nature are unbalanced and are tilted towards giving much protection to foreign investors. The importance of foreign investment treaty domestication aligned with the sustainable development agenda may mitigate the unbalanced nature of the treaties. By integrating the principles and objectives of the sustainable development agenda into implementing strategies of investment agreements, countries can ensure that foreign investments may not inhibit sustainable development but also contribute positively to economic, social, and environmental sustainability.[24]

Foreign investment treaties focus on protecting investors' rights and providing favourable conditions for investment.[25] However, this narrow focus often disregards the potential negative impacts on host countries, including environmental degradation, social inequality, and the violation of human rights.[26] Aligning these treaties with the sustainable development agenda helps to address these concerns and foster a more holistic approach to investment as they emphasize the importance of leaving no one behind and ensuring inclusive development.[27]

3.1. Sustainable Development Policy Space

While Ethiopia lacks a comprehensive and independent sustainable development policy, it is possible to derive the principles and objectives related to sustainability from various sources such as the constitution, fragmented legislations, and different existing policies. In addition to the constitutional provisions, sustainable

<https://www.bing.com/search?q=Sustainable%20development%20addresses%20economic%20%2C%20social%20and%20environmental%20issuespdf#:~:text=Development%20Knowledge%20Platform-,https%3A//sustainabledevelopment.un.org/content/documents/150%E2%80%A6,-%C2%B7%20PDF%20file.> accessed Jun. 20, 2023

[24] ibid

[25] Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Kavaljit Singh and Burghard Ilge (Eds) *Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices*, 2016, P53

[26] United Nations/Economic and Social Commission for Asia and the Pacific (ESCAP), Sustainable development provisions in investment treaties, 2018, p14

[27] SDGs 1, 2,4,5,10

development is referred to in different piecemeal Ethiopian legislations including the Investment Proclamation.[28], the Industrial Parks proclamation[29], and Mining operation proclamation[30].

The FDRE constitution provides under Article 43(1) that the People of Ethiopia have the right to get improved living standards and sustainable development.[31] Article 43(3) also states that Ethiopia's right to sustainable development must be protected and upheld by all international treaties ratified by Ethiopia.[32] The fact that the constitution has taken the right to sustainable development as one of the values to be protected with due care offers a good opportunity to make it a guiding principle in the process of FDI regulations. The constitution also provides that the principle for external relations should be based on the protection of the country's national interests. It is provided that international agreements should promote the interests of Ethiopia.[33] This process inherently allows for the examination and potential reordering of treaty provisions within the framework of our legal system. It involves ensuring that the provisions and obligations outlined in investment treaties are aligned with the principles and objectives of sustainable development such as environmental protection, social inclusiveness, poverty reduction, and economic growth.

Thus, the concept of integrating and balancing environmental, social and economic issues all together has a constitutional basis.[34] Therefore, giving primacy to economic growth at the expense of environmental and social dimensions of

[28] Investment Proclamation, 2020, Proc.No 1180/2020, Art 5. Federal Negarit Gazette, year 26. No 28
Arts .17-22, Art 5.
[29] Industrial Park Proclamation, 2015, Proc No. 886/2015, Art 4(5), Federal Negarit Gazette, year 21, no 39
[30] Mining Operations Proclamation, 2010, Proc. No. 678/2010, Preamble, Federal Negarit Gazette,
[31] Supra note 7. Art 43(1)
[32] ibid, Art 43(3)
[33] Ibid, Art 86(3)
[34]Jibril Abdi, 'The Right to Development in Ethiopia', p8. Available at: <https://www.academia.edu/9359320/The_Right_to_Development_in_Ethiopia.> accessed Jun. 2, 2023

sustainable development is unconstitutional. This can be a guarantee for any government body that wishes to take measures with the purpose of aligning FDI activities with sustainable development.

The investment proclamation provides that one of the objectives of the proclamation is 'to improve the living standard of the peoples of Ethiopia by realizing a rapid, inclusive and sustainable economic and social development.'[35] This policy direction holds significance as it can aid in law enforcement and interpretation, even if it is not explicitly stated in the operational sections of the proclamation. This can be evident when we notice the powers and responsibilities of the Ethiopian Investment Commission (EIC) under Art 38 of the investment proclamation. The majority of the powers and responsibilities of the Commission are devoted to the promotion of investment and making the investment environment conducive for investors, not to a sustainable development agenda.

Ethiopian Industrial Park Proclamation has highlighted that one of the objectives is to attain sustainable economic development.[36] The Proclamation to promote the development of mineral resources provides its objective as 'the Government must protect the environment for the benefit of present and future generations and to ensure ecologically sustainable development of minerals.'[37]

Different Economic policy documents are prepared taking into account sustainable development agenda. For example, they are incorporated in the 1997 Environmental Policy of Ethiopia.[38] Ethiopia's Climate-Resilient Green Economy (CRGE) does also embrace pillars of sustainable development. The CRGE vision and strategy are based on the Constitution of Ethiopia and the environmental policy of Ethiopia.

[35] Supra note 28, Arts .17-22,
[36] Industrial Park Proclamation, 2015, Proc No. 886/2015, Art 4(5), Federal Negarit Gazette, year 21, no 39
[37] Mining Operations Proclamation, 2010, Proc. No. 678/2010, Preamble, Federal Negarit Gazette,
[38] FDRE (1997), Environmental Policy of Ethiopia, EPA/MoEDC, Addis Ababa, Ethiopia, 3.

[39]The first Growth and Transformation Plan (GTP I) has highlighted the crucial role of environmental conservation in achieving sustainable development.[40] The plan has also emphasized the importance of constructing a 'Green Economy' and implementing environmental laws as key strategic directions during its implementation period.[41] Similarly, the successor to GTP I, the Growth and Transformation Plan II (GTP II), recognizes the necessity for coordinated and concerted efforts to ensure rapid, sustainable, and equitable economic growth.[42] Furthermore, the Ten-Year Development Plan (2021-2030) has reiterated the significance of sustainable development.[43]

By incorporating the principle of sustainable development in the constitution, various legislations and economic policy documents would imply that FDI legal frameworks should be implemented in a manner which enhances sustainability. Any concerned body in FDI regulation would have all these opportunities and get a foundation for aligning regulations of FDI with the goals of sustainable development. However, upon closer examination of sustainable development in general and within the context of Ethiopia, it becomes apparent that there is a lack of genuine commitment to this goal. There is a lack of enforcement mechanisms or lack of clarity as to what would happen to investors who have undermined the overall pursuit of sustainable development.

Currently, the practice of orienting BIT-making with a sustainable development agenda is observable. Several recent BITs and model BITs make at least a preambular statement about sustainable development. For instance, the Indian Model

[39] Environmental Protection Authority (EPA) (2012), United Nations Conference on Sustainable Development (Rio+20), National Report, 19. Available at: https://sustainabledevelopment.un.org/content/documents/973ethiopia.pdf. (accessed 28, May, 2024)
[40] The First Growth and Transformation Plan (GTP I) (2010-2014), P119
[41] ibid
[42] ibid
[43] Planning and Development Commission, Ten Year Development plan: a path way to prosperity, (2021-2030), p14, p22, p34, p48

BIT, the Norway Model BIT, the Dutch Model BIT, the International Institute for Sustainable Development (IISD) Model BIT, and the Southern African Development Community (SADC) Model BIT are acclaimed for their Sustainable development orientation.[44]

Morocco - Nigeria BIT (2016),[45] Japan - Mozambique BIT (2013),[46]), Argentina - Japan BIT (2018),[47] India - Kyrgyzstan BIT (2019),[48] Türkiye-Uruguay BIT (2022) [49] Brazil- United Arab Emirates BIT (2019)[50] These are some examples of BITs with good sustainable development orientation. These BITs inculcate provisions on one or more environmental standards, labour rights standards, and human rights protection. Even if there are some recent Ethiopian BITs which have sustainable development orientation, some others are not ratified yet.[51] Interestingly, Ethio-United Arab Emirates BIT Ratified in 2021 should be praised for its sustainable development orientation. It incorporated sustainable development and its constituting elements in the preamble and specific treaty provisions.[52] It indicates that sustainable development is penetrating recent treaty-making practices.

3.2. International Commitments for Sustainable Development

The Stockholm Declaration[53] laid the foundation for the idea of sustainable development, it was the 1987 Brundtland Report, titled "Our Common Future," that popularized the concept and provided a comprehensive definition.[54] The report

[44] International Institute for Sustainable Development (IISD) Model BIT (2006); Southern African Development Community (SADC) Model BIT (2012)
[45] Preamble of Morocco - Nigeria BIT (2016)
[46] Preamble of Japan - Mozambique BIT (2013)
[47] Preamble of Argentina - Japan BIT (2018)
[48] Preamble and Arts 11 and 12 of India - Kyrgyzstan BIT (2019)
[49] Preamble and Art 13 of Türkiye-Uruguay BIT (2022)
[50] Preamble and arts 15-17 of Brazil- United Arab Emirates BIT (2019)
[51]Preamble of Ethio-Quatar BIT (2017) and Preamble of Ethio-Brazil BIT (2018)
[52] Preamble and Arts 11-13 of Ethio-United Arab Emirates BIT (2016)
[53] Declaration of the United Nations Conference on the Human Environment, 1972, (Stockholm Declaration)
[54] World Commission on Environment and Development (WCED), Paragraph 27 of Brundtland Report, Our Common Future, 1987

defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs.''[55] Since then, the notion of sustainable development has lingered in many international policy formulation endeavours. Based on this, one can notice the commitment of the global community to sustainable development in various instances. For instance, the notion of sustainable development has been promoted in three consecutive UN conferences. In 1992 the Earth Summit/Rio Conference[56], in 2002 the World Summit on Sustainable Development or Johannesburg Conference[57] and in 2012 the Rio+20 Conference[58] on Sustainable Development, the notion was given emphasis and was reiterated.

These world conferences were large both in size and diversity of participants. Not only representatives of sovereign states but also representatives from international NGOs, businesses and intergovernmental organizations have participated in the conferences.[59] The adoption of the SDGs in 2015 marked a significant milestone in global efforts towards sustainable development. The goals provide a shared framework for countries, organizations, and individuals to work together to achieve a more sustainable and equitable world by 2030. Since their adoption, the SDGs have influenced policy-making, development planning, and investment decisions at the national and international levels.

[55] ibid

[56] The conference had produced as the final document the Rio Declaration and had opened for signature two conventions - the UN Framework Convention on Climate Change and the Convention on Biological Diversity

[57] Johannesburg Declaration 2002, World Summit on Sustainable Development (Johannesburg Summit) 'Report' (26 August-4 September 2002) UN Doc A/AC.257/32, Chapter 5 is devoted to trade and FDI [45]-[47], and the action plans – Agenda 21 and the Johannesburg Plan of Implementation, see also UN Conference on Environment and Development 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF. 151/26/Rev 1 vol I, 3.

[58] 64th Session of the United Nations General Assembly, UN General Assembly's Resolution 64/236.

[59] IIDS Reporting Service, Earth Negotiations Bulletin, A Reporting Service for Environment and Development Negotiations, Vol.27, No.6, 25 July 2011. Available at: <https://cites.org/sites/default/files/common/com/ac/25/enb_sum.pdf. >accessed Jan. 24, 2024

Ethiopia is a party to many international conventions embracing elements of sustainable development. Among other things, these include United Nations Framework Convention on Climate Change (UNFCCC)[60], United Nations Convention to Combat Desertification (UNCCD)[61], the African Charter on Human and Peoples' Rights[62], Right to Organize and Collective Bargaining Convention, 1949 (No. 98)[63], and Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).[64] All these will furnish legal grounds for reordering BITs contravening sustainable development agenda. Literal implementation of BITs will result in violation of labor rights, human rights and environmental standards enshrined in these international conventions.

In addition to all these, currently, there are soft law instruments which intend to regulate behaviors of multinational Corporations in line with sustainable development. Even if it may be contended that soft laws lack enforceability as binding agreements, we could not disregard their normative value. They could serve as a framework for behavior, shaping expectations, and embracing persuasiveness. Additionally, they lay the groundwork for future binding norms by establishing common norms and standards. These includes the UN Global Compact,[65] the UN Guiding Principles on Business and Human Rights (UNGPs),[66] OECD Guidelines

[60] Ministry of Planning and Development, Ethiopia's Third National Communication to the United Nations Framework Convention on Climate Change (UNFCCC), 2022, p86

[61] The Federal Democratic Republic of Ethiopia Ministry of Environment and Forest, Second National Communication to the United Nations Framework Convention on Climate Change (UNFCCC), 2015, p217

[62] African Union, List of Countries Which Have Signed, Ratified/Acceded to The African Charter on Human And People's Rights, available at: <https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf.> accessed on 3/2/2024

[63] International Labor Organization (ILO), available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102950.> accessed on 3/2/2024

[64] ibid

[65] United Nations Global Compact and the UN Human Rights Office of the high Commissioner, Embedding Human Rights into Business Practice II, available at: https://www.ohchr.org/Documents/Publications/Embedding_II.pdf.

[66] UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011)

for Multinational Enterprises.[67] The UN Global Compact provides 10 principles embracing fundamental responsibilities of Businesses in the areas of human rights, labor, environment and anti-corruption.[68] The UNGPs on human rights provides also a set of global standards on business and human rights.[69] They emphasize the state duty to protect human rights the corporate responsibility to respect human rights and access of effective remedy for victims' corporate abuse and violations.[70]The need for equitable and inclusive development has been also reiterated under the UN Declaration on the right to development.[71] The declaration calls for stronger international cooperation and partnership between developed and developing countries to address global challenges and to bring about inclusive and equitable development.

Therefore, what is implicated in the above discussion is that there are important opportunities for host states indicating that the wind is blowing in their direction. The implication of all these global trends is that host states too need to take actions that are believed to be in line with sustainable development. Thus, host states have ample global policy support in the process of aligning FDI regulation with sustainable development.

4. Public Interest Protection

Under international law, including under international investment law, unilateral domestic actions taken by host States in the interest of the public would be legal if they are not used unpredictably, arbitrarily, discriminatorily, or to promote

[67] OECD Guidelines for Multinational Enterprises 2011 Edition, available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf.> Accessed Dec 22, 2023.
[68]African Union, List of Countries Which Have Signed, Ratified/Acceded to The African Charter on Human and People's Rights, available at: <https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf.> accessed on 3/2/2024
[69] UN Human Rights Office of the high Commissioner, Guiding Principles on Business and Human Rights, available at: https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights.
[70] Ibid
[71] UN, Declaration on the Right to Development, December 1986 (General Assembly resolution 41/128)

protectionism.[72] Developing host states need to balance offering regulatory incentives with regulating for public interest. Investment treaties and ISDS offer little flexibility, emphasizing rigid adherence to agreements over public interest and thus this nature of the treaties and ISDS mechanism needs reconsideration in favor of public interest.[73] Jorge Viñuales rightly states 'foreign investment agreements are exceptions to the principle that peoples and nations have sovereignty over their resources and that the public interest overrides the private interest.'[74] Therefore, measures by host states to protect public interest should be given supremacy as far as they are predictable, non-discriminatory and non-arbitrary.

Currently, considerable number of arbitral decisions from Investor State Dispute Settlement (ISDS herein after) process indicated that international investment treaties should balance investor protection and other legitimate public interests' issue like human rights protection and environmental issue. In line with this the Urbaser v. Argentina Tribunal stated that:

> International law recognizes that an investor accepts to become subject to the laws of the host state and it assumes the risk that there may be subsequent modifications to the regulations or that new measures may be adopted. The *Parkerings* Tribunal stressed that any businessman or investor knows that laws will evolve over time. The fair and equitable treatment standard requires good faith, transparency, reasonable treatment, free from arbitrariness and discrimination, and it does not protect any expectations that there will be absolute stability of the legal and commercial framework. The economic and social environment of a host State is relevant to such

[72] Carlo De Stefano, 'Litigating Climate Change Mitigation and Adaptation in Investment Dispute Resolution', ISSN 2724-6299 (Online) https://doi.org/10.6092/issn.2724-6299/18168, (Athena, Volume 3.2/2023, pp. 187-208), p204

[73] Nicolás M. Perrone, *Investment Treaties and the Legal Imagination, How Foreign Investors Play by Their Own Rules,* (Oxford University Press, 2021), p200

[74] Jorge E. Viñuales, 'Sovereignty in Investment law', in Zachary Douglas, *The Foundations of International Investment Law: Bringing Theory into Practice* (Eds)

> determination. In this regard, the State's leeway to issue regulations for reason of public order or interest is to be taken into account.[75]

Therefore, a trend seems to emerge to recognize adapting investment treaty obligations to accommodate legitimate public interest objectives. Investors are expected to recognize host states authority to issue regulations for public interest reasons like environmental, social and economic reasons.

Similarly, the *Methanex* Tribunal confirmed legitimacy of host state measures for protection of legitimate health issues.[76] The tribunal meaningfully advanced the development of legal principles by affirming the significance of a state's authority to regulate health matters despite its obligations to protect investments.[77] The tribunal's recognition that regulations implemented for a public purpose, characterized by non-discrimination and adherence to due process, possess the capacity to impact foreign investments without being deemed as expropriation or necessitating compensation would encourage host states to protect public interests including sustainable development agenda.

5. The Need for Democratic Scrutiny on BITs

Until recently, in the investment treaty-making process public deliberation and participation is limited as it was considered only a technocratic process.[78] As studies indicate, it is doubtful that government officials thoroughly evaluated the advantages and disadvantages of these treaties when they signed them.[79] The scarcity in public debate and participation in the treaty negotiation process and limited parliamentary scrutiny is criticized as it undermines the democratic process. However, currently

[75] *Urbaser S.A. v. Argentina,* ICSID Case No. ARB/07/26, Award, para 594, (Dec. 8, 2016).
[76] *Methanex Corp. v. United States*, UNCITRAL, Final Award (Aug. 3, 2005).
[77] Ibid
[78] Cotula, L., *Public Participation and Investment Treaties: towards a New Settlement? P42* (Brill, Leiden, 2021), available at: <https://www.iied.org/20116x. > accessed Nove 10, 2023
[79] Ibid, see also Lorenzo Declaration on the Right to Development | OHCHR, 'International Law and Practice: Democracy and International Investment Law', Leiden Journal of International Law, (2017), 30, pp. 351–382, p370

there seems to be an inclination to intensify democratic scrutiny of investment treaties.[80]

In line with this, Lorenzo Cotula stated that

> [D]emocratic scrutiny of investment treaty making has evolved significantly in recent years, particularly in the context of negotiations among medium- and high-income polities that offer space for political contestation. The institutions of representative democracy have provided an important arena for these developments. As investor-state arbitrations highlight the implications that investment treaties can have in a wide range of policy areas, some parliaments are taking a more proactive role in investment treaty making, and NGOs have put pressure on parliaments to do so.

The need for democratic scrutiny of investment treaties arises from the belief that these agreements should not be negotiated and ratified behind closed doors without adequate public participation and oversight.[81] It is suggested that decisions that can have significant impacts on a country's economic, social, and environmental policies should be subject to democratic processes and public debate. It entails involving a broader range of stakeholders, such as civil society organizations, affected communities, and national legislatures, in the negotiation, implementation, and review of investment treaties.[82] Such process can open a room for the people's representatives to ascertain investment treaties are promoting sustainable development needs of a country.

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[80] Elena Cima, 'Parliamentary Scrutiny over Investment Projects: The Case of Tanzania's Natural Resources
Regulatory Reform' in Eric De Brabandere and et al, *Public participation and foreign investment law: From The Creation of Rights and Obligations to Settlement of Disputes (Brill | Nijhoff, 2021)*, p177

[81] Joanna Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', The International and Comparative Law Quarterly, Jan., 2006, Vol. 55, No. 1 (Jan., 2006), pp. 121-159, p158

[82] Supra note 79, p374

The inclination towards intensifying democratic scrutiny of investment treaties reflects a growing awareness of the need to align international investment rules with sustainable development and social justice objectives, while also respecting the principles of democratic governance and human rights.[83] The leaning in the arbitral jurisprudence to embrace legitimate public interest into the investment protection space would strengthen host state attempts to align investment protection with sustainable development objectives.

Treaty making practices are blamed for their democratic deficits. There are urges to give greater role to the legislative body in the treaty making process in some countries like Australia.[84] The legislative body as representative of the people and transparent forum is considered best suited to fill the democratic deficit in the treaty making process.[85]

Though there is increasing interest in the democratic scrutiny attributable to increasing Investor State Arbitrations, a drive by NOGs and civil society organizations, and an increase in awareness of negative repercussions on BIT on local communities, there are challenges which shackled the democratic scrutiny.[86] In developing countries where there is less mature democracy, rooms for such scrutiny are reduced. Cotula stated this as 'where parliament and the executive are politically aligned and party discipline is strong, scope for independent scrutiny would tend to be reduced.'[87]

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[83] European Union, 'Parliamentary scrutiny of trade policies across the Western world', 2019, p4. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603477/EXPO_STU(2019)603477_EN.pdf. Accessed March 6, 2023.

[84] Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion,* (Oxford University Press, 2011) P29

[85] ibid

[86] Joanna Harrington, 'Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament', 2005, McGill Law Journal 50: 465. available at: <http://lawjournal.mcgill.ca/userfiles/other/3959529-1225244248_Harrington.pdf.> accessed May 28, 2024

[87] Supra note 79

This challenge to subject BITs to democratic scrutiny in the legislature is likely to face Ethiopia. There is fusion between the executive which is responsible to treaty signing and the legislature which is responsible to ratify BITs. The legislative body should have been one proper body which strike a balance between protecting foreign investors' rights and safeguarding public interest and thereby sustainable development.[88] This should have been a venue for identification and rectification of potential imbalances or negative impacts that may arise from BITs. Democratic scrutiny can contribute to greater transparency, accountability, and legitimacy in the implementation of investment treaties.

6. Challenges and Opportunities in Integrating Sustainable Development Agenda into Foreign Investment Regulations in Ethiopia

Integrating sustainable development into Ethiopia's FDI regulation is faced with both challenges and opportunities. One, among the challenges, includes maintaining delicate balance between investment protection and sustainable development. Foreign investment treaties often prioritize investor protection, while the sustainable development aims to promote economic growth, social inclusion, and environmental protection. Another challenge could be lack of commitment and institutional capacity to sustainable development friendly treaty implementation as evidenced from development first paradigm and reluctance to implement environmental standards.[89] In spite of such challenges, there are also opportunities for sustainable development friendly domestication and implementation of investment treaties including incorporation of sustainable development in the constitution and in different legislations.

6.1 Challenges

[88]Supra note 80, p178

[89] Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023; see also Elias Nour, The Investment Promotion and Environment Protection Balance in Ethiopia's Floriculture: The Legal Regime and Global Value Chain, (University of Warwick School of Law, PhD Dissertation unpublished), 2012, p264

6.1.1. BITs Potential Restraint on Ethiopia's Regulatory Space

The content of BITs is primarily influenced by unbalanced negotiations between capital exporting states with higher bargaining power and capital importing states with lower bargaining power.[90] The party that holds greater negotiating power in a state-to-state interaction influences the treaty to align more closely with its own preferences, whereas the less powerful party tends to accept the terms set by the stronger party without much influence.[91]Ethiopia as capital importing country is obviously with lower bargaining power in the treaty negotiation process as it is evident from nature of the BITs. They have given primacy to property rights protection of foreign investors with little attention to Sustainable development. Treaties are frequently negotiated with less consideration for the development priorities and needs of the host country since developed nations or multinational businesses frequently have stronger negotiating positions.[92]

The majority of treaties are criticized for restricting the regulatory autonomy of the host country. This is technically known as regulatory chill effect. Tietje et. al. define regulatory chill as 'a state will fail to enact or enforce *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration.'[93] It refers to a host states abstention from taking good faith regulatory measure for fear of arbitration with foreign investors.

Regulatory chill can be of three types: anticipatory regulatory chill, specific response regulatory chill and precedential regulatory chill.[94]Anticipatory regulatory chill refers to abstinence of policy makers from taking new public policy measures for

[90] Huikuri, Tuuli-Anna, 'Constraints and incentives in the investment regime: How bargaining power shapes
BIT reform', The Review of International Organizations vol. 18, (2023) p368 <https://link.springer.com/article/10.1007/s11558-022-09473-1. > accessed Jan. 24, 2024.
[91] ibid
[92] ibid
[93] Christian Tietje et al, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (2014) (Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands). P40
[94] Ibid p41

fear of the potential disputes with foreign investors.[95] Specific response regulatory chill refers to chilling effect of a specific regulatory measure once policy makers sensed actual or perceived notice of arbitration from investors.[96] Precedential regulatory chill happens when states hesitate to take regulatory measure for fear of arbitration taking experience from already settled disputes.[97] Though it is difficult to measure existence of one or the other kind of regulatory chill, increasing number of ISDS arbitrations would send signal to many host states including to Ethiopia. This is evident from the fact that currently, many states are trying to renegotiate or terminate existing treaties for fear of arbitral litigation.[98]

Ethiopia, like other least developed countries, encounter similar challenges and face comparable problems. For example, foreign investment treaties have clauses that restrict Ethiopia's ability to pursue policies that are in line with its development objectives as many of the BITs contain broad and unqualified Fair and Equitable Treatment (FET) clauses, indirect expropriation clauses and full protection and security (PS) clauses.[99] Investor-state dispute resolution procedures may also limit the capacity of Ethiopia to take measures that serve sustainable development for fear of arbitration risk. In order to ensure and advance sustainable development, it is crucial to strike a balance between investor rights and Ethiopia's regulatory autonomy.

[95] ibid
[96] ibid
[97] ibid
[98] Timothy Meyer, 'Power, Exit Costs, and Renegotiation in International Law', Harvard International Law Journal, Vol. 51, No. 2, Summer 2010, p395
[99] Art. 2(2) & 3(1&2) Ethiopia-Sweden BIT, Ethiopia-Libya BIT, Art. 3 (1); 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, Art2(3&4), Ethiopia-Austria 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)

Ethiopian BITs not only lack the necessary safeguards to the host states regulatory powers but also embrace vague standards like FET standards and indirect expropriation standards which are blamed to be sustainable development inhibiting.[100] These standards which are available in many BITs restrain host states regulatory space. Thus, there should be some mechanism to limit these provisions so that they should not limit host states regulatory autonomy unduly. In Ethiopia only few BITs try to maintain provisions having implication with host states regulatory power. Only the Ethiopia-France BIT[101] recognizes a general right to regulate by giving explanation to FET. Additionally, a few additional BITs specifically include environmental regulation measures. Only the preamble of the Ethiopia-Finland BIT[102] makes reference to the necessity for environmental protection. The Ethiopian-Belgian-Luxembourg BIT[103] includes a distinct provision for environmental protection, even though it has not yet come into effect.

To mitigate this problem, some countries are taking measures by clarifying vague investment protection standards. For instance, Morocco–Nigeria BIT and United Arab Emirates–Uruguay BIT provide that FET includes the obligation not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process of law.[104] European Commission and Canada in the CETA included textual clarification for some of the state's responsibilities to protect foreign investors.[105] Canada and the United States in their post-2001 reforms of NAFTA have also included such textual clarifications of investment protection standards.[106]

[100]Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, 2018, p60
[101] Ethio- France BIT, 2003(Explanation to Art 3 of the BIT)
[102] Preamble of Ethio-Finland BIT
[103] Art 5 of the Ethiopian-Belgian-Luxembourg BIT
[104] Morocco–Nigeria BIT (2016), Art. 7.2(a); United Arab Emirates–Uruguay BIT (2018), Art. 3.2(a)
[105] Gus Van Harten, 'Reforming the system of international investment dispute settlement' in C.L. LIM, *Alternative Visions of The International Law on Foreign Investment: Essays in Honor of Muthucumaraswamy Sornarajah*, (Cambridge University Press 2016) p118
[106] ibid

Even with the presence of these challenges, host states have the potential to mitigate these risks by creating a well-designed regulatory framework for FDI that aligns with sustainability components. It is possible to carefully scrutinize and reject BITs that can limit regulation in the interest of sustainable development or can put reservations on some provisions of the BITs during the ratification process. All legitimate critics leveled against the BITs regime could strengthen sovereignty reassertion through the process of domestication.[107] Ethiopian parliament is mandated by the constitution to do this.[108]This can create opportunity for governments to introduce policies that require foreign investors to meet certain localization requirements, such as local content obligations, technology transfers, or employment quotas, and environmental safety standards which can help in achievement of sustainable development objectives. These measures aim to promote domestic industries and ensure that foreign investments contribute to local economic development, social inclusion and environmental protection.

Ethiopia has about 22 active BITs which are ratified and has become part of enforceable domestic law.[109] Textual analysis of the ratification proclamations indicate that the BITs are incorporated into Ethiopian legal system without harmonizing them with domestic law especially with the constitution.[110]

6.1.2. Lack of Political Commitment and Law Enforcement Problems

Another challenge in the process of sustainable development friendly domestication of investment treaties may be related to lack of political commitment and lack of law enforcement capacity.[111] Political leaders may prioritize short-term economic gains

[107]UNCTAD, Taking Stock of IIAs Reform: Recent Developments, issue 3, 2019, p3
[108] Supra note 7, Art 43(3)
[109] UNCTAD, International Investment Agreements Navigator, available at:
< https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia. > Accessed May 20, 2024
[110] Supra Note 7. Art 43
[111] Interview with Addisu Tibebu, In Ethiopian Environmental Protection Authority Business Enterprises Follow Up and Control Expert, on 01/08/2023

over long-term sustainability goals.[112] This can lead to the relaxation of environmental and social regulations, compromising sustainable development efforts.

Sometimes development promoting legal frameworks may fail to achieve their objective due to weak law enforcement.[113] For instance, a study by Dejene (2013) revealed various factors for failure of EIA which would have been one of the tools to align FDI to sustainable development.[114] According to Dejene, EIA has failed due to lack of political commitment, absence of implementing subsidiary legislation, conducting EIA only for simulation or formality or conducting it after some projects have started operation.[115]

In Ethiopia, it is also expected that effective implementing and monitoring FDI regulations in line with sustainable development can be challenged due to limited capacity and expertise, insufficient resources and technical knowledge.[116] For instance environmental impact assessment experts provide factious study results without conducting real environmental impact assessment in the field.[117] The same is true in producing some required documents, for instance work plan in Ministry of Mining to obtain exploration licenses, to obtain permits from the government.[118]

6.1.3. Higher need for attracting FDI and Economy First Paradigm

[112] Ghebretekle Tsegai, 'Interrogating the Economy-First Paradigm in "Sustainable Development": Towards Integrating Development with the Ecosystem in Ethiopia' (2017) 11(1) Mizan Law Review 64, 79.

[113] Interview with Lemesa Erpie in Ethiopian Environmental Protection Authority Environmental Protection Audit expert, on 01/08/2023

[114] Dejene Girma Janka, 'The Impact of Transplanting Environmental Impact Assessment Law into the Ethiopian Legal system', Jimma University Journal of Law, Vol. 5, 2013, p95

[115] ibid

[116] Adugna Feyissa Gubena, 'Environmental Impact Assessment in Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation', Journal of Environment and Earth Science, ISSN 2225-0948 (Online) Vol.6, No.1, 2016, p7.

[117] Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023

[118] Interview with Netsanet Melese, In Ministry of Mining Exploration Permit Expert, on 03/08/2023

BITs are used as tools of FDI promotion than the importance of investors and host states behavior regulation. Investment promotion agents in a country may have incentives to maintain weak regulatory standards and resist improved regulation.[119] Typically, economic growth tends to prevail in the case of anticipated trade-off among the pillars of sustainable development.[120] Additionally, government may be hesitant to implement stricter FDI regulations for fear of deterring foreign investors, thus undermining sustainable development objectives.[121] Taking sustainable development merely as a green-washing without considering in its genuine content presents critical challenge in the process of aligning FDI regulation with sustainable development.[122] For instance, Ethiopian environment law enforcement was reported to be weak by BTI country report of Ethiopia in 2016. The possible reasons were stated to be the countries' higher desire for development/growth. The government did not need to scare FDI investors on ground of pollution and environmental regulations.[123] Similarly, focusing solely on economic growth without adequately considering the social and environmental dimensions of a country may be related to the development first paradigm. Elias (2012) stated this fact as ''sustainable development' in its current mainstream interpretation, has been reduced to serve as the façade for the 'growth first' paradigm.'[124] This setup can lead to unsustainable practices, such as exploitation of natural resources, labor rights violations, and disregard for environmental protection. Harmonizing FDI regulations with

[119] Interview with Addisu Tibebu, In Ethiopian Environmental Protection Authority Business Enterprises Follow Up and Control Expert, on 01/08/2023

[120] Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023; Nina Eisenmenger and et al., 'The Sustainable Development Goals prioritize economic growth over sustainable resource use: a critical refection on the SDGs from a socio-ecological perspective', Sustainability Science (2020) 15:1101–1110, p1105

[121] Beltersmann Stifung, BTI 2016---Ethiopia country report. Gutersloh. 2016, 21 <https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2016_ETH.pdf.> accessed Oct.15, 2023

[122] Frank Vanclay, Impact Assessment and the Triple Bottom Line: Competing Pathways to Sustainability? (Sustainability and Social Science: Roundtable Proceedings, University of Tasmania) Jan, 2002, p28

[123] Ibid

[124] Supra note 89; Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023

sustainable development requires a shift towards a holistic approach that balances economic growth with social and environmental considerations.

The problem of lack of commitment to embrace environmental and social responsibilities extends beyond BITs unbalanced nature. Ethiopia's increased eagerness to attract FDI poses challenges in fulfilling social and environmental responsibilities. This is evident from the foreign investment protection standards incorporated in the investment proclamation[125] and the range of fiscal incentives offered to foreign investors.[126] This is not special curse for Ethiopia, it is rather behavior of many developing countries which trying to lax environmental, labor and human rights standards to attract FDI.[127]

6.1.4. Environmental Impact Assessment and Its Inefficacy in Ethiopia

In the course of evaluating certain initiatives' social and environmental effect, Sustainability Impact Assessment (SIA here after) and Environmental Impact Assessment (EIA hereafter), come to the table. SIA refers to a process by which the implications of an initiative on sustainability are evaluated, where the initiative can be a proposed or existing policy, plan, programme, and project, piece of legislation, or a current practice or activity.[128] The SIA is commended for its balanced representation of social, economic, and environmental sustainability and for its significance to complement existing environmental impact assessment approaches.[129] Inclusion of all sustainability dimensions i.e environmental, social

[125] Supra note 28, Arts .17-22

[126] Council of Ministers Investment Incentives Regulation No 517/2022, Art 4(2 and 4), Federal Negaret Gazette, no 28, year 39.

[127] Maryam Asghari, What is "Race-to-the-Bottom" Effect on FDI Inflow? Iranian Economic Review, Vol.16, No.32, Spring 2012, p75

[128] Jenny Pope and et al., 'Conceptualizing sustainability assessment', Environmental Impact Assessment Review, Volume 24, Issue 6, 2004, 595-616, ISSN 0195-9255, p595

[129] Suominen T, Modelling for Sustainability Impact Assessment, (School of Forest Sciences Faculty of Science and Forestry University of Eastern Finland, unpublished), (2021) p16, available at: <https://www.researchgate.net/publication/357069675_Modelling_for_Sustainability_Impact_Assessment.> Accessed Oct. 10, 2023

and economic dimensions makes it preferable alternative among the realms of impact assessments.[130]

The purpose of a SIA is to inform decision-making by providing evidence-based insights into the potential consequences of a project. This helps stakeholders understand the potential trade-offs, risks, and opportunities associated with different options, and supports the integration of sustainability considerations into the decision-making process.[131]After the Brundtland Commission, the 'three-pillar' or 'triple bottom line' (TBL hereafter) model has come to be popular Sustainability impact analysis model.[132] It emphasizes that material gains alone are insufficient measures of human well-being. In this context, the TBL model considers sustainability as a decision-making framework that gives equal importance to environmental, social, and economic considerations.[133]

While SIA could be considered as a component of a more comprehensive EIA, there is uncertainty regarding its ability to encompass human rights impact assessment. It could be argued that expecting such assessments is a luxury for least developed nations like Ethiopia. Nevertheless, it is important to acknowledge that sustainable development is a fundamental principle and a desirable objective to pursue, irrespective of a country's level of development.

It is EIA which is legally recognized in Ethiopia though it is shackled with many problems including inadequate implementation of legislations, limited technical expertise and capacity, insufficient stakeholder engagement, lack of transparency, limited monitoring and enforcement, less political commitment and the like.[134] For

[130] Ibid, Jenny Pope, (supra note 127) p595
[131] Ibid, p596
[132] Janet Hammer, 'The triple bottom line and sustainability in economic development theory and practice', Economic Development Quarterly 31(1):25-36. November 2016, P25
[133] ibid
[134] Interview with Lemesa Erpie in Ethiopian Environmental Protection Authority Environmental Protection Audit expert, on 01/08/2023 and interview with Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on

instance, experts from Ethiopian Environmental protection Authority indicated that investors are conducting EIA only as part of fulfilling formality.[135] They stated that sometimes experts conducting environmental impact assessment for investors directly copy and paste an environmental impact assessment made for one previous project. Ethiopian Investment Commission did not include it as one of the requirements to obtain investment permit for foreign investors.[136] There is tendency to consider environmental and social issues as costs by businesses and government.[137]

A legal framework governing the EIA procedure has been put in place in Ethiopia.[138] The primary law controlling EIA in Ethiopia is the Environmental Impact Assessment Proclamation No. 299/2002. Before launching projects, major negative effects the projects could have on the environment and society must be assessed.[139] In Ethiopia, the primary regulatory organization tasked with regulating the EIA procedure is the Environmental Protection Authority (EPA).[140] The EPA is able to examine and approve EIAs, keep track of compliance, and enforce environmental laws.[141]

Even if there are so many problems and gaps in implementation, the EIA proclamation has provided chances through which Ethiopia could align FDI practices to sustainable development. The lack of implementation of laws related to

01/08/2023 see also Adugna Feyissa Gubena, Environmental Impact Assessment in Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation, Journal of Environment and Earth Science) ISSN 2225-0948 (Online) Vol.6, No.1, 2016, p7

[135] ibid

[136] Ethiopian Investment Commission, Investment Guide to Ethiopia, 2023, pp46-51

[137] Interview with Interview with Addisu Tibebu, In Ethiopian Environmental Protection Authority Business Enterprises Follow Up and Control Expert, on 01/08/2023

[138] Environmental Impact Assessment Proclamation, 2002, Proc. No. 299/2002, Federal Negarit Gazeta, year 9. No 11.

[139] Ibid Art 3.

[140] Environmental Pollution Control Proclamation, 2002, Proc. No. 300/2002, Art 3. Federal Negarit Gazeta, year 9. No 12

[141] ibid

EIA in Ethiopia is highlighted in various studies.[142] Despite the existence of the EIA Proclamation, there are weak enforcement mechanisms in place to hold project proponents accountable for conducting an EIA before obtaining an investment permit.[143]

A number of studies conducted on different aspects of EIA revealed problems concerning its implementation. It is indicated that EIA has failed to achieve its objective due to lack of public participation in the process.[144] Jennifer stated that '[t]he spread of EIAs into less developed countries primarily is the result of external pressure by international conventions, international environmental organizations, the international donor community, and the international science community.'[145] This author has also indicated that EIAs in Africa still appear plagued by a lack of trained personnel, inadequate budgets, and the concern that EIAs might hold back economic development.[146] Unfortunately, due to the strong desire for promotion of foreign investment and development first paradigm of different government authorities, efficacy of existing slight practice of EIA is doubtful.

It is important to promote responsible corporate governance, environmental preservation, social accountability, and the protection of human rights. Despite the existence of Proc No 299/2002, which allows for the provision of incentives, its implementation is currently lacking due to partly the absence of prepared

[142] Dejene Girma, 'Participation of Stakeholders in Environmental Impact Assessment Process in Ethiopia: Law and Practice'. Jimma University Journal of Law, Vol. 4 (1). 2009; Dejene Girma, The Impact of Transplanting Environmental Impact Assessment Law into the Ethiopian Legal system, Jimma University Journal of Law, Vol. 5: 75-109. 2013.

[143] Ibid; Gedifew Yigzaw, Assessment of Ethiopian Environment Impact Assessment (EIA)Proclamation No. 299/2002, Munich, GRIN Verlag, 2019, available at: <https://www.grin.com/document/497750.> accessed Jul. 12, 2023; supra not 124, Art 18(3(d))

[144] Ibid

[145] Jennifer C. Li, 2008, Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security? P6. available at: <template.pub (fess-global.org)> accessed Oct. 14, 2022

[146] Ibid

regulations.[147] By offering incentives and assistance to responsible investments, Ethiopia can attract investors who are dedicated to sustainable development and promote the alignment of foreign investment with the Sustainable Development agenda.

To sum up, with its own shortcomings had there been effective enforcement tools and institutions availability of legal frameworks for EIA in its broad sense, could assist in the effort to align foreign investment activities to sustainable development goals. However, it is SIA which is comprehensive in covering all dimensions of sustainable development than EIA.

6.2. Enabling Opportunities for Aligning Bilateral Investment Treaty Domestication with Sustainable Development in Ethiopia

6.2.1. Parliamentary Scrutiny in Investment Treaty Ratification Process in Ethiopia

Unbalanced nature of BITs can be mitigated in the ratification/domestication process. Investment Treaty ratification practices in Ethiopia indicate that domestication happens with ratification. Treaties are incorporated by mere legislation of ratification proclamation which declares ratification of a treaty without reproducing treaty provisions as they are or as per understanding of the law maker. Balanced approach recognizes the rights of host countries to regulate in the public interest and safeguards their sovereignty while maintaining responsible investment protection.[148] Ratification process opens a chance for the legislative body to scrutinize investment treaties compatibility with constitutionally protected sustainable development principle in Ethiopia.

Ethiopia domesticates international treaties by ratification. Ratified treaties are considered as part of the law of the land. This indicates that Ethiopia is dualist state

[147] Environmental Impact Assessment Proclamation, 2002, Proc. No. 299/2002, Federal Negarit Gazeta, year 9. No 11, Art 10.

[148] M. Sornarajah, *Resistance and Change in The International Law on Foreign Investment* (Cambridge University Press,2015), p349

as it assumes independence between international and national legal systems. Breaches in rules of one system cannot be justified by invoking rules of another.[149] In dualist states, a treaty cannot be directly implemented without transforming a treaty with further legislation. In some dualist states ratification is just one step in the domestication process. Some state enacts domestic legislation directly reproducing provisions of a treaty and based on the legislatures understanding of treaty provisions.[150]

Unfortunately, ratification process in Ethiopia is made simply by enacting ratifying proclamation which declares incorporation of the treaty without reproducing the treaty in the ratifying proclamation or in other independent legislation which would make the treaty ready for implementation. Making reservation, putting implementing direction, interpreting ambiguous terms in a treaty or total rejection unless terms of ratification are fulfilled should be under the mandate of the parliament so that it can discharge its duty to ratify a treaty which is in line with the constitution. The constitution clearly stipulated that treaties that should not uphold the people's right to sustainable development should not be ratified. This process can engage the legislative body in the treaty making process if the other contracting party accepts it tantamount to involvement of the parliament in renegotiation.

Ethiopian parliament is duty bound to ascertain that the BITs to be ratified by Ethiopia should not be prejudicial to sustainable development. The parliament as any government body is responsible to protect sustainable development protected by the constitution.[151] Therefore, scrutinizing investment treaties sustainable friendliness and implementing them in a manner which upholds all sustainable development dimensions is essential for the need of the constitution among other things. The possible regulatory chill effects attending in Ethiopian international investment

[149] Peter Tomka et.al., International and Municipal Law Before the World Court: One or Two Legal Orders? XXXV Polish Year Book of International law. P15
[150] Raffaela Kunz, International Law and Domestic Law, p145
[151] Supra note 7, Art 9(2)

agreements, the legitimacy crisis in the international investment law regime together with the above constitutional affirmation that treaties should ensure sustainable development should boost confidence of the legislative body for scrutinizing BITs at the point of ratification/domestication. This scrutiny allows the parliament and stakeholders to assess the compatibility of the proposed treaty with national sustainable development objectives. If this process is properly utilized, it can create one avenue for sustainable development- friendly implementation of Ethiopia investment treaties.

In Ethiopia, the two steps seem to be merged as treaties ratified become part of domestic law without further parliamentary legislation. Incorporation of treaties into domestic law can happen through directly reproducing provisions of a treaty as it is or by redrafting the treaty to be implemented in its own terms so as to adapt it to domestic law.[152] This process of transforming ratified investment treaties into Ethiopian legal system is absent.

Ethiopia enacted a law which outlines the procedures for making and ratifying international agreements in 2017.[153] According to the proclamation, treaty adoption involves various government authorities from its initiation to its ratification including any government organ or ministry that initiates treaty adoption. These include Council of Ministers, Ministry of Justice, Ministry of Foreign Affairs and the House of Peoples Representatives.[154]

Upon the completion of the negotiation process, the MoFA ensures that the treaty aligns with the country's interests and prepares the final draft for signature. The authority to negotiate and sign treaties lies with the Prime Minister and the Minister

[152]Stéphane Beaulac and John H. Currie, Canada, in *Dinah Shelton, International Law and Domestic Legal Systems*; Incorporation, Transformation, and Persuasion, (ed) (Oxford Univrsity Press, 2011) p128.
[153] The International Agreements Making and Ratification Procedure Proclamation, 2017, proclamation No.1024/ 2017. Year 23, No 55. Federal Negarit Gazette.
[154] Ibid, Arts 4-12

of Foreign Affairs although this power can be delegated to other officials within government departments.[155]

After the treaty is signed, the government body responsible for the negotiation submits a copy of the signed treaty, along with an explanatory note in Amharic (the official language), to the Council of Ministers.[156] The explanatory note includes comments from relevant stakeholders and a draft ratification proclamation. Subsequently, the treaty and its accompanying materials, including explanatory notes, are sent to the House of Representatives (Parliament) for ratification.[157]

At this juncture it must also be noted that the explanatory note embraces only the obligations it imposes and the benefits it accrues, it will not embody the problems it may pose on Ethiopia, especially its regulatory chilling effect.[158] In ratifying treaties, the parliament would mention treaty implementing body too.[159] The parliament has constitutional mandate to give direction to treaty implementing government so that implementation may be sustainable friendly.

The adoption of legislation to implement a treaty creates additional opportunities for parliamentary and possibilities to deliberations.[160]

Overview of BIT ratification proclamations manifest structural similarities. They embody preamble, short title of the proclamation, declaration of ratification and designating implementing body and effective dates.[161] One can safely argue that potential danger of BITs in limiting government action in the interest of sustainable

[155] Ibid Art 6(2)
[156] Ibid Art10(1)
[157] Ibid Art 10(3)
[158] Ibid Art 10(2), Interview with Amaltias Zewdu, in Ministry of Foreign Affairs international treaties and contracts legal consultant, on 20/07/2023
[159] Supra note 153, Art 11(3)
[160] Supra note 79, P368
[161] The State of Israel Agreement on Promotion and Reciprocal Protection of Investment Ratification, 2004, Proclamation No.389/2004. (Fed. Neg. Gaz.10th Year No. 24; Investment Reciprocal engagement and Encouragement Agreement with the Government of the Republic of France Ratification proclamation, 2004, proclamation No 405/2004

development is not understood by the parliament. This can be evident from all ratified Ethiopian BITs as there is lack of reservation or recorded rejection while majority of Ethiopian BITs are sustainable development unfriendly. The ratification process could be one important opportunity to ascertain Treaties sustainable development friendliness. Author of this paper argues that the parliament has missed its chance to revise or reject unconstitutional treaties.

6.2.2. Performance Requirements for Sustainable Development

Performance requirements (PRs) in relation to FDI refer to standards that countries set to gear behaviors of investors to certain specified goals so that FDI activities could positively contribute to achievement of those goals including sustainable development issues.[162] To foster the good effects of FDI and enhance their contribution to sustainable development, specific intervention measures are required. Use of performance requirements by host states could be one such possible intervention measures.[163] They are among policy instruments to multiply benefits of FDI to the host economy.[164] Regulation of FDI, in line with sustainable development, involves guiding investors at the entry and operation stages. Putting regulatory prescriptions at all these stages aligned with sustainable development priorities to Ethiopia through the instrumentality of PRs is of paramount importance.

Performance requirements are also described as Host Country Operational Measures (HCOMs) in UNCTAD publications.[165] They refer to wide range of actions taken by

[162] Suzy H. Nikièma, IISD, Performance Requirements in Investment Treaties: Best Practices Series - December 2014, p3. Available at: < https://www.iisd.org/system/files/publications/best-practices> accessed May 20, 2023

[163]Ibid p1

[164] Howard Mann, 'The New Frontier: Economic Rights of Foreign Investors Versus Government Policy Space for Economic Development', in C.L. LIM, *Alternative Visions of The International Law on Foreign Investment: Essays in Honor of Muthucumaraswamy Sornarajah*, (Cambridge University Press 2016) P291

[165] Z. Boroo (2012). 'Effective Use of Performance Requirement's and Investment Incentives' The Mongolian Journal of International Affairs 97, p. 98.

host states to regulate how foreign investors operate while subject to their laws.[166] HCOMs can be in the form of limits or performance standards and can include requirements on ownership and control, employment of staff, acquiring inputs, and sales conditions.[167] They are typically used to affect the type and location of FDI and, more specifically, to increase its advantages in light of national objectives including sustainable development. Some of them are Trade-Related Investment Measures (TRIMs) that have impact on trade flows. HCOMs are interventionist techniques used to address real or imagined market imbalances.[168]

Even though PRs are criticized for the fact that they could impede inflow of FDI, some studies are indicating that some countries like those mentioned as the Asian tigers have successfully used them for their current economic success while attracting good deal of FDI.[169] Suzy H. Nikièma indicated countries that effectively used PRs in the process of their industrialization.[170] UNCTAD has also indicated that benefits associated with FDI can be increased through PRs/HCOMs.[171]

If the specific actions to be taken are not explicitly prohibited in BITs, regional investment agreements or multinational investment agreements, it is possible for a host country to impose certain measures aimed at improving the role of FDI in the socio-economic advancement and/or sustainable development of the host country. The measures could include requirements to establish a joint venture with domestic participation; requirements for a minimum level of domestic equity participation;

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[166] UNCTAD, Host Country Operational Measures, 2001, p60(UNCTAD Series on issues in international investment agreements), available at: < https://unctad.org/system/files/official-document/psiteiitd26.en.pdf.> Accessed Aug. 20, 2023

[167] ibid

[168] ibid

[169] Suzy H. Nikièma, IISD, Performance Requirements in Investment Treaties: Best Practices Series - December 2014, p3, available at: < https://www.iisd.org/system/files/publications/best-practices> accessed May 20, 2023

[170] ibid

[171] UNCTAD, Host Country Operational Measures, 2001, p60(UNCTAD Series on issues in international investment agreements), available at: < https://unctad.org/system/files/official-document/psiteiitd26.en.pdf.> Accessed Aug. 20, 2023, p60

requirements to locate headquarters for a specific region; employment requirements; export requirements; restrictions on sales of goods or services in the territory where they are produced or provided, requirements to supply goods produced or services provided to a specific region exclusively from a given territory; requirements to act as the sole supplier of goods produced or services provided; requirements to transfer technology, production processes or other proprietary knowledge; and research and development requirements.[172]

Taking such measures would enhance many of the sustainable development dimensions. In this connection we can find two main types of performance requirements: mandatory and non-mandatory.[173] Let's delve into each type in a brief detail.

6.2.2.1. Mandatory Performance Requirements

The terms for the entry and operation of the investment are related to mandatory PRs.[174] The conditions governing the initiation and functioning of the investment are associated with obligatory regulatory provisions. In order to invest or engage in business activities, the investor is required to agree to these terms. Mandatory performance requirements, in the context of FDI, refer to the terms and conditions imposed by the host state on foreign investors prior to establishing their investment in that country.[175] These requirements are set by the host state and are considered non-negotiable. The foreign investors have the choice to either accept these requirements and proceed with their investment or decline and seek other opportunities.

[172] UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, p3
[173] International Institute for Sustainable development (IISD), IISD Best Practices Series: Performance Requirements in Investment Treaties, p2, 2014
[174] ibid
[175] ibid

These performance requirements are within the control of the host state, meaning that they have the authority to dictate the specific conditions that foreign investors must adhere to in order to operate within their jurisdiction. The purpose of imposing these requirements is often to protect the interests of the host country, promote economic development, and ensure compliance with local laws and regulations.

Ethiopia has set some requirements for foreign investors to obtain before issuance of investment permit. These requirements include minimum capital, willingness to invest in sectors permitted to foreign investors, documents evidencing financial position of the investor when it is considered necessary (this is optional) and other documents related to constitution of the enterprise like memorandum of association.[176] One can criticize that important mandatory requirements which are necessary in the process of aligning behavior of investors with sustainable development are not included. For instance, Environmental impact assessment is not set as requirement for establishment.[177]

Moreover, investors are expected to act in compliance with laws of the country while implementing their projects. As such they are duty bound to respect environmental sustainability and social inclusion values.[178]They are also required to submit a quarterly progress report on the implementation of the investment project to the appropriate investment organ.[179] Such report may be required not only periodically but also whenever they are required.[180] These can provide an environment that encourages foreign investors to align their behavior with sustainability objectives, ensuring their projects are conducted ethically and responsibly. Compliance of labor, human rights and environmental standards can be ascertained by such reports had

[176] Investment Regulation, 2020, Reg. No. 474/2020, Arts 7 and 8, Federal Negaret Gazette, year 26, no 78
[177] Ethiopian Investment Commission Guiding procedures for foreign investors to establish a company in Ethiopia, pp1-5
[178] Supra note 28, Art 54
[179] ibid
[180] Ibid art 14

this report been made to pertinent regulatory bodies like Ethiopian Environmental Protection Authorities, Ministry of labor and skills, and Human Rights Commission.

States have unrestricted sovereign authority to control foreign investor entry.[181] A state can forbid foreign investments and place restrictions on their entry, but a sovereign entity can give up this authority through a treaty.[182] Ethiopia's authority to regulate foreign investment within its own laws remained unaffected by any BITs before establishment of the investment. This grants the country the priority to exercise its sovereign regulatory rights. Thus, Ethiopia can strengthen its FDI admission criteria so that sustainable unfriendly FDI could not get establishment rights. Some other BITs explicitly emphasize that the obligation to provide care and protection applies only after the foreign investment has been approved.[183] Neither the investor nor the home states seek reimbursement from the host state due to pre-admission treatment criteria violations.

6.2.2.2. Non- Mandatory Performance Requirements

Designing effective legal frameworks to utilize FDI to host states sustainable development, involves also use of non-mandatory performance requirements. Non-mandatory performance requirements, sometimes, are linked to obtaining specific advantages from the host countries, such as tax exemptions or financial support.[184] Certain incentives effectively leave the investor with no choice but to comply with the regulatory provisions.[185]

[181] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 19&20, p88
[182] Ibid, p90
[183] ibid
[184] United Nations Conference on Trade and Development (UNCTAD), Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, 2003, p15
[185] UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, p3

Some treaties like the Trade Related Investment Measures (TRIMs) and other BITs prohibit performance requirements as investment and trade restrictive.[186] There are various formulations of performance requirement prohibitions in treaties. Fortunately, Ethiopia has neither BIT nor multilateral international treaty prohibiting it from imposing performance requirements. Studies indicate that, even if there is a chance to use performance requirements, they are underutilized in the Ethiopian legal framework.[187]Ethiopia could benefit if it could prepare comprehensive policy and legal framework packages that would enable effectively utilize performance requirements in line with its sustainable development priorities.

Ethiopian gives fiscal incentives to investments with the purpose to attract more investment to specific sectors and areas as well as employment of domestic workers by FDIs.[188] However, there is a lack of incentives to encouraging adherence to environmental, labor, and human rights standards which are directly related to sustainable development.

7. Conclusion

BITs are important components of FDI regulation in Ethiopia. There is a growing concern that these treaties are not adequately addressing sustainable development objectives. This article suggests sustainable development-friendly domestication and implementation of BITs. By understanding global trends in the making in the area of international investment regime it is possible to embrace the legitimate purpose of promoting sustainable development. Adapting BITs either in the process of their ratification or in their implementation to enhance their alignment with sustainable development components should be legitimate.

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[186] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement], Art 2.

[187] Tihitina Ayalew Getaneh (2020). 'The Role of the Investment Legal Framework in Ethiopia's FDI-development Nexus: PhD Thesis (Tilburg University), pp160-161

[188] Council of Ministers Investment Incentives Regulation No 517/2022, Art 4(2 and 4), Federal Negaret Gazette, no 28, year 39., Regulation No 517/2022, Art 4(2 and 4)

The tension between sustainable development components and investment treaties can be addressed by recalibrating the rights and obligations enshrined in these treaties in the process of transposing them into the domestic legal frameworks. BITs require ratification for their domestic implementation. Through ratification BITs would be incorporated into enforceable investment legal frameworks. This opens one room to align them with constitutional principle of sustainable development. The parliament can take various measures including putting reservations, totally rejecting treaties and putting direction to the treaty implementing body so that it should implement the treaty in a manner which enhances sustainable development. During the ratification process of investment treaties, incorporating reservations allows countries to modify treaty provisions that may conflict with sustainable development objectives. This ensures that the treaty's obligations are consistent with domestic priorities, enabling a more sustainable implementation.

This article contends that there are national and international legal grounds to recalibrate Ethiopian BITs in line with Sustainable development agenda. Firstly, the constitutions prohibit ratification of such treaties which contravene Ethiopian interests including Ethiopian sustainable development agenda. Secondly, there are also ample international conventions to which Ethiopia is a party that can be violated with direct application of Ethiopian BITs. Taking these national and international legal grounds into consideration, arguably, it would be proper to hold that the process of domestication can open rooms for sustainable development -friendly transposing of BITs into the national foreign investment frameworks.

Absence of performance requirement prohibition in Ethiopian BITs could be taken as an opportunity to Ethiopia as a host state. Introducing performance requirements for foreign investors can promote sustainable practices. These requirements could include environmental protection measures, local job creation, technology transfer, and adherence to labor rights. These performance requirements could be taken with or without incentives. By imposing such obligations, investment projects can

contribute positively to Ethiopia's constitutionally guaranteed sustainable development objectives.

Making sustainability impact assessments mandatory requirement for foreign direct investment projects can help to evaluate the potential social, environmental, and economic impacts of such projects. This assessment should be conducted prior to approval, ensuring that only sustainable and socially responsible investments are allowed to proceed. The rush to only to increase the volume of FDI without ensuring its negative impact on sustainability should be reconsidered.

While recognizing the trade-offs between safeguarding foreign investment and sustainable development, preference for sustainability is grounded in multitude of compelling reasons. In addition to the global changing landscape in the investment treaty regime, the incorporation of sustainable development in the constitution and different piecemeal legislations and policy documents including the Investment Proclamation, Industrial Park Proclamation, Mining Proclamation, and the Ten Years Development plan could be taken as additional enabler to customize investment treaty domestication in Ethiopia.

The Rights of Deaf Persons Access to Civil Justice in Ethiopia: Examining the Laws and Practices

Muluken Kassahun Amid♣

Abstract

It is estimated that up to 5 million people in Ethiopia suffer from hearing difficulties. Some have dual or multiple disabilities, such as persons with hearing and visual impairments. Persons with hearing impairments confront communication challenges in court while struggling to defend their rights. Providing a sign language interpreter or other forms of accommodation lessens their communication barrier in court. This article investigates how the Ethiopian civil justice delivery system accommodates the rights and needs of deaf persons to ensure their right to access justice effectively. Based on a sociolegal research assessment of the law and practice in Federal and Oromia regional courts, it contends that the present legal framework of Ethiopia does not adequately provide accommodations for deaf people to access civil justice, effectively. Practically, courts lack a permanently functioning sign language interpreter and do not provide a conducive court environment to meet the special needs of deaf individuals. With this, it recommends amending existing laws, adopting sign language as a working language of the courts and providing essential facilities in courts to enable deaf people to access civil justice.

Keywords: Civil Justice, Courts, Deaf Persons, Ethiopia, Sign Language Interpreter

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1. Introduction

Access to justice is part and parcel of human rights that facilitates the enjoyment of all other rights.[1] Access to justice can be measured by citizens' ability to access justice institutions capable of resolving disputed claims. This involves physical accessibility of the institution, economic affordability of the system, information accessibility of the law and institution, and other factors.[2]

The linguistic accessibility of judicial institutions is another aspect of access to justice. Individuals should be informed about their case; in addition, they should be able to present and defend it in a language they understand, to ensure their mental presence and equal participation in court proceedings.[3] If the litigant party cannot understand and speak the court's working language, the court and litigant parties will face difficulties in proceeding with the case until an interpreter is assigned. Uninterpreted trials jeopardize the fairness of hearing the case and equality before the courts. In this aspect, deaf people[4] are unable to hear and comprehend vocal languages spoken by other individuals. Hearing impairment limits deaf people's access to justice unless a sort of accommodation modality is implemented to address communication hurdles. Relyea stressed ‘without language assistance, a person with

[1] Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, 'Access to Justice for Persons with Disabilities: From International Principles to Practice', International Bar Association, (2017), p.5.

[2] Andrea R. Ball, ‘Equal Accessibility for Sign Language under the Convention on the Rights of Persons with Disabilities, Case Western Reserve Journal of International Law’, Vol. 43, No.3, 2011, P. 760.

[3] *ibid*, p. 761.

[4] There are debates regarding the best way to describe deaf people. Some scholars advocate using the term 'person with a hearing impairment' instead of 'deaf person,' but sign language experts argue that the term impairment is wrong because the deaf population is a linguistic minority rather than an impaired or disabled person. Several institutions, notably the World Health Organization, use the terms 'deaf person', 'person/people with a hearing impairment', and 'person with hard of hearing or hearing loss' interchangeably. However, the terms 'the deaf', 'deaf-mute' and ‘normal person’ have been condemned as derogatory terms that degrade the dignity of deaf persons. In this article, the terms ‘persons with hard of hearing’, deaf persons, people with hearing impairment and deaf litigant party are used interchangeably to refer to persons who have hearing impairments.

hearing impairment cannot hear or understand the testimony of witnesses, the judge's comments, or the attorneys' remarks'[5].

On this matter, article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) offers novel techniques to ensure persons with hearing impairments access to justice. The provision guarantees deaf persons "the right to equal access to justice as others; the right to procedural accommodation, such as the provision of a sign language interpreter; and the right to be supported as direct and indirect participants in all legal proceedings, whether civil, criminal, or administrative".[6] Provision of accommodation for those who are hard of hearing in the judicial process also contributes to the realization of the Sustainable Development Goal slogan of 'leave no one behind' and fosters the attainment of Goal 16 on the rule of law and access to justice.[7]

The federal and regional constitutions of Ethiopia recognize access to justice as a fundamental human right.[8] This constitutional protection guarantees deaf litigants have the right to sue and defend their rights before courts. In addition, the House of People's Representatives (HPR) has ratified the CRPD.[9] The Convention guarantees a wide range of disability-friendly rights that consider or accommodate the special

[5] Gregg F. Relyea, 'Procedural Due Process: A Deaf Defendant's Right to Be Heard Should Encompass a Right to "Hear" Civil Trials Through Interpretation, Catholic University Law Review', Vol.29, Issue 4, Summer 1980, P.870.

[6] Bronagh Byrne, Brent Elder and Michael Schwartz, 'Enhancing Deaf People's Access to Justice in Northern Ireland: Implementing Article 13 of the UN Convention on the Rights of Persons with Disabilities' (2021), Scandinavian Journal of Disability Research', Vol. 23, No. 1, 2021, P. 74; UN Human Rights Council, 'Right to Access to Justice under Article 13 of the Convention on the Rights of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights.' (2017), para. 19.

[7] Beqiraj, McNamara and Wicks (n 1), p.11.

[8] Art. 37 of the 1995 Federal Constitution, Art. 37 of the 2001 Oromia and Amhara Regional Constitutions, Art. 38 of the Gambela and Benishangul Gumuz Regional Constitutions, Art. 36 of the 2001 Afar Regional Constitution, Art. 37 of 2002 Somali Regional Constitution, Art. 37 of the 2004 Harari Regional Constitution, Art. 36 of the 2020 Sidama Regional Constitution, Art. 37 of the 2022 South Western Ethiopia Regional Constitution, Art. 38 of the Central Ethiopia Regional Constitution, and Art. 36 of the Southern Ethiopia Regional Constitution.

[9] Convention on the Rights of Persons with Disability Ratification Proclamation, 2010, Procl. No. 676/2010, *Fed. Neg. Gaz,* Year 16, No. 32.

needs and interests of persons with disabilities (PWDs), such as the provision of sign language interpreters for deaf persons when accessing public services. Article 31 (2) of the Federal Courts Proclamation No. 1234/2021 explicitly provides the right to a sign language interpreter in all proceedings. Nevertheless, in most regional state court laws, the right to a sign language court interpreter at state expense in civil cases has yet to be expressly provided.[10]

This article investigates the extent to which the Ethiopian civil justice delivery system accommodates the rights and needs of deaf people, focusing on their right to access justice. It examines the laws and practices in selected Federal and Oromia regional courts. It considers the federal courts to assess the practice, by taking the explicit recognition of the right to a sign language interpreter in the Federal Court Proclamation No. 1234/2021. Whereas, it focuses on the Oromia region by considering the absence of clarity on the legal framework in addition to the prevalence of the highest number of PWDs in the region, including deaf people, according to the 2007 Ethiopian census.[11] The article also explores and analyses literature, relevant foreign experiences and regional legislation to construct its arguments and insights.

Accordingly, this article argues that the existing legal framework of Ethiopia fails to protect deaf people's rights to access civil justice effectively. Courts also lack the practice to provide modalities of access to justice to meet the special needs of deaf individuals, mainly the absence of a permanently hired sign language interpreter and the provision of a conducive court environment. This article systemically discusses and draws its findings in six sections. The second and third sections delve into the conceptual and theoretical frameworks in addition to the status of deaf people's

[10] Elizabeth Demessie, '"Recognition" Status of Ethiopian Sign Language and the Deaf in Key Legislations: A Critical Review from Linguistic Human Rights Perspective, Ethiopian Journal of Human Rights', Vol. 6, 2021, P. 31

[11]Ethiopian Statistical Service, '2007 Population and Housing Census of Ethiopia.' Available at: <https://www.statsethiopia.gov.et/wp-content/uploads/2019/06/Population-and-Housing-Census-2007-National_Statistical.pdf >. Accessed on 10 June 2024.

access to civil justice under relevant human rights treaties. The fourth and fifth sections explore and analyse the legislative safeguards and practices governing deaf people's access to civil justice in Ethiopia and the practical challenges of deaf litigants in civil proceedings. Finally, the article wraps up with concluding remarks and recommendations, mainly adopting and implementing sign language as a court working language.

2. Access to Civil Justice and Deaf Litigant Parties: Conceptual and Theoretical Frameworks

Jacob defined the civil justice system as "the substantive law, machinery, and procedures for vindicating and defending civil claims – in effect, the entire system of the administration of justice in civil matters".[12] Civil justice encompasses both substantive and procedural legislation governing civil cases. Civil justice is important to protect the property and liberty of individuals. Although the right to access civil justice is legally recognized for all, not every segment of society, particularly vulnerable populations, enjoys it equally.[13]

Linguistic barriers are the primary impediment for deaf persons to effective communication and litigation in court proceedings. Language problems can lead to adjudicative incompetence, which is the litigant party's incapacity to fully understand and defend their case in litigations. [14] An individual's mere physical presence in court does not enable him or her to defend the case. The linguistic human rights protect the right of deaf litigants to be informed and communicate in a language they understand. Thus, the right to access a sign language interpreter or

[12] Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2009), pp. 7.

[13] William B. Rubenstein (2002), 'The Concept of Equality in Civil Procedure, Cardozo Law Review', Vol. 23, No. 5, p. 1866.

[14] Katrina R. Miller and McCay Vernon, 'Linguistic Diversity in Deaf Defendants and Due Process Rights, Journal of Deaf Studies and Deaf Education', Vol. 6, No. 3, 2001, P. 226.

other forms of accommodation functions as a communication bridge between the deaf litigant party and the court.[15]

Aside from communication challenges, several experts describe the issues confronting people with disabilities, including deaf persons. Beqiraj, McNamara, and Wicks identified societal, legal, economic, and accessibility impediments as the key challenges to access justice that persons with disabilities encounter.[16] Deaf people are often limited in their ability to represent themselves and participate equally in civil proceedings.[17] Furthermore, Elder and Schwartz claim that information barriers about court litigation, financial barriers to funding the expense of sign language interpreters and attorneys, and the absence of a legal aid system limit effective access to justice for deaf people.[18]

Among the four models of disability,[19] the social model and the human rights model advocate for states to create a conducive environment for PWDs so that they can participate and enjoy their rights to access public services equally. The social model states that the state is responsible for empowering PWDs to participate fully in all

[15] Bhekizenzo Ben Simelane, 'Exploring the Role of Court Interpreters in Kwazulu-Natal Province of South Africa' (MA Thesis, Durban University of Technology, 2022); Samuel Joseph Lebese, 'The Undefined Role of Court Interpreters in South Africa' (MA Thesis, University of South Africa-UNISA, 2013).

[16] Beqiraj McNamara and Wicks (n 1), p. 7.

[17] *ibid.*

[18] Brent C Elder and Michael A Schwartz, 'Effective Deaf Access to Justice', Journal of Deaf Studies and Deaf Education, Vol. 23, No.4, 2018, P.331.

[19] The four models are: medical model, charity model, social model, and human rights model. The medical model defines disability as a sickness/impairment that requires medical treatment, whereas the charity model describes disability as a dependent and helpless victim in need of care and assistance. The social model advocates disability as an integral part of human diversity, and the barriers that people with disabilities have while interacting with others can be eliminated by providing accommodating circumstances. The human rights model advocates for the right of PWDs to be treated equally in order to enjoy their human rights equally. The charity and medical models are older approaches that promote discrimination/segregation against PWDs, whereas the social and human rights model advocates for their inclusion and empowerment in both private and public spheres of life. (Nicola Colbran, 'Access to Justice – Persons with Disabilities in Indonesia- Background Assessment Report', International Labour Organization (2010), p. 12).

activities and working to eliminate social prejudice against them.[20] The judicial system should accommodate PWDs' needs and interests based on their individual circumstances and differentiated needs, such as providing braille for blind people and a sign language interpreter for deaf litigants.[21]

The human rights approach also advocates that PWDs have rights that require states to fulfil positive obligations for PWDs, such as providing appropriate accommodation in accessing courts.[22] This includes offering legal protection for equal recognition and treatment before courts, as well as providing basic facilities that allow individuals to participate equally in court litigation processes. Denial of accommodations or essential facilities for PWDs constitutes a denial of justice. The denial also undermines judicial integrity and renders the court a one-sided instrument that favours the litigating party who does not have a disability problem.[23]

Various types of accommodation can be provided to deaf litigant parties to ensure equal access to the courts. The provision of a sign language interpreter is the principal way of accommodation for deaf litigants in civil litigation. Sign language interpreters give services to the inborn deaf, late deafened, and hard-of-hearing individuals who learn sign language.[24] Deaf people who are illiterate and do not learn sign language do not benefit from sign language interpretation. In effect, family interpreters and/or family representation are temporary alternatives to securing their right to justice.[25]

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[20] Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System, ILSA Journal of International & Comparative Law', Vol. 17, No. 2, 2011, P. 287.
[21] *ibid.*
[22] Aschalew Ashagre, 'Access to Justice for Pwds in Civil Proceedings before the Federal Courts of Ethiopia: The Law and Practice, Mizan Law Review', Vol. 14, No. 1, Sept. 2020, P. 6.
[23] Lemlem Dejenu, 'The Right to Access to Justice for Persons with Disability in Civil Matters before Ethiopian Federal Courts' (LLM Thesis, Jimma University, 2020), p. 25.
[24] World Health Organization, 'Deafness and Hearing Loss: Fact Sheet. World Health Organization' available at: <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss>. Accessed on 05 December 2023.
[25] Eilionóir Flynn & others, 'Final Report Access to Justice of Persons with Disabilities', NUI Galway Centre for Disability Law & Policy (2019), p. 18.

There are also a variety of technological assistive devices that allow hearing people and deaf litigants to communicate effectively in court. This includes speech-to-text software (Communication Access Real-Time Translation/CART), assistive listening devices (ALD) for hard-of-hearing people, and UbiDuo (a device that enables simultaneous written communication between deaf and hearing people).[26] CART and UbiDuo are adjusted to court working language and are intended for deaf litigants who can read and write it. Technological assistive devices may facilitate efficient communication in court rooms, but they do not substitute the provision of a sign language interpreter.

In practice, states give accommodations to deaf people based on local reality. For example, in Nairobi, Kenya, the government established a special PWDs court known as the Milimani PWDs Court.[27] The Court has made suitable accommodations for different types of disability to ensure their equal participation in court proceedings. While in the USA, the District of Columbia Courts are required to offer sign language interpreters and essential technological assistive devices for deaf people in all court litigation proceedings.[28] There are however countries that are less devoted to accommodating PWDs in the courtroom, exposing them to miscarriages of justice.

3. Protection of Deaf Persons' Access to Civil Justice under Human Rights Instruments

Human rights instruments adopted at the international and regional levels serve as guidance for states to realize rights on a domestic scale. The instruments adopted

[26] Douglas M. Pravda, 'Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings, Valparaiso University Law Review', Vol. 45, No. 3, 2011, P. 938.

[27]Committee on the CRPD, 'Consideration of Reports Submitted by State Parties under Article 35 of the Convention Initial Reports of State Parties Due in 2010- Kenya', (2012), para. 139.

[28] District of Colombia Court, 'Language Access Plan, Joint Committee on Judicial Administration of the District of Columbia, the policy-making body for the District of Columbia Courts' (2022), p. 15.

before the CRPD pay less attention to precisely addressing the right to access justice concerns of PWDs, including deaf persons.[29] For example, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) guarantee everyone's right to effective remedy and a fair trial.[30] However, each instrument neither specifically addresses the specific circumstances of deaf persons nor explicitly indicates the right to interpretation in civil proceedings.

In this context, the United Nations (UN) Human Rights Committee's (HRC) General Comment No. 31 on the ICCPR right to effective remedy states that effective remedies should take into account the special circumstances of vulnerable groups, including deaf persons.[31] Furthermore, the HRC General Comment No. 32 on the right to a fair trial (Article 14) allows for the provision of a free interpreter in civil proceedings to destitute parties in order to avoid a miscarriage of justice.[32] Such free interpreter provisions apply to both vocal and sign language interpreters. In other words, the HRC indirectly acknowledges the provision of free sign language interpreters for deaf litigant parties under Articles 2 and 14 (1) of the ICCPR.

The general right to interpretation in judicial proceedings, including sign language interpretation in civil cases, is also recognized by the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (Article 12), The Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Article 5 (1C)), ICERD General Comment No. 31

[29] Ortoleva (n 20), P. 287.
[30] See Art. 8 and 10 of the UDHR and Art. 2(3) and 14 of the ICCPR.
[31] UN Human Rights Committee, General Comment No. 31, 'Nature of the General Legal Obligation on States Parties to the Covenant', para. 4 U.N.Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15. Available at:
<https://www1.umn.edu/humanrts/gencomm/hrcom31.html > accessed on 07 June 2024.
[32]UN Human Rights Committee, General Comment No. 32, Art. 14: 'Right to equality before courts and tribunals and to a fair trial', U.N. Doc. CCPR/C/GC/32 (2007), para. 13. <http://hrlibrary.umn.edu/gencomm/hrcom32.html > accessed on 07 June 2024.

(2005)[33], CRC General Comment No. 11[34], CEDAW General Comment No. 33 (2015)[35], CEDAW General Comment No. 39 (2022), and other human rights instruments.

The CEDAW General Comment No. 39 (2022) specifically guarantees the provision of sign language interpreters and other forms of accommodation to enable deaf people to have equal access to legal information and courts.[36] Although soft instruments such as general comments and declarations do not have binding effects, they provide guidelines for achieving equal access to courts for the deaf and PWDs.

3.1. CRPD

The UN adopted the CRPD in 2006. Even though the CRPD does not define disability, it uses the social and human rights approach to conceptualize PWDs. According to the Covenant, PWDs are those "who have long-term physical, mental, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[37] Accordingly, impairment does not automatically qualify one as a person with a disability. Such impairment should be long-term and hinder a person from "full and effective participation in society." This indicates that the CRPD uses a

[33] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Committee, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 17 (b). < https://www.refworld.org/legal/general/cerd/2005/en/64371> accessed on 07 June 2024.

[34] Convention on the Rights of Child (CRC) Committee, General Comment No. 11 (2009) - Indigenous children and their rights under the Convention, para. 76. Available at: < https://www.refworld.org/legal/general/crc/2009/en/102812> accessed on 07 June 2024.

[35] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, General Recommendation No. 33 on women's access to justice, para. 17 (b). Available at:<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CEDAW%2FC%2FGC%2F33&Lang=en > accessed on 07 June 2024.

[36] CEDAW Committee, General recommendation No. 39 (2022) on the rights of Indigenous women and girls, paras. 27 & 33 (f). available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGC%2f39&Lang=en> accessed on 07 June 2024

[37] Convention on the Rights of Persons with Disabilities and Optional Protocol (adopted 13 December 2006 UNGA Res A/RES/61/106 (CRPD), Art. 1.

social model of disability, taking into account how disabilities affect social interaction.[38]

Several provisions of the CRPD recognize rights affiliated with the right to access civil justice for deaf persons. Among others, article 13 (1) of the CRPD reads "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages".

Accordingly, the term "procedural accommodation" encompasses the provision of sign language interpreters and other assistive devices. Without sufficient procedural accommodations, deaf litigants do not have effective access to justice or enjoy equality of arms. The phrase "in all legal proceeding" expands the scope of the right's application to civil proceedings and all stages of case handling.[39] The provision puts an immediate positive responsibility on states. The clause aims to ensure the full and equal participation of deaf litigants alongside hearing persons. Denial of accommodation for a deaf person constitutes discrimination and denial of justice.[40]

Articles 5, 9, 12, and 21 of the CRPD are all equally vital in safeguarding PWDs' right to access justice. Article 5 guarantees equality and non-discrimination against PWDs. In this aspect, the CRPD requires governments to offer reasonable accommodations for PWDs unless the provision imposes an undue burden on states.[41] The term "undue burden" attempted to strike a balance between PWDs' diverse needs and states' capacity to provide accommodation based on available resources.[42] States should employ alternative mechanisms to provide sign language

[38] Ortoleva (n 20), P. 287.
[39] Byrne, Elder and Schwartz (n 6), P. 75.
[40] Ball (n 2), P. 788.
[41] *ibid.*
[42] *ibid.*

interpreters and assistive devices rather than completely denying accommodation by claiming the undue burden defense.

Article 9 governs public service accessibility, including the provision of sign language interpreters to enable deaf people to communicate effectively. Article 21 recognizes the right to access information, which is essential for the accessibility of legal information via sign language since "ignorance of the law is not an excuse" and deafness is not a defense to evade legal accountability.

Article 12 affirms the equal legal capacity of PWDs. The provision underscores that impairment does not equate to incapacity. Laws that deprive PWDs of legal capacity (such as legal interdiction), prohibit PWDs from engaging in legal acts (such as the right to sue), and fail to recognize the provision of accommodation undermine PWDs' right to equal recognition before the law.[43]

The CRPD provides an additional Optional Protocol that authorizes the CRPD Committee[44] to hear individual complaint communications/cases alleging violations of CPRD rights. The Committee receives and considers cases from states that adopted Optional Protocol in addition to the CRPD. As of June 2024, 104 states out of 186 CRPD member states have ratified the CRPD Optional Protocol.[45]

3.2. ACHPR Person with Disability Protocol

The African Union (AU) is one of the regional organizations that has adopted a separate treaty governing disability. The African Charter on Human and Peoples' Rights (ACHPR) Protocol on the Rights of Persons with Disabilities in Africa

[43] Colbran (n 19), p. 10.
[44] The CRPD Committee is a monitoring body for the CRPD's enforcement. The Committee is in charge of receiving state reports and considering communications filed from state parties that ratified the CRPD's Optional protocol.
[45] UNOHCHR, Status of Ratification Interactive Dashboard <https://indicators.ohchr.org/ > accessed on June 11, 2024.

(ACHPR PWDs Protocol), adopted in 2018, has yet to be enforced.[46] Most African nations ratified CRPD[47], but they are hesitant to accede to the ACHPR PWDs Protocol. The protocol, like the CRPD, uses a social model of conceptualizing PWDs and has expanded PWDs to include "psycho-social, neurological, developmental, and other impairments" in addition to "physical, mental, intellectual, or sensory impairments." [48]

The protocol includes several innovative provisions, such as prohibiting ritual killings of PWDs, eradicating harmful practices (article 11), the right to self-representation at different levels (article 22), the rights of youth with disabilities (article 29), and the rights of older person with disabilities (article 30). Furthermore, PWDs have the responsibility to perform duties stipulated under the ACHPR (Article 31).[49]

The ACHPR PWDs Protocol, however, does not recognize certain rights as self-standing rights in contrast to the CRPD. This includes CRPD's recognition of freedom from exploitation, violence and abuse (Article 16), protecting the integrity of the person (Article 17); liberty of movement and nationality (Article 18), personal mobility (Article 20), and respect for privacy (Article 22). Elements of each right and freedom are scattered across different provisions of the protocol.

In connection to access to justice, the ACHPR PWDs Protocol is a modified version of the CRPD Protocol. For example, article 13 of the protocol, which guarantees the

[46] As of February 2024, the protocol was ratified by fourteen African countries. The protocol will become into effect with the ratification of at least 15 member states of the AU. (ACHPR Press Release, available at: <https://achpr.au.int/en/news/press-releases/2024-02-29/ratification-view-entry-force-older-persons-rights-persons > accessed on June 13, 2024.
[47] UN OHCHR (n 45).
[48] Center for Human Rights, University of Pretoria- Disability Rights Unit, Barriers to equal access to justice: A study of the criminal justice system in Botswana, South Africa and Zambia, available at: <https://www.chr.up.ac.za/dru-news/3106-persons-with-disabilities-and-barriers-to-equal-access-to-justice-a-study-of-the-criminal-justice-system-in-botswana-south-africa-and-zambia> > accessed on June 15, 2024.
[49] African Charter on Human and Peoples Rights (ACHPR) provides a list of duties from art. 27-29 of the charter.

right to access justice, requires states to facilitate the inclusion of PWDs in customary dispute resolutions[50] and to provide legal aid to PWDs. Recognizing the inclusion of PWDs' interests is vital because the majority of disputes in rural Africa are settled through informal justice systems.[51]

Unlike the CRPD, the ACHPR PWDs Protocol does not include an undue burden criterion for providing accommodation. Instead, the protocol calls for "reasonable and progressive measures"[52] (accommodation) to ensure public service accessibility. The convention makes no distinction between the terms "appropriate [procedural] accommodation" under Article 13 (access to justice) and "progressive measures" under Article 15 (2).

The term "progressive measures" implies the provision of accommodation that is progressively realized based on the economic capacity of the state, particularly in socioeconomic rights.[53] Whereas procedural accommodations related to civil and political rights provisions of the CRPD and ACHPR PWDs Protocol, including access to justice, are immediate by their nature.[54] Hence, states are required to enforce procedural accommodation irrespective of their socioeconomic status.

4. The Legal Protections and Practices of Deaf Persons Access to Civil Justice in Ethiopia

Legal protection is essential for realizing any rights. Unfortunately, the rights of persons with hearing impairments, especially their right to justice, are rarely recognized under Ethiopian law. For example, the rights of persons with hard of hearing are not addressed in any of the Ethiopian four constitutions adopted since 1931. As a result, the rights of individuals with hearing impairments and their access

[50] Article 13 (2) of ACHPR PWDs Protocol.
[51] Flynn & others (n 25), p. 30.
[52] Article 15 (2) of the ACHPR PWDs Protocol.
[53] Ball (n 2), P. 787.
[54] Melaku T. Zengeta, 'Access to Justice: New Right or a Reaffirmation of Existing Human Rights for Persons with Disabilities? Yustisia Jurnal Hukum', Vol. 11, No. 3, 2022, P. 163.

to civil justice have been inferred from the interpretation of general legal guarantees such as equality before the law and the right to access justice.

Article 28 of the 1931 Constitution, for example, recognized the right of all citizens to petition, including deaf persons. The subsequent three constitutions (1955, 1987 and 1995 Constitutions) pledged equality before the law, non-discrimination, and equal legal protection.[55] Furthermore, Amharic has been recognized as the working language of the central government in each constitution.[56] The rights of non-speakers of the state's working language were not addressed in the 1955 imperial constitution.

The 1987 Ethiopian constitution, however, recognizes the right to interpretation. Article 105 of the Constitution says, "courts shall provide interpretation services to any party who does not understand the language in which they conduct their judicial proceeding". Accordingly, individuals who are unable to understand the state's working language, Amharic, including deaf persons, have the right to interpretation in both civil and criminal matters. Similarly, Article 27 of the Transitional Period proclamation that establishes the self-autonomous national regional government of Ethiopia recognizes the right to interpreter. The act requires states to assign language interpreters for people who are unable to understand the court working language.

Since 1995, the federal and regional constitutions have protected all persons, including deaf individuals, the right to access justice. The 1995 Federal and Regional Constitutions recognize the provision of "assistance and rehabilitation" to people with physical and mental disabilities.[57] The constitution adopts the charity model of disability by making PWDs the recipients of rehabilitation and care. Moreover, the constitution guarantees the rights only for persons with physical and mental

[55] See Articles 37 and 38 of the 1955 Imperial Constitution, Article 35 of the 1987 Derg Constitution, and Article 25 of the 1995 Federal Constitution.
[56] See Article 125 of the 1955 Imperial Constitution, Article 116 of the 1987 Derg Constitution, and Article 5 (2) of the 1995 Federal Constitution.
[57] Constitution of Federal Democratic Republic of Ethiopia, (FDRE Constitution), Art. 41(5), Procl. No. 1/1995, *Fed. Neg. Gaz.* Year 1, No.1; Revised Constitution of Oromia Regional State, Art. 41 (5), Procl. No. 46/2001, Mag. Oromia, Year 10, No. 6.

disabilities and is silent towards the provision of support for those who have sensory impairments, such as deaf persons.[58]

Additionally, the federal and regional constitutions at each level do not acknowledge sign language as the working language of the state, but they do embrace the equality of all languages. The federal and regional constitutions restrict the state's provision of interpretation services for criminally suspected and accused individuals, who are unable to understand the working language of the court.[59]

4.1. Protections under Existing Ethiopian Legal and Policy Frameworks

Ethiopia has begun to incorporate disability-friendly legislation and policies into its legal system, particularly since the UN adopted the CRPD. As an illustration, in 2008, the country issued a proclamation governing the employment rights of PWDs. The proclamation stipulates that PWDs have the right to sue in court through disability associations in cases of violations of their members' rights. Besides, if a person with a disability alleges that s/he was discriminated against during recruitment, promotion, transfer, or replacement, the burden of proof shifts to the defendant.[60] The right applies to all groups of PWDs, including deaf persons.

The country ratified the CRPD in 2010 but has yet to adopt the ACHPR PWDs protocol. The CRPD requires state parties, including Ethiopia, to harmonize and enforce domestic legislation based on CRPD principles. Ethiopia has so far submitted the initial state report in 2013, as well as the second and third periodic reports in 2023. In its concluding observation on the initial report, the CRPD Committee recommends that Ethiopia improve the provision of procedural

[58] *ibid.*
[59] See Art. 20 (7) of the FDRE Constitution, Afar, Amhara, Harari, Oromia, Sidama, Southern Ethiopia and South Western Ethiopia Regional State constitutions; Art. 21 (7) of the Benishangul-Gumuz, Somali and Gambela Regional State Constitutions and Art. 22 (10) of the Central Ethiopia Regional Constitution.
[60] Right to Employment of Persons with Disabilities Proclamation, 2008, Art. 7, Procl. No. 568/2008, *Fed. Neg. Gaz.* Year 14, No.20.

accommodation in all court proceedings while considering making sign language the country's working language.[61] According to the 2023 periodic report, the country began mainstreaming disability rights in court proceedings, including the deployment of sign language interpreters for deaf persons.[62]

Since 2018, the country has been undertaking legal and policy reforms that also explicitly recognize the rights of people with hearing impairments. By way of instance, the 2020 Ethiopian language policy states on sign language:

> 'nationals with hearing impairment have the right, in their place of habitation, to use the Ethiopian sign language, develop it, communicate and receive information in it from the government, become beneficiaries of appropriate technology for the language, and become entitled to special support from the government to exercise this right.'[63]

The policy entitles deaf persons to the provision of accommodations at the expense of the state. Such policy assurances serve as a foundation for litigant parties with hearing impairments to assert the state's provision of a sign language interpreter in civil proceedings.

Above all, Article 31 (3) of Federal Courts Proclamation No. 1234/2021 became the first parliament law explicitly safeguarding the right to a sign language interpreter during court proceedings. The law compels courts to provide sign language expertise to everyone in need, as well as fostering swift court decisions and professional support for persons with disabilities.[64] This protection applies to people with hearing impairments who are involved in court litigation in both civil and non-civil matters.

[61] Committee on the CRPD, 'Concluding Observations on the Initial Report of Ethiopia', (2016), para 48.
[62] Committee on the CRPD, 'Combined Second and Third State Reports Submitted by Ethiopia under Article 35 of the Convention, Due in 2020', (2023), para 17.
[63] Federal Democratic Republic of Ethiopia Language Policy, Ministry of Culture and Tourism (2023), p.12.
[64] See Art. 31 (3) and 19 (1g) of Federal Courts Proclamation No. 1234/ 2021.

The government has also begun the process of ratifying the ACHPR PWDs Protocol.[65] There is also a draft proclamation on the rights of PWDs. As discussed in previous sections, each legal instrument includes measures that enhances deaf persons access to civil justice. Adoption of each law will strengthen the legal protection of PWDs' rights in Ethiopia.

The broad right to an interpreter during ordinary civil proceedings is also incorporated in various regional court establishment laws, such as the Amhara Region Court Establishment Proclamation.[66] The federal and regional Sharia religious court proclamations also provide the same rights in personal and family issues.[67] Nonetheless, unlike the Federal Court Proclamation, the regional ordinary and Sharia Court proclamations do not clearly guarantee the right to a sign language interpreter. In effect, the broader right to interpretation covers both verbal interpretation and deaf people's access to sign language interpreters.

In contrast, the Oromia Court Proclamation restricts the free provision of interpreters in criminal cases.[68] In other words, Oromia courts are not obligated to offer sign language interpreters for deaf litigant parties in civil proceedings. The clause contradicts Article 13 of the CRPD, which requires states to provide appropriate procedural accommodation in all legal proceedings, including free provision of sign language interpreters in civil lawsuits.

Aside from the aforementioned facts, no laws of the country require courts to provide technological assistive devices for PWDs in general, and deaf litigant parties such as CART, ALD, and UbiDuo in particular. In this regard, the CRPD's procedural

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[65] *ibid.*

[66] For instance, See Revised Amhara National Regional State Court Establishment Proclamation, 2022, Art. 42 (3) Proc. No. 281/2022, *Zik. Hig.*, Year 27, No.21.

[67] For instance, See Sidama Regional State Sharia Court Establishment Proclamation, 2021, Art. 15, Proc. No. 16/ 2021, *Aff. Gaz*., Year 1, No. 16, Oromia Regional State Sharia Court Establishment Proclamation, 2002, Art. 15, Proc. No. 53/2002, *Mag. Oro.*, Year 9, No. 2.

[68] A Proclamation to Redefine the Structure, Powers and Functions of the Oromia Regional State Courts, 2021, Art. 36 (3), Proc. No. 216/2018, *Mag. Oromia*, Year 27, No. 7.

accommodation encompasses both the provision of a sign language interpreter and assistive devices to ensure equal participation and self-representation by deaf litigating parties.[69] However, Ethiopia's existing court laws only guarantee the provision of an interpreter, as stated above.

4.2. Deaf Litigant Parties Right under Federal Supreme Court Directives

The Federal Supreme Court of Ethiopia issues several directives to enforce the right to a sign language interpreter guaranteed under the Federal Courts Proclamation. Among others, first, Article 17 (11/2) of the Federal Courts Civil Cases Flow Management Directive 08/2021 directs judges to identify the need for a sign language interpreter before beginning preliminary hearings and scheduling to examine witnesses.

Second, the Federal Courts Court Proceeding Directive No. 13/ 2021 requires a sign language interpreter to be fluent in both sign language and the court's working language, Amharic. Article 23 of the directive comprises the court interpreter's ethical code of conduct such as diligence, respect for the litigating parties, impartiality, respecting and enforcing the judge's order, and so on.

Above all, the Federal Supreme Court issued a Federal Court Interpreters Service Fee Determination and Payment Directive in 2020.[70] The directive governs the assignment, provision of service, and allowance of temporarily assigned court interpreters. The directive mandates federal courts to offer sign language interpreters in all civil proceedings at the state's expense.

The directive specifies that domestic language interpreters are entitled to a 250 birrs allowance per case for half-day service and a 500 birrs allowance for full-day service.[71] In the case of foreign languages, the court interpreter payment is 500 birrs

[69] Byrne, Elder and Schwartz (n 6), P. 76.
[70] The Federal Supreme Court, Federal Courts Court Interpreters Service Fee Determination and Payment Directive (Federal Court Interpreters Directive), Directive No. 06/2020, 2020.
[71] Federal Court Interpreters Directive, Section 3.4.5.

per case for a half-day and 1000 birrs for a full-day task. The allowance includes transportation and other expenses. Although the directive fails to set an allowance amount for sign language, courts utilize standard payment for local languages.[72]

Payment disparities between local and foreign languages result in language discrimination and contradict the principle of "equal pay for equal work". Key informants from Federal Courts claim the unavailability of a foreign language interpreter as the reason for the difference.[73] However, there are also local languages, particularly those spoken by minorities, and sign language interpreters are not easily accessible. In other words, the reasons given by court officials for the disparity in payment are unfounded.

4.3. The Right of Deaf Persons Access to Civil Justice under the Draft Proclamation on the Rights of Persons with Disabilities

Ethiopia has drafted a proclamation that separately governs the rights of persons with disabilities, but it has yet to be ratified. The draft law recognized deafness as a disability in the definition part under the term 'sensory impairments'.[74] The draft proclamation guarantees that PWDs, including deaf persons, have equal legal capacity. The adoption of the law will eliminate the incapacity of PWDs defined by the Ethiopian Civil Code, Civil Procedure Code, and other legislations.[75]

The elements of the right to access justice under the draft law is almost a direct replica of the CRPD clause. Furthermore, Article 27 of the draft proclamation specifically states that deaf persons have the right to access sign language interpreters in judicial institutions, and it requires the government to hire and offer

[72] Interview with Ms Zeineb Behonegn, Federal Supreme Court Bench Service Directorate, Addis Ababa, on 31 January 2024.
[73] *ibid.*
[74] Ethiopian Rights of Persons with Disabilities Draft Proclamation, Art. 2 (1).
[75] Refer to Section 4.1 for detailed discussions.

such services. The proclamation is intended to have nationwide application in both state and non-state entities.

Unfortunately, the government delays the ratification of the law. The Ethiopian Lawyers with Disability Association (ELDA) and Ethiopian Human Rights Commission (EHRC), for example, are urging the government to enact and execute the law right away.[76] According to the drafting member of Ethiopia's PWDs draft proclamation, state officials challenge the draft law on two main grounds.[77]

First, consider whether adopting a separate PWD proclamation is essential. Several state officials argue that the issue of disability can be handled by laws governing different sectors. For example, PWDs' educational concerns should be governed by education-related laws, and access to justice issues should be addressed by court or judicial organ proclamations.[78] In effect, they argue that special legislation for PWDs is unnecessary.

The second point is that the contents of the draft law put an undue burden on the state. As an instance, the quota system for employment, opportunities, and budgets, as well as tax-free incentives included in the draft law, impose unreasonable load on the government. However, the drafting law member believes that the draft law provisions are derived from the CRPD clause and other African countries that have comprehensive disability laws, such as Kenya and Côte d'Ivoire.[79]

Adopting a separate PWDs law offers better protection by devoting more attention to PWDs' challenges rather than dealing with them through scattered laws. Besides, enacting separate laws for vulnerable groups are not new in the country. As an instance, Ethiopia enacted a separate refugee proclamation No. 1110/2019 to offer

[76] EHRC, 'Human Rights Situation Report on Disability Rights and Rights of Older Persons' (Ethiopian Human Rights Commission Annual Disability Report, (2023), p. 21.
[77] Confidential Telephone Interview, Drafting Member of Ethiopian Person with Disability Proclamation, Addis Ababa, on 10 June 2024.
[78] *ibid.*
[79] *ibid.*

more robust refugee protection. Similarly, adopting a separate proclamation recognizing the rights of PWDs has the potential to ensure stronger protection and enforcement of those rights. Currently, the draft proclamation appears to have been put on hold due to a lack of commitment from relevant government organs.[80]

4.4. Practices of Providing Accommodation for Deaf Persons in Civil Proceedings

The Court's provision of deaf-friendly accommodations, such as the provision of a sign language interpreter, ensures the equal participation of the deaf litigant party in courts. A deaf person presents and defends his or her case, as well as examines evidence, with the assistance of a sign language interpreter. The dearth of a sign language interpreter or other forms of accommodation for deaf persons amounts to a denial of justice.[81]

In Ethiopia, the federal and Oromia regional courts do not have an established structure that requires hiring of sign language. [82] In federal courts, when the need for sign language interpreter arise, the courts usually seek assistance from Ethiopian National Association of Deaf (ENAD).[83] The provision of sign language is not only for litigant parties but also includes their witnesses. In *Melkamu Fanta v Beauty Terefe* case, for instance, the minor deaf witness gives testimony.[84]

In some cases, courts interact with educated deaf litigant parties in writing. In the case of *Shimellis Mosa v Zanabach Mosa*, for example, the plaintiff with hearing

[80] *ibid.*
[81] Pravda (n 26), P. 927; Ortoleva (n 20), P. 281.
[82] Interview with Ms. Zinashwerk Haileyesus, Federal Supreme Court Human Resource Management Team Leader, Addis Ababa, on 15 January 2024; Interview with Ad. Mulu Berhanu, Director of Oromia Region Supreme Court Human Rights Directorate, Addis Ababa/Finfinne, on 07 February 2024.
[83] Interview Zeineb (n 72); Interview with Mr Alemayehu Legese, Vice Chief Registrar of Federal High Court, Addis Ababa, on 12 March 2024; Confidential Interview with Federal First Instance Court (FFIC) Chief Registrar, Addis Ababa, on 13 March 2024.
[84] Melkamu Fanta v Beauty Terefe, Akaki Federal First Instance Court, File No. 109225, 2016 E.C.

impairments communicates with the court and the opponent party in writing.[85] In relation to this, the court assigns a sign language interpreter to the litigant with hearing impairments who learns sign language. When an illiterate deaf person appears in court, s/he is supported by a community or family interpreter.[86]

In the Oromia region, there is no regional statute requiring the court to offer sign language interpreters in civil proceedings. In practice, courts provide sign language interpreters in criminal proceedings for deaf defendants or witnesses who have learnt sign language.[87] In civil cases, there is no uniform practice. One key informant observes that Oromia courts have no structure in place to assist deaf litigants in civil proceedings, judges urge that deaf litigants be represented by a family member or close friend.[88] There are also circumstances where deaf litigants were ordered by courts to bring their sign language interpreters at their own expense.[89]

A judge from Adama City Bole Sub-City First Instance Court argues that if a deaf litigant party appears in court in civil disputes, the matter is resolved in accordance with Article 34 (2) of the Civil Procedure Code.[90] When a deaf plaintiff or defendant appears in court, the judge orders a stay of proceedings until they appoint their representative. He contends that the phrase "disability" under the statute includes deaf litigant parties. Because court judges are unable to effectively communicate all legal actions with deaf litigants, they mandate representation by persons of their choice. However, the representation requirement restricts equal treatment before the

[85] Shimellis Mosa vs. Zanabach Mosa, Lideta Federal First Instance Court, File No. 60212, 2011 E.C.
[86] Confidential Interview, Legal Attorney with Disability at Federal Courts 1, Addis Ababa, on 25 November 2023; Interview with FFIC Chief Registrar (n 83).
[87] Interview with Honorable Judge Tolosa Hirko, Oromia State Supreme Court Judge, Addis Ababa/Finfinne, on 09 February 2024.
[88] Confidential Interview with Oromia Supreme Court Legal Expert, Addis Ababa/Finfinne, on 07 February 2024.
[89] Confidential Interview with Oromia State Supreme Court Judge, Addis Ababa/Finfinne, on 06 February 2024.
[90] Confidential Interview with Adama City Bole Sub- City State First Instance Court (SFIC) Judge, Adama, on 26 March 2024.

law and courts, denies the right to self-representation, and fails to comply with the procedural accommodation provisions recognized by the CRPD.

The annual work performance reports issued by the Federal Supreme Court show federal courts provided court interpretation services to 30, 347 people between 2015 and June 2023 (2009-2015 E.C).[91] Similarly, the Oromia region courts provided 169,698 court interpretation services between 2010 E.C and 2015 E.C.[92] Each report, however, neither distinguishes the number of services provided in civil and non-civil cases as well as the number of service provided for vocal and sign language interpretation needs. According to a key informant from federal court, the federal courts began to provide sign language interpreters before the right to sign language officially recognized by the Federal Courts Proclamation No. 1234/2021. [93] However, there is no similar commitment from Oromia courts.

In connection to the issue, the Federal Supreme Court's five-year strategic plan (2021-2026) states that the court intends to develop a standard and certification system for court interpreters to strengthen court interpretation services, including sign language interpretation.[94] However, the process of standardization and certification has not yet begun.

In the context of Oromia, the Oromia Supreme Court has developed its ten-year strategic plan (2021- 2030 G.C/ 2013-2022 E.C). According to the plan, the court intends to improve court interpretation services by recruiting more interpreters and

[91] Federal Supreme Court, 'Federal Courts Annual Reports', available at: https://www.fsc.gov.et/Digital-Law-Library/Annual-Reports/PgrID/888/PageID/1, accessed on 10 December 2023.
[92] Oromia State Supreme Court, 'Court Interpretation Service Report' (2009-2015 E.C) (on file with the author).
[93] Confidential Interview with Federal Supreme Court (FSC) Registrar Officer, Addis Ababa, on 20 October 2023.
[94] Federal Supreme Court, 'Federal Courts Annual Reports' (n 91), available at: https://www.fsc.gov.et/Digital-Law-Library/Annual-Reports/PgrID/888/PageID/1, accessed on 10 December 2023.

enhancing their capacity. [95] However, the strategy restricts the provision of interpretation services in circumstances recognized under "the federal and regional constitutions and regional laws".[96] In other words, the service's provision focuses solely on criminally accused individuals while ignoring the demands of civil proceedings interpreters, which is against Article 13 of the CRPD.

5. Barriers to Providing Accommodation for Deaf Persons in Civil Proceedings

Deaf persons face numerous hurdles in accessing civil justice in both the federal and Oromia regional courts. The 2022 Federal Courts users' satisfaction survey report shows only 37% of respondents are satisfied with the provision of court interpretation services.[97] This implies the majority of the court clients of deaf people have complaints about the same interpretation services, and the same is also observed in Oromia courts. This section discusses factors that impede people with hearing impairments from fully exercising their right to access civil justice under the Ethiopian legal system, based on the analytical inputs observed in the federal and Oromia regional courts.

5.1. Legal Barriers

Adopting a disability-friendly regulatory framework in Ethiopia is in its early stages. This study finds five main flaws in Ethiopian law and policy frameworks that inhibit deaf persons' access to civil justice, both directly and indirectly. First of all, the country does not recognize sign language as a working language of the state, mainly courts, though, according to the World Health Organization, Ethiopia has approximately five million people with hearing impairments.[98]

[95] Oromia State Supreme, 'Oromia Region Court Ten Years Strategic Plan' (2013-2022 E.C), p. 42.
[96] *ibid.*
[97] Federal Supreme Court, 'Federal Court Users Satisfaction Survey Report' (2022), p. 28. Available at: <https://www.fsc.gov.et/Digital-Law-Library/Annual-Reports > accessed on June 08, 2024.
[98] Demessie (n 10), P.32; World Health Organization (n 24).

Demographically, the projected sign language speakers are the fifth largest language in the country, next to Afaan Oromo, Amharic, Tigrigna, and Somali. The potential speakers of sign language outnumber those of several languages chosen as the federal government's working language under the 2020 Ethiopian Language Policy, such as Afarigna, which is spoken by approximately two million people. Making sign language a working language of the courts facilitates easy access to sign language interpreters. Currently, ENAD, EHRC, and other players are lobbying the government to make sign language the country's working language.[99]

Second, the Ethiopian government is hesitant to enact relevant legal and policy frameworks, as well as disability-related treaties, that would improve deaf persons' access to civil justice. These include failure to adopt the draft PWDs proclamation and non-ratification of the ACHPR PWDs Protocol and the CRPD's Optional Protocol.[100] Although the government has begun the process of ratifying the ACHPR PWDs Protocol, there has been no corresponding initiation in the case of the CRPD Optional Protocol.[101] Besides, the government lacks a civil justice policy, as opposed to a criminal justice policy, which guarantees the right to court interpretation in criminal cases.

Third, Ethiopia's existing policy and legal frameworks failed to adequately accommodate the right of PWDs to access to justice. Starting with the constitution, neither the federal nor regional constitutions of the country specifically guarantee the rights of PWDs, nor are they modified in conforming with the CRPD standard. In this regard, the newly formed regional state constitutions of South Western Ethiopia, Central Ethiopia, and Southern Ethiopia recognize the right to non-

[99] Interview with Mr. Gedamu Hundecha, Director of Ethiopian National Association of the Deaf Persons (ENAD), Addis Ababa, on 21 November 2023; EHRC (n 76), p. 1.
[100] Regarding the importance of ratifying each treaty instrument for the deaf litigant party refer to sections 2.1 and 2.2.
[101] *ibid.*

discrimination based on disability, as well as equal protection and recognition for PWDs.[102]

On top of that, the regional court establishment statutes and federal and regional Sharia Court proclamations do not specifically guarantee the right to access sign language interpreters. Perhaps, each law recognizes the right to interpretation for anybody unable to understand the court's working language.[103] Besides, despite the government's adoption of the National Action Plan for Persons with Disabilities (2012-2021), the plan was silent on PWDs' right to access to justice. This implies that the major Ethiopian regulatory frameworks have a deficiency in recognizing procedural accommodation to ensure access to justice for PWDs.

The absence of appropriate harmonization of Ethiopian legislation with the CRPD and other disability rights norms is another downside of Ethiopian laws. The CRPD mandated states to undertake policy and legislative reforms and to harmonize with the rights of PWDs.[104] Several laws in the country restrict PWDs from exercising their civil rights. For example, Articles 339-388 of the Ethiopian Civil Code erode PWDs', equal recognition and full legal capacity to enjoy all civil rights, including access to civil justice.[105] For example, article 340 of the civil code defines deaf people to be incapable, in contrast to Article 12 of the CRPD, which recognizes equal capacity.

Beyond that, the 1965 Ethiopian Civil Procedure Code not only fails to provide persons with hearing impairments with procedural accommodations but also forces

[102] See South Western Ethiopia Regional State Peoples' Constitution, 2021, Art. 25 (1), Proc. No. 1/2021, SW Neg. Gaz., Year 1, No. 1; Southern Ethiopia Regional State Constitution, 2023, Art. 26 (1), Proc. No. 1/2023, Deb. Eth. Neg. Gaz., Year 1, No. 1; Central Ethiopian Regional State Constitution, 2023, Art. 27(1) Proc. No. 1/2023, Cent. Neg. Gaz., Year 1, No. 1.

[103] Mohamed Abdo, 'Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia, Mizan Law Review', Vol. 5, No. 1, Spring 2011, P. 78; Endris Muhammed, 'Protection of Accused Persons with Hearing and Speech Disabilities under the Ethiopian Criminal Justice System, Ethiopian Journal of Human Rights', Vol. 6, 2021, P.109.

[104] CRPD, (n 37), Art. 4 (1a).

[105] Committee on the CRPD, 'Concluding Observations on the Initial Report of Ethiopia', (2016), para. 25.

PWDs to sue and be sued through a legal representative.[106] In other words, the code precludes deaf persons from representing themselves in court. As previously stated, some judges of Oromia region courts invoke the provision requiring deaf persons to be represented by family or other persons before launching civil proceeding litigations.[107] Although the CRPD Committee recommends that Ethiopia revise and harmonize laws that contravene the rights of PWDs, the country does not take adequate and formal actions to reform and repeal these laws.[108]

Lastly, the country's legal and policy instruments continue to use pejorative terms to refer to people with disabilities.[109] For example, in the Ethiopian Constitution and the recently enacted Federal Courts Proclamation, the term 'disabled' has been employed instead of PWDs.[110] Similarly, the Ethiopian Civil Code and Commercial Code utilized the terms 'infirm' and 'deaf-mute' to refer to those who are hard of hearing.[111] Such derogatory words are discriminatory and jeopardize the dignity of persons with hearing impairments and other PWDs.

The CRPD Committee raised concern that pejorative terminology continues to be used in legal and policy frameworks. The Committee recommends that the country should eliminate any abusive language used to refer to PWDs and use appropriate terminologies compatible with PWDs' human rights and the CRPD.[112]

5.2. Issues Concerning Sign Language Interpreters

[106] See Art. 34 (2) of the 1965 Civil Procedure Code of Ethiopia.
[107] Confidential Interview with Adama SFIC Judge (n 90).
[108] Ethiopian Lawyers with Disabilities Association (ELDA), 'Reviewing Major Federal and Regional Laws and Practices Pertaining to People with Disabilities' Rights' (2022), Research Report, p. 12.
[109] Committee on the CRPD, 'Concluding Observations on the Initial Report of Ethiopia', (2016), para.5
[110] FDRE Constitution, 1995, Art. 41(5); Federal Courts Proclamation, 2021, Art. 31(3).
[111] Civil Code of Ethiopia, 1960, Art. 339-388, Proc. No. 165/1960, *Fed. Neg. Gaz*. (Extraordinary issue), Year 19, No. 2; Commercial Code of the Federal Democratic Republic of Ethiopia, 2021, Arts. 205 (1b) & 229(1e), Proc. No. 1243/2021, *Fed Neg. Gaz* (Extraordinary issue). Year 27, No.23.
[112] Committee on the CRPD, 'Concluding Observations on the Initial Report of Ethiopia', (2016), para. 27.

People with hearing impairments prefer sign language for communication in their private and public lives. The CRPD does not explicitly recognize the right to sign language interpreters during court proceedings. Perhaps, article 13 of the Covenant warrants the provision of procedural accommodations to PWDs, which includes the assignment of a sign language interpreter for a deaf person.[113] In Ethiopia, only the Federal Courts Proclamation and its subordinate legislations require courts to offer a sign language interpreter for litigant parties with hearing impairments, regardless of the nature of the case. [114]

The enforcement of the clause could also prove challenging. First and foremost, courts did not employ sign language interpreters. The Federal Courts Proclamation requires courts to provide sign language services as needed. The courts can provide the service by hiring either temporary or permanent sign language court interpreters. Among the possibilities, recruiting a permanent interpreter offers greater accessibility and quality of interpretation service.

Nonetheless, courts are hesitant to hire sign language interpreters due to the intermittent nature of the case. They contend that hiring a permanent sign interpreter for sporadic work is a waste of public resources and that the job does not meet the Ethiopian public servants' minimum working hour standard of 39 hours per week.[115]

In this sense, the ENAD members disagree with the argument. They claim that, even though sign language interpretation is an irregular task, sign language interpreters are difficult to find when the need comes. They proposed and requested that courts hire a limited number of permanent sign language interpreters who can serve in various courts on a mobile basis.[116]

[113] Wilson Macharia, 'Access to Justice for Persons with Disabilities in Kenya from Principles to Practice' (MA Thesis, HRDA Global Campus Africa, 2020), p. 25; Ortoleva (n 20), P. 294.
[114] ELDA Report, (n 108), p. 23.
[115] Confidential Interview with FSC Registrar Officer (n 90).
[116] Confidential Interview with Sign Language Expert at ENAD, Addis Ababa, on 21 November 2023.

Alternatively, the association proposes that existing verbal language court interpreters and judges be given sign language training.[117] However, the federal and regional courts prefer to use temporary sign interpreters. In Uganda, for case in point, "the Judicial Service Commission has trained legal officers in sign language in order to effectively communicate with persons with hearing impairments.[118]

The legal awareness of sign language interpreters is another source of worry. According to Mikkelson, mastery of both court interpreting techniques and legal terminologies is required for effective court interpreting.[119] Regrettably, sign language interpreters are unfamiliar with legal jargon and vocabulary, which requires specialized training and knowledge.[120] In practice, misinterpretation and miscommunication occur between the deaf litigant party, the interpreter, and the judge who entertains the case.[121] Miscommunication and misinterpretation may jeopardize the litigant's with hearing impairments right to access to justice.

Plus, while Ethiopia is home to more than 80 languages, Ethiopian Sign Language is the sole standardized language used by the country's deaf persons minority.[122] Ethiopian Sign Language is less accessible to people from diverse communities, particularly those who do not learn Amharic Geez Script. Several academics have also questioned the comprehensiveness and consistency of Ethiopian Sign Language. Some words and signs are made up arbitrarily with no connection between sign and meaning.[123] In a courtroom, such linguistic interpretation mismatch might have tragic consequences for litigant parties with hearing impairments.

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[117] Interview with Gedamu (n 99).
[118] Committee on the CRPD, 'Combined Second to Fourth Periodic State Reports Submitted by Uganda under Article 35 of the Convention, Due in 2022', (2023), para. 66.
[119] Simelane (n 15), p. 17.
[120] Interview Honourable Judge Habtamu Kabtimyer, Federal Supreme Court Cassation Bench Judge, Addis Ababa, on 08 February 2024.
[121]Confidential Attorney with Disability at Federal Courts 2, Addis Ababa, on 25 November 2023.
[122] Demessie (n 10), P.32; African Sign Language Resource Center- Ethiopia, available at: <https://africansignlanguagesresourcecenter.com/ethiopia/ >. Accessed on 07 December 2023.
[123] *ibid;* Demessie (n 10), P.32.

When an illiterate litigant party with hearing impairments comes into court, the challenge of employing sign language is exacerbated. More than 85% of deaf individuals in Ethiopia are uneducated and live in rural areas where learning sign language is difficult.[124] Sign language interpreters provide interpretation services for litigant parties who have mastered sign language. If a litigant party with hearing impairments does not learn sign language, he or she will be unable to communicate using sign language.[125]

When deaf persons who have not learned sign language appear in court, courts either use a family/ community interpreter or request that the litigant party with hearing impairments be represented by a close companion or family members.[126] In the case of *Eyerusalem Balay v Gedlu Addisu,* as an example, the plaintiff with a hearing disability was supported by a family interpreter.[127] However, this approach is neither standardized nor institutionalized. Family interpreters may also interpret in favour of the litigant party with hearing impairments side.[128]

Inadequate and delayed payment for court interpreters also hampers the effective provision of sign language interpretation services in courts. According to the Federal Supreme Court's five-year strategic plan (2021-2026), federal courts are not appropriately offering court interpretation due to insufficient and delayed payment to court interpreters.[129] The temporary sign language interpreters are paid 250 birrs for each sign language service.[130]

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[124] Bezawit Bekele, Yonas Mulugeta and Hanna Girma, 'Women with Disabilities, Their Challenges in Laws and Administration of Justice: Cases from Addis Ababa, Ethiopian Journal of Human Rights', Vol. 3, 2018, 138; Federal Ministry of Education, 'Education Statistics Annual Abstract September 2021/22-2014 E.C.' (2021), p. 68

[125] Confidential Interview with Sign Language Expert at ENAD (n 116).

[126] Confidential Interview with Attorney with Disability at Federal Courts 1 (n 86).

[127] Eyerusalem Belay vs. Gedlu Addisu, Lideta Federal First Instance Court, File No. 0021/2010, 2010 E.C.

[128] Interview with Honourable Judge Hanna Gebremichael, Lideta Federal First Instance Court Judge, Addis Ababa, on 22 March 2024.

[129] Federal Supreme Court, 'Federal Courts 3rd Strategic Plan (2021-2026)' (2021), p. 35.

[130] Confidential Interview with Sign Language Expert at ENAD (n 116).

The service remuneration is not only inadequate but also fails to account for actual transportation costs and waiting time at court to deliver the service. Sign language interpreters, according to ENAD key informants, perform the service at their own expense to comply with court orders and to help the deaf litigating party rather than getting adequate payment for their professional services.[131]

Additionally, sign language interpreters are not paid at the courts when they provide sign interpretation services. To give an example, the allowance payment for sign language court interpretation service delivered in all eleven federal first instance courts and four federal high courts in Addis Abeba is only served at Lideta Federal High Court, whereas payment for other verbal language court interpreters is served at the court where interpretation service is provided.[132] In this regard, the Federal First Instance Court and Federal High Court key informants responded the payment of sign language interpreters currently began to be served at the court, where the service was provided.[133]

The payment is also made after several adjournments, in contrast to the Federal Court Interpreters Directive, which requires courts to pay service fees on the day interpretation services are rendered, immediately.[134]Due to budget constraints, the court orders the litigant party with hearing impairments to bear the expense of an interpreter in some cases.[135] This approach defies the legal protection of deaf persons' right to sign language interpreters at state expense.

Last, but not least, the current salary scheme for court interpreters is unappealing. In federal courts, for example, a diploma holder with two years' experience is paid 3,333 Ethiopian birrs per month, while a degree graduate with two years' experience

[131] *ibid.*
[132] *ibid.*
[133] Interview with Mr. Alemayehu and FFIC Chief Registrar (n 83).
[134] Federal Court Interpreters Directive, section 3.4.8; Interview with Sign Language Expert at ENAD (n 116).
[135] Confidential Interview with ELDA member, Addis Ababa, on 21 December 2023.

is paid 4609 birrs per month.[136] In Oromia, the Court Interpreter position requires a BA degree in Language and Literature in all tiers of courts and pays 3934 birrs per month.[137] Furthermore, there is no system of promotion or salary increase for those who upgrade their educational level or expertise.[138]

The salary is not only insufficient but is also difficult to cover the worker's personal and household expenses. [139] Ultimately, the benefits, allowance, and payment system for expert court interpreting services are disappointing. In practice, many people are uninterested in entering the profession and delivering assistance.[140]

5.3. Cost of Civil Litigations

The cost of litigation for the deaf litigant party is another barrier to accessing civil justice. According to the International Labour Organization (ILO), 95% of Ethiopia's PWDs (including deaf persons) are impoverished.[141] Although few deaf people are financially strong, the majority of them are unable to handle the cost of pleading preparation, court fees, translation and transportation expenditures, and other associated costs.[142]

In the case of litigations that have monetary value, court fees are based on the amount of the claim. For example, a person claiming 100,000 Ethiopian birrs before federal courts is required to pay a court fee of 3,350 birrs at first instance jurisdiction and 1,675 birrs (50%) to claim for a single appeal, disregarding other expenses.[143] In the

[136] Interview with Zinashwerk (n 82).
[137] Interview with Mulu (n 82).
[138] Interview with Ad. Itenesh ___, Oromia State Supreme Court Interpreter, Addis Ababa/Finfinne, on 06 February 2024.
[139] *ibid*; Interview with Mr Ermiyas Name, Federal Supreme Court of Ethiopia Local Language Court Interpreter, Addis Ababa, on 20 December 2023.
[140] Interview with Mr. Shewangizaw _____, Federal Supreme Court Foreign Language Interpreter, Addis Ababa, on 24 January 2024.
[141] International Labour Organization, 'Inclusion of People with Disabilities in Ethiopia', available at:<https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_112299.pdf >. Accessed on 17 December 2023.
[142] Ashagre (n 22), P. 28.
[143] Federal Supreme Court, 'Federal Supreme Court of Ethiopia- Court Forms and Fees.' available at:

case of Oromia, a person filing to claim 100,000 birrs is required to pay 6% (6000 birrs) for the initial hearing, 3000 birrs for the appeal, and 500 birrs for the opening of execution files.[144] Attorney expenses usually range from 7 to 10 percent of the claimed monetary value. Indigent plaintiffs or appellants with hearing impairments are not in a position to cover such expenses.[145]

Although the Ethiopian Civil Procedure Code permits indigents who cannot afford court fees to file civil suits in forma pauperis, the proofing process to obtain the service is complicated.[146] Producing evidence of pauperism is challenging for PWDs compared to other persons due to the lack of appropriate accommodation before concerning bodies such as the Kebele administration.[147] In this respect, the Kenyan PWDs Act exempts PWDs from paying court fees to ensure their effective access to civil justice by considering the destitute situation of most PWDs and to avoid over-processing of cases.[148]

In Ethiopia, unlike Kenya, PWDs do not have automatic privilege in judicial proceedings except labour case litigation which is guaranteed for all employment case litigations.[149] The pauper suit is conditional upon application, producing evidence of pauper status and approval by the concerned organ. To mitigate the challenge, at least, exempting court fees by mere declaration of PWDs as poor and shifting the burden of proof to the opposing party fosters access to justice for deaf persons.

<. https://www.fsc.gov.et/Court-Services/Registry-Services/Court-Forms-and-Fees>. Accessed on 05 December 2023.

[144] Oromia Regional Courts Court Fee Regulation, Regulation 08/2016 E.C (2023), Article 18, 15 (3d) and annex.

[145] Interview with Mr Jafar Aliyi, Attorney at Oromia and Federal Courts, Addis Ababa, on 20 December 2023.

[146] Confidential Telephone Interview (n 77); Ashagre (n 22), P.28.

[147] *ibid.*

[148] Committee on the CRPD, 'Kenya 2012 State Report, para. 134.

[149] Federal Supreme Court, 'Federal Supreme Court of Ethiopia- Court Forms and Fees.' (n 143).

On top of that, if there is an economic imbalance between the destitute person and the opposing party that covers litigation costs, such as attorney's fees, the litigant with hearing impairments becomes detrimental in defending his or her case. In civil proceedings, William Rubenstein observes that 'litigants lose equal access to justice if they lack the resources to litigate their cases more or less as effectively as their opponents'.[150] Indeed, federal and state advocate statutes require private attorneys to provide limited pro bono advocating services to indigent clients.[151]

The Federal Ministry of Justice and regional justice offices also provide free legal assistance and representation to society's most vulnerable populations.[152] Such legal recognition could contribute to reducing the power imbalance between plaintiff parties in civil proceedings litigations. Accessing the service, however, can be tricky for a person with hard of hearing owing to limited access to information and a scarcity of sign language interpreters for effective communication.[153]

Similarly, free legal aid centres found at public universities and PWD associations, such as The Federation of Ethiopian National Associations of PWDs and ELDA, offer free legal consultation and representation to poor PWDs.[154] Legal aid services are typically limited in major cities and may be difficult to access for people with hearing impairments living in rural areas. They also confront resource constraints, such as the lack of a sign language interpreter to handle their case.[155]

5.4. Data and Documentation Issues

[150] William B Rubenstein, (n 13), P. 1865.
[151] Federal Advocacy Service Licensing and Administration Proclamation, 2021, Art. 31, Proc No. 1249/2021, *Fed. Neg. Gaz*., Year 27, No. 42; Proclamation Licensing and Administration of Advocates and Paralegals of Oromia National Regional State, 2013, Art. 33 (4b), Proc. No. 182/2013, *Mag. Oro.*, Year 21, No. 7.
[152] Interview with Mr Fikadu Demissie, Director of Advocate Licensing and Free Legal Aid Directorate at Ministry of Justice, Addis Ababa, on 17 January 2024; Interview with Ob. Juhar Mohammed, Head of Justice Office at Adama City Bole Sub-city, Adama, on 26 March 2024.
[153] *ibid.*
[154] *ibid.*
[155] *ibid.*

Article 31 of the CRPD requires state parties to collect and disseminate statistical and research data on PWDs to relevant bodies to facilitate the formulation and implementation of appropriate policy and legal frameworks. In Ethiopia, however, there are no accurate updated statistics on PWDs, including the number of deaf persons and people with hearing and visual impairments.

According to the 2007 census, there are 146, 859 people with hearing impairments out of a total of 805,492 people with disabilities (deaf people (27, 288), people with difficulties of hearing (73, 632), and people with hearing and speaking impairments (45, 959).[156] However, the credibility and census quality were in doubt.[157] The ENAD estimates the country's current deaf population to be 3.5 million, whereas the African Sign Language Resource Centre estimates it to be 2.5 million.[158]

According to the WHO, the country has five million persons with hearing impairments.[159] According to studies, people who are hard of hearing account for roughly one-fifth of the total PWD population.[160] Moreover, there has been no census of people with hearing and visual impairments, simultaneously. The ENADB believes that there are thousands of deaf-blind people in Ethiopia.[161] In general, data on PWDs is erroneous, inadequate, fragmented, and deceptive, including the number of people with hearing impairments in the country.

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[156] Ethiopian Statistical Service (n 11).
[157] Yordanos Seifu Estifanos, 'Commentary: Ethiopia's Census Dilemma: From Implementation Gap to the Politics' *Addis Standard* (2018) <https://addisstandard.com/commentary-ethiopias-census-dilemma-from-implementation-gap-to-the-politics/ > accessed on 13 December 2023.; Dagnachew B Wakene, Priscilla Yoon, and Tsion Mengistu, 'Country Report: Ethiopia, African Disability Rights Yearbook', Vol. 9, 2021, P.212.
[158] Interview with Gedamu (n 99); African Sign Language Resource Center- Ethiopia (n 122).
[159] Demessie (n 10), P. 32; World Health Organization (n 24).
[160] Zelalem Tenaw, Taye Gari and Achamyelesh Gebretsadik, 'The Burden of Disabilities in Sidama National Regional State, Ethiopia: A Cross-Sectional, Descriptive Study, PLoS ONE', Vol. 18, No. 7, 2023, P. 2; Solomon Mekonnen Abebe and others, 'Severe Disability and Its Prevalence and Causes in Northwestern Ethiopia: Evidence from Dabat District of Amhara National Regional State. A Community Based Cross-Sectional Study' (2021) <https://doi.org/10.21203/rs.3.rs-18602/v5 >, accessed on 13 December 2023.
[161] Interview with Mr Mesay Teferi, Project Officer at Ethiopian National Deaf-Blind Association, Addis Ababa, on 5 December 2023.

The lack of trustworthy data has detrimental consequences for developing and carrying out intervention mechanisms to meet the needs and interests of the PWD community. Ethiopian courts also lack comprehensive statistics on the demand-supply side of hearing-impaired accommodation.[162] The federal and regional courts have refused to hire sign language interpreters, citing the country's small population with hearing impairments in need.[163] It is difficult to influence and persuade policymakers and officials to meet the needs and preferences of the population with hearing impairments when there is no credible data.

Although the Ethiopian constitution requires the government to conduct a national census every ten years, the country's most recent census was conducted in 2007. The inconsistent and misleading projections made by many entities question the data's veracity and the scale of the problem into suspicion.[164] The lack of trustworthy statistics exacerbates the marginalization of the country's already marginalized populations of deaf persons.

6. Conclusion

This article examines how the Ethiopian civil justice system accommodates the rights of deaf litigant parties in court proceedings, with a focus on the selected federal and Oromia regional courts. Federal and regional laws recognized everyone's right to access civil justice, including the deaf person. At the federal level, the Federal Courts Proclamation No. 1231/2021, several Federal Supreme Court Directives, and Ethiopian Language Policy (2020) all acknowledged the provision of sign language interpreters at public expense for court access. In Oromia, however, the recognition of court interpreters is limited to criminal trials and does not include the provision of sign language interpreters in civil cases, in contrast to articles 12 and 13 of the CRPD.

[162] Confidential Interview with FSC Registrar Officer (n 93); Interview with Gedamu (n 99).
[163] Interview with Zinashwerk and Mulu (n 82).
[164] Estifanos (n 157); Wakene, Yoon, and Mengistu (n 157), P. 213.

In practice, federal courts appoint a sign language interpreter for a person who understands sign language. The illiterate who has not learnt sign language is either supported by family members or represented by a person of his or her choosing. In Oromia courts, deaf litigant parties must either furnish their interpreter or be represented by another person in civil proceedings. This practice limits deaf litigants' rights to equal recognition and capacity in court, as well as their right to self-representation in court litigations.

The actual provision of appropriate procedural accommodation for deaf persons presents several challenges. Among other things, Ethiopia has yet to recognize sign language as a working language and is reticent to enact the draft law governing the rights of PWDs. On top of that, the country fails to promptly modify and harmonize obsolete disability-hostile laws, such as civil code clauses that contradict CRPD standards. In addition, no federal or regional legislation requires courts to provide technological assisting devices to deaf litigants.

Furthermore, the federal and regional courts lack the structure to hire permanent sign language interpreters, given the service's sporadic nature. The court interpreter's payment and benefit structure are likewise unappealing for providing the service. Besides, more than 85% of the country's deaf population is illiterate, relying on family interpreters or legal representation instead of using Ethiopian Sign Language.

The expensiveness of civil litigation may also discourage destitute persons with hearing impairments from seeking civil justice. The statistics data on PWDs, especially the number of people with hearing impairments in the country, is unreliable and misleading for designing and implementing intervention mechanisms. These constraints restrict deaf litigant parties' rights to equal participation and equality of arms in civil proceedings.

To address the aforementioned limitations, this article recommends that the federal and regional state governments should undertake radical legal and practical reforms,

such as making sign language a working language of courts; revising and adopting disability-friendly laws, including explicit recognition of free sign language interpreters in civil proceedings; elimination of derogatory terms in existing laws; expanding access to education for PWDs, including sign language for deaf persons and court staffs; and strengthening the provision of necessary accommodations in courts.

Courts should also employ permanent sign language interpreters, establish separate PWD courts or divisions with proper facilities for diversified types of disabilities, and allocate adequate budgets for accommodations. More importantly, courts should provide sign language training to judges and court staff. In addition, they shall provide training to sign language interpreters on essential substantive and procedural laws.

State and non-state actors' free legal aid providers should expand their services to remote rural areas and improve accommodation facilities for PWDs, including recruiting sign language interpreters. It is also preferable if the court charge is waived by mere declaration of deaf litigant parties as indigent and shifting the burden of proof of non-indigency to the opposing party to facilitate access to justice, as the vast majority of PWD live in destitute situations.

Contractual or Judgmental Approach: Unearthing the Legal Nature, Effect and Execution of Compromise Agreement under Ethiopian Law

Eyader Teshome Alemayehu[♣]

Abstract

As a matter of general principle, voluntary and pacific settlement of civil matters (and arguably some criminal matters) through compromise agreement between parties to an actual or potential legal dispute is commendable on various beneficial grounds. Compromise is a voluntary resolution of legal disputes to avoid litigation or put an end to one already commenced. Yet, an effective accomplishment of its purpose requires establishing an efficient legal framework that regulates every aspect of legal issues it involves. Accordingly, this article investigates the status, requirements, parties, subject matter, time, execution and legal effect of compromise under Ethiopian law. Based on a doctrinal legal research approach, it argues that the legal status, clarity and effect of compromise are vague in the Ethiopian legal framework. The legal regime is ambiguous about whether compromise is a contract or consent decree in addition to the vagueness of its substantive and procedural requirements for an execution. The recently introduced Arbitration and Conciliation Working Procedure Proclamation [No.1237/2021] also overlooks the subject of compromise. Hence, this article recommends an overall revision of compromise in the Ethiopian legal system. This includes clearly defining its legal status, scope that identifies subject matters not amenable to it, and establishing conditions such as the requirement for a written form to enter into it and court approval for its execution.

Keywords: Agreement, compromise, Ethiopian Law, res judicata, satisfaction and settlement

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1. **Introduction**

The formal litigation of legal disputes in a court of law is the primary mode of resolving disputes of both civil and criminal matters.[1] Nevertheless, one of the distinctive features of civil matters is that an individual whose right is allegedly infringed cannot be compelled to bring and pursue his/her claim against the defendant in a court of law.[2] As a natural corollary to this, parties can resolve their dispute in or out of court either through litigation, conciliation[3], arbitration[4] or even to the extent of abandonment[5] of their claim.

In an attempt to legally acknowledge this private right in resolving disputes, many legal systems recognize compromise as one of the devices for prevention and/or termination of litigation over civil matters (and arguably some criminal matters)[6] where parties settle their contentious issues by agreement.[7] The very purpose of such compromise is a voluntary resolution of legal disputes and, at the same time, avoids litigation before the court on the same matter. Public policy acclaims this peaceful settlement of dispute between and among individuals for such resolution provides innumerable advantages over litigation from the vantage point of saving time, cost, and energy of parties as well as the court to the maintenance of social relationships.[8]

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[1] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 37 & Article 79, Proc. No.1/1995, *Fed. Neg. Gaz.*, (Extraordinary Issue), Year 1, No.1.

[2] For one thing, it is a dispute over private rights or interests and for another thing, compulsory litigation of such matter is difficult and at times impossible as there is less public interest in it.

[3] Arbitration and Conciliation Working Procedure Proclamation, 2021, Article 4-Article 53, Proc. No.1237/2021 *Fed. Neg. Gaz.*, Year 27th, No.21 [Herein after ACWP Proclamation No.1237/2021]; Civil Code of Ethiopia, 1960, Article 3318-3324, Proc. No. 165/1960, *Neg. Gaz.*, (Extraordinary Issue), Year 19, No.2

[4] ACWP Proclamation No.1237/2021, Article 54-76; Civil Code, Article 3325-3346; Civil Procedure Code of Ethiopia, 1965, Article 315-319 cum Article 350-357, Decree No.52/1965, Neg. *Gaz* (Extraordinary Issue) 25thYear, No.3

[5] Civil Procedure Code, Article 278-279.

[6] Some argue that compromise can be validly made over certain types of crime. See I.J. Hardingham, 'Setting Aside Agreements of Compromise,' Melbourne University Law Review, Vol.8, 1971, p.152

[7] Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2044-Article 2058. Civil Code of the Philippines, Republic Act No. 386, Article 2028-Article 2041.

[8] David Fosket, *The Law and Practice of Compromise*, (4th ed., London: Sweet & Maxwell 1996).

Nonetheless, compromise can also be an instrument of multiple litigations, dilatory tactics, exploitation of weakest parties, and unnecessary sacrifice of rights unless effectively regulated.[9]Therefore, for compromise to effectively settle disputes, it must be backed by an efficient legal framework that is a foundation for its effective utilization and easy enforcement. In particular, the law recognizing, governing and regulating compromise must be able to provide a detailed account of how, when and between whom compromise can be reached, its legal status and effect, the manner of its enforcement, and subject matters that can and cannot be amenable to it. This is particularly true given that the entire efficacy or otherwise of compromise depends on whether the law clearly and effectively governs those matters.

In Ethiopia, the applicable rules on compromise are primarily found in the Civil Code[10] and the Civil Procedure Code. [11]Inexplicably, the legal status of those provisions on compromise is neither repealed nor reformed by Arbitration and Conciliation Working Procedure Proclamation No.1237/2021 [ACWP Proc.No1237/2021], Federal Courts Proclamation No.1234/2021 and Federal Court Annexed Mediation Directive No.12/2014 E.C. One may wonder as to the comprehensiveness, effectiveness and even contemporariness of the Civil Code and the Civil Procedure Code provisions on compromise after half a century, which in turn, merits systematic investigation. In this regard, even if some scholars made notable contributions,[12] still much is left to be explored[13] vis-à-vis the underlying

[9] For arguments against compromise see Owen Fiss, 'Against Settlement,' Yale Journal of Law, 1984, p.93.
[10] Civil Code, Article 3307-3317.
[11] Civil Procedure Code, Art.274-277.
[12] Tecle Hagos, 'Amicable Dispute Resolution in Civil and Commercial Matters in Ethiopia: Negotiation, Conciliation and Compromise', Mizan Law Review, Vol.13, No.1, 2019, PP.1-30. Samuel Ephrem, 'The Need for Comprehensive Legislative Reform on Court Annexed ADR in Ethiopia', Mizan Law Review, Vol.17, No.1, 2023, pp. 151-166. Fekadu Petros, 'Underlying Distinctions between ADR, Shimglina and Arbitration: A Critical Analysis', Mizan Law Review, Vol.3, No.1, pp.105-133. Shipi M. Gowok, 'Alternative Dispute Resolution in Ethiopia - A Legal Framework,' African Research Review, Vol. 2, No.2, 2008, pp. 265-285.
[13] For example, a detailed study has not been carried out in relation to the legal status of compromise, contractual or judgmental nature of compromise, legal effect, and parties to, time and execution of compromise in Ethiopia.

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landscape of compromise and the relationships between these different laws to regulate every legal matter about compromise.

Accordingly, this article aims to provide a comprehensive investigation and analysis of the compromise agreement in the Ethiopian legal framework. For this purpose, a qualitative and doctrinal legal research approach is employed. Primarily, through doctrinal analysis, it identifies and analyses pertinent legal documents, such as laws and binding decisions to examine their legal nature, logicality, consistency, relevance and comprehensiveness. In addition, through a systematic literature review, it analyzes and digests secondary sources to support its arguments.

Thus, the article argues that the Ethiopian legal framework is ambiguous about whether a compromise is a contract or a consent decree, in addition to the deficiency of its substantive and procedural requirements for execution. The recent Arbitration and Conciliation Proclamation No.1237/2021 also doesn't adequately address the subject of compromise. Accordingly, as part of the legal reform on compromise, this article suggests the need to define the legal status of compromise and its scope of application in addition to introducing the requirements, such as a written form of compromise agreement and court approval for its execution. In the subsequent sections, this article discusses the theoretical and conceptual considerations about compromise; then it analyses the Ethiopian legal framework on the understanding, nature, scope of application, gaps and ambiguities of compromise; finally, it draws concluding remarks.

2. Theoretical and Conceptual Considerations of Compromise

2.1. Concept and Rudiments of Compromise

The term compromise[14] is interchangeably referred to as settlement, adjustment, negotiated or conciliated agreement or even just agreement. It is difficult to provide

[14] In this article the words compromise, compromise agreement, and settlement are used interchangeably.

a generally acceptable definition of the term for the obvious reason that its meaning and purpose are used in diverse contexts.[15]Definitions forwarded for compromise demonstrate its contractual source that comes to being and getting legal force as a result of the consensual agreement of parties with a core determination of preventing or ending a dispute.[16] It has been held that a compromise is a contract perfected by mere consent where the parties making reciprocal concessions avoid litigations or put an end to one already commenced.[17] The Ethiopian Civil Code defines compromise as 'a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute from arising in the future'.[18] As noted by Sally Brown, there are four requirements for valid creation and enforcement of compromise: (1) existence of litigation, (2) agreement between the parties, (3) intention of ending or preventing the litigation, and (4) reciprocal concessions or sacrifices made by the parties.[19]

Accordingly, the first element of compromise is the existence of litigation which contemplates the presence of either actual or potential legal dispute between parties. In explaining the denotation and rationale of this element of compromise, Sally maintains that "the mere existence of a disagreement, or even the belief that a dispute will arise, constitutes litigation to reach a compromise and such disagreement is required because if the parties did not disagree, there would be nothing about which to settle."[20]

[15] For example, Black's Law Dictionary defines compromise in two ways: first as a normal compromise and second as a satisfaction "1. *An agreement between two or more persons to settle matters in dispute between them*. [Or] 2. *A debtor's partial payment coupled with the creditor's promise not claim the rest of the amount due or claimed.* Bryan A. Garner*, Black's Law Dictionary*, (7th ed., West Publishing Co. St. Paul., 1999).

[16] Sally Brown Richardson, 'Civil Law Compromise, Common Law Accord and Satisfaction: Can the Two Doctrines Coexist in Louisiana?' Louisiana Law Review, Vol.69, No.1, 2008, p.180.

[17]*Air Transportation Office Vs Gopuco*, The Supreme Courts of Philippine, 2008, Jr, Sol phil.228, http:// sc.judiciary.gov.ph /jurisprudence/2013/ [last accessed December; 2023].

[18] Civil Code, Article 3307.

[19] Sally Brown, *supra* note 16.

[20]*Ibid.*

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The second component of compromise is the existence of agreement which is a mutual assent or meeting of minds between parties to resolve their differences through settlement. This requirement is a clear indication that compromise is a progeny of parties' free will and consent, not of law or court. Consequently, the first nature of compromise is that it is a voluntary act. Thus, one is not legally or otherwise forced to enter into compromise. Such agreement can be made before, during or after commencement of litigation, in or out of court.[21] In the same fashion, Ethiopian law considers compromise as a contract which has a multifaceted implication.[22] The third requirement of compromise is the presence of cause, motive or purpose in the agreement. As a result, for a valid compromise to exist, the agreement must intend to end or prevent a dispute. The following remark has been made regarding this element:

> 'If a dispute arises and the parties enter into an agreement, then the goal of that agreement must be to resolve the dispute via settlement rather than judgment. Otherwise, the agreement does not serve the purpose of a compromise, as the disagreement between the parties will continue to exist.'[23]

The existence of an element of cause or motive in a compromise agreement can be considered as one of its distinctive features.[24] In principle, cause or motive is not relevant in determining the validity of the contract under Ethiopian law unless it is explicitly indicated in the contract itself.[25] Sally Brown*'s* last requirement for a valid

[21] Civil Procedure Code, Article 275.
[22] Civil Code, Article 3307. Concerning the contract nature of compromise, the provisions of the Civil Code (Article 1675-2125 of Civil Code) governing General Contract Law do have application whenever the special provisions governing compromise are silent (Article 1676(1)(2) of Civil Code). This insinuation of reference to provisions of general contract law is particularly important given that the special provisions on compromise are silent regarding most legal requirements on the conclusion of compromise agreement such as capacity of parties, offer, acceptance etc.
[23] Sally Brown, *supra* note 16, P.182.
[24] In fact, an element of cause or motive is also found in the case of an Administrative Contract; see Civil Code Article 3170-3171.
[25] *Id.,* Article 1717 and Article 1718.

compromise is the existence of reciprocal concessions. Parties to compromise usually end or prevent disputes through methods of reciprocal concessions or sacrifices. The actual meaning and legal effect of this particular phrase is not clear under Ethiopian law. It has been interpreted as a condition requiring consideration[26] where both parties undertake an obligation in exchange for something in which there is a quid pro quo, something given, done, or not done in return.[27] Here, the resolution of a disputed claim in return for obligations assumed by the defendant can be considered as a reciprocal concession or good consideration.[28] Hence, mutual concession in case of compromise means parties avoid the filing of a suit or put an end to one that has already been instituted by giving, promising, or retaining something.[29] A question might arise as to whether unilateral undertaking, when only one of the parties assumes obligation or gives away his rights without taking anything from the other, is regarded as a compromise. The position of the Ethiopian Civil Code seems to recognize the total renunciation of rights by one party as a compromise.[30]

Putting together most definitions, it is possible to describe compromise as an agreement between two or more persons with actual or potential legal disputes who enter into a settlement in or out of court to end or prevent litigation over such disputes through mutual concession.[31] Hence, a validly created compromise must be able to resolve disputes, and at the same time prevent future litigation or end one that has already been undergoing.

[26] General Contract law of Ethiopia does provide considerations as elements of the contract, unlike most common law legal systems.
[27] Sally Brown, *supra* note 16, p. 186.
[28] I.J. Hardingham, *supra* note 6, p.151.
[29] Sally Brown, *supra* note 16, p.186.
[30] Civil Code, Article 3309-3310.
[31] *Id.,* Article 3307.

2.2. **Nature and Legal Status of Compromise**

There have been uncertainties and at times scholarly debates,[32] regarding the particular nature and legal status of compromise. About its nature, the usual debate revolves around whether compromise is regarded, in and of itself, as a dispute settlement mechanism or it is a mere result of other dispute resolution mechanisms like negotiation, conciliation or court-annexed mediation. Still, the most important confusion pertains to the characterization of the legal status of compromise as a contract (contractual approach) or consent-decree (judgmental approach). The particular association or classification of compromise either as a contract or judgment does have far-reaching repercussions on the legal effect, enforcement and execution of it as well as in its utility to avoid multiplicity of suits over the same subject matter. Consequently, careful delineation of its nature and legal status inevitably goes beyond academic discourse as it has practical implications.

A. Process Vs. Result Nature

Here the issue is whether a compromise agreement is a means of dispute settlement or it is a result of other dispute settlement mechanisms. To answer this question, one needs to consider whether a compromise agreement includes procedural aspects in addition to substantive features.

The answer to the above query sequentially boils down to an assessment of whether what is considered a compromise is the final agreement of the parties or whether it includes all procedural aspects before those agreements. Some hold that normally compromise is an outcome of amicable dispute resolution methods (particularly that of negotiation and conciliation/mediation) which makes it a by-product or end; rather

[32] See different positions maintained by works of Tecle Hagos, *supra* note 12, p.25 and Damissew Tessema, 'Compromise as a Dispute Settlement Mechanism under the Ethiopian Civil Procedure Code' (Senior Thesis, Addis Ababa University, 2000) (Unpublished).

than itself being an independent dispute settlement mechanism or means.[33] It naturally follows that according to this view, compromise does not have a separate and autonomous existence.

On the other hand, by considering a contract as a dispute settlement mechanism, it is equally possible to consider compromise as a distinct and independent means of dispute resolution.[34] Thus, as a contract, compromise encompasses serious transactions of pre-contractual discussions, offers, counter-offers, and acceptance, and as such can be considered as a process of dispute resolution.

This writer holds that compromise can be treated both as an autonomous process of dispute settlement mechanism or result of negotiation, conciliation and court-annexed mediation. A closer look at Ethiopian law reveals that the law seems to adopt both processes and result nature of compromise. First, both the Civil Code and Civil Procedure Code treat compromise as a distinct means of preventing, ending or discontinuing disputes and litigation.[35] On the other hand, Article 3324 of the Ethiopian Civil Code indicates the result nature of compromise by affirming that compromise can be reached through conciliation. Similarly, the result nature of the settlement agreement is maintained under some provisions of the Arbitration and Conciliation Working Procedure Proclamation No.1237/2021[36] and Federal Courts Proclamation No.1234/2021.[37] Yet, the characterization of compromise as a process or result of dispute settlement still depends on whether it is a contract or judgment.

B. Contractual Vs. Judgmental Approach

A compromise is a contract in the sense that it is a by-product of the parties' consensual agreement, unlike third-party-imposed court judgment or arbitral award.

[33] Tecle Hagos, *supra* note 12, p.25.
[34] Fekadu Petros, 'Underlying Distinctions between ADR, Shimglina and Arbitration: A Critical Analysis', Mizan Law Review, Vol.3, No.1, pp.105-133.
[35] Civil Procedure Code, Article 274-Article 277 &Civil Code, Article 3307-Article 3317.
[36] ACWP Proclamation No.1237/2021, Article 67 & Article 68.
[37] Federal Courts Proclamation No.1234/2021, Article 45 (3 & 4). See also Federal Court Annexed Mediation Directive No.12/2014 E.C.

But once it comes to life through a contract between parties, its characterization as a contract or judgment carries consequences of different gravity on its legal effect and enforcement mechanism.

It has already been noted that compromise between parties settles disputes through agreement and prevents or ends litigation over such matters. But it is possible that, later on, disputes between parties might arise on various issues such as over existence or validity of such compromise itself, and whether or not it settles the underlying subject matter. The legal resolution of those disputes mostly depends on the legal approach adopted in the treatment of compromise as a contract or consent decree. Furthermore, compromise mostly settles original disputes by substituting them with new arrangements or by creating new rights and obligations.[38] There is still a prospect for disputes to emerge lest one of the parties fails or refuses to abide by the terms and conditions of compromise. The legal status of such compromise still determines the enforcement mechanism of this newly created arrangement as well as the legal remedies and remedial recourse pursued by the aggrieved party. If one bestows a decree status upon compromise, one can simply enforce it by instituting execution proceedings. On the other hand, if one continuously regards compromise as a contract, it must be enforced through the normal judicial proceeding of a full-blown trial.

Hence, it is necessary to ascertain the particular legal status of compromise under the legal system. The Ethiopian law lacks clarity on the particular legal status of compromise other than declaring that between parties' compromise has the force of res judicata without appeal.[39] This legal effect of compromise invites a conclusion that compromise does have judgmental status as it bars any subsequent suit on the matter. However, it is doubtful whether all kinds of compromise have such status

[38] Civil Code, Article 3308(1) declares that a compromise may be made to create a legal obligation.
[39] Civil Code, Article 3312(1).

regardless of approval by the court or whether made before or after litigation, in or out of court.

In many of its decisions, the Cassation Division of the Federal Supreme Court vividly proclaimed and underlined the status of compromise as a judgment rendered by the court.[40] In most of those cases, by referring to Article 277 of the Civil Procedure Code, the Cassation attaches approval of the court after ascertaining legality and morality as a requirement for compromise to be treated and executed as court decree.[41] However, in one of its decisions, the Cassation Bench seems to have taken the judgmental status of compromise too far by noting compromise made out of court has judgmental status and effect capable of execution as a decree even without the approval of the court.[42]Though it emanates from the contractual agreement, compromise has a peculiar characteristic of the consent judgment, which is binding and capable of execution by itself like judgment when approved by the court.[43] This court decree character of compromise emanates from its very nature of ending or terminating litigation like a court judgment.

The finality, non-appealability and court decree like the execution of a settlement agreement that emanates from conciliation and court-annexed mediation are also provided under both ACWP Proclamation No.1237/2021[44] and Federal Courts Proclamation No.1234/2021.[45] It is also stated under Article 15 (2) of Federal Court Annexed Mediation Directive No.12/2014 E.C that a compromise agreement

[40] *Birru Qorcho v. Kifle Habdeta*, Federal Supreme Court, Cassation Bench, File No.25912, (02/08/00 E.C), Vol.5, p.343. *Kedir Haji and Lucy College Sh.c. v. Amin Usman and Nuriya Jemal*, FSC, Cassation Bench, File No.52752, (16/10/2002 E.C), Vol.9, p.341. *Werkinesh Wubeneh v. Alemaz Alemu et.al*., FSC, Cassation Bench, File No.83582, Vol.15, (27/07/2005 E.C), p.144-148.
[41] *Ibid.*
[42] *Niema Abadga Abawaji & Others vs. Taha Jemal Adem*, Federal Supreme Court, Cassation Bench, File No.85873 (13/07/05 E.C), Vol.15, at 110. Similarly, in other case the Cassation Bench held that according to Article 3312 of Civil Code compromise agreement is like a final judgment. *Id.*, p.343.
[43] *Haji Beya Abamecha Kelifa Abakoyas vs. Oromia Forestry and Wild Animal Protection Authority (and Merawa Coperative Society)*, FSC, Cassation Bench, File No.114623, (22/06/2009 E.C), Vol.20, p.124-127.
[44] ACWP Proclamation No.1237/2021, Article 67 & Article 68.
[45] Federal Courts Proclamation No.1234/2021, Article 45(3 & 4).

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springing from court-annexed mediation is executed like court judgment once approved by the court.

Consequently, one may arguably conclude that compromise does have both characteristics of contract and judgment. It has a contractual nature as to its sources, but considering its purposes in ending/terminating disputes and in its res judicata effect, it has a judgmental nature. As noted, before, the contractual nature of compromise relates to its source which is the parties' consent. Hence, any dispute concerning the existence of a valid compromise between parties, its content, scope and subject matter encompasses the contractual aspect of compromise which should be entertained through normal court proceedings. However, once the valid existence of compromise on a litigious matter is ascertained, subsequent controversies over the original subject matter of dispute, its termination, and breaches of terms and conditions of compromise call for judgmental treatment of compromise. This in turn calls for an execution proceeding rather than a full-blown trial.

2.3. **Compromise vis-à-vis Satisfaction, Withdrawal of Suit, Conciliation and Arbitration**

Here, it is helpful to differentiate compromise from withdrawal, satisfaction of suit and other alternative dispute resolution mechanisms. Withdrawal of suit is a unilateral act made by the plaintiff that abandons to pursue of his claim up to the end of litigation and thus will lose his right of instituting fresh suit unless such withdrawal is made with the permission of court.[46] On the other hand, compromise is a mutual and bilateral act of both parties. Moreover, unlike compromise, withdrawal of suit is mostly applicable after commencement of litigation and not made for obvious purposes of preventing or ending litigation; rather it has something to do with personal reasons of the plaintiff. On the other hand, accord or satisfaction of suit is a payment by the defendant of the full or partial claims of the plaintiff which

[46] Civil Procedure Code, Article 278-279.

met with full or partial acceptance by the latter. [47]It is more like the performance of claims. In case of satisfaction, if it is accepted by the plaintiff, nothing is left and it is the end of litigation, while in case of compromise, most of the time, it replaces the subject matter of the suit with new rights which should be performed or executed.[48] If parties to compromise perform their reciprocal obligations at the same time, it instantly ends litigation as that of satisfaction. Like the withdrawal of the suit, satisfaction operates after the institution of the suit. Given this post institution of suit application of withdrawal and satisfaction of suit, it is possible to conclude that they have procedural aspects only. On the other hand, compromise has both substantive aspects (as a contract) and procedural aspects (as an effect) in ending or terminating disputes. Due to this, withdrawal and satisfaction of the suit are treated separately from compromise under Ethiopian law.[49]

Compromise is also different from other out-of-court alternative dispute resolution mechanisms such as conciliation and arbitration. Though voluntary and non-binding, compromise is different from conciliation and mediation as it usually comprises a result of other dispute settlement mechanisms such as negotiation, conciliation or court-annexed mediation. Second, unlike conciliation and mediation, compromise can come to be even without the involvement of a neutral and impartial third-party conciliator/mediator. Legal disputes can be settled by compromise either between parties themselves or through the facilitation of a third party. It is worthwhile to mention that compromise can be a result of conciliation proceedings or court-annexed mediation[50]. Compromise is also different from arbitration in the sense that it is non-adversary and there is no third party appointed by the disputants to render binding decisions.[51] Unlike arbitration, there is no risk of losing, and no semi-formal

[47] Civil Procedure Code, Article 281-283 indicates that "satisfaction" is the actual acceptance by the creditor of the substitute performance.
[48] Civil Code, Article 3308(1).
[49] Civil Procedure Code, Article 278-279 and Article 281-283.
[50] Federal Courts Proclamation No.1234/2021, Article 45(3 & 4).
[51] Fekadu Petros, *supera note* 34.

procedural aspects involved in compromise as to appearance, argument of claim, production of evidence and rendering of decision. However, compromise has a striking similarity with negotiation. One of the differences between the two is that while compromise sometimes operates as a result of other dispute settlement mechanisms, negotiation does not.

2.4. **Utility and Otherwise of Compromise**

There has been a consensus that, rather than going to court for litigation, parties to actual or potential legal disputes are encouraged to settle their matters voluntarily through compromise with the attendant saving of time and expense to both the litigants and the court,[52]for maintaining social harmony,[53]and reducing court congestion. In relation to its easy enforceability and other advantages associated with compromise, the Right Honorable Lord Bingham of Cornhill has made the following remarks in writing a foreword to one of the most celebrated books on the subject:

> 'The law loves compromise. It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by a court decision. A party who settles forgoes the chance of total victory but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat.'[54]

Compromise is creditable for being a less expensive, expeditious, private or confidential resolution of disputes, and most importantly it maintains post-resolution societal accord between disputants. It also shares benefits of other ADRs as it enables disputants to control the process and outcomes of dispute resolution, in its win/win,

[52] *Carney v. Hartford Accident & Indem. Co*., 250 So. 2d 776, 779 (La. App. 1st Cir. 1970) *Cited in* Sally Brown, *supra* note 16, p.176.
[53] Robert A. Sedler, *Ethiopian Civil Procedure*, (Haile Sellasie I University, Addis Ababa,1968), p.187
[54] David Fosket, *supra* note 8, p.ix

transparent, predictable, and flexible outcome, and reduces unreasonable emotional, economic and time costs which in turn can improve disputants' satisfaction and trust.[55]

Like all mechanisms of dispute resolution, compromise has its adverse sides. One of the drawbacks of compromise is that it has the potential to aggravate the position of weaker parties in the agreement when the bargaining powers of the parties are not equal.[56] It has been pointed out that in case of an imbalance of power between plaintiff and defendant, settlement [compromise] can produce unfair outcomes.[57] Second, compromise does not necessarily mean an accurate and fair outcome in the sense of determining conclusively the legitimate rights and obligations of parties. Rather it is a partial or total sacrifice of legal interests in an attempt to avoid or put an end to litigation. As Owen Fiss argued, "parties might settle while leaving justice undone."[58] Similarly, Laura Nader opined that settlement favours harmony over justice.[59] Theoretically speaking, compromise means parties agree over disputes of substantive rights recognized under the law, but the existence of which should have been verified by evidence before the court of law. It can be contended that, in case of compromised dispute, controversies over substantive rights, the existence of which is not proved, have been given legal recognition and enforcement just because they emanate from parties' consent.[60] As a result, the appropriate utilization of compromise must take into account those limitations and has to be operated together

[55] Samuel Ephrem, "The Need for Comprehensive Legislative Reform on Court Annexed ADR in Ethiopia", Mizan Law Review, Vol.17, No.1, 2023, p. 158.
[56] Owen Fiss, *Against Settlement*, *supra* note 9, p.1076-1077. See also David Luban, 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice', Philosophy & Public Affairs, Vo.14, No.4, 1985, pp.413-414.
[57] *Ibid.*
[58] *Id*., p.1085.
[59] Laura Nader, 'Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology', Ohio State Journal on Dispute Resolution, Vol.9, 1993, p.1.
[60] As some argue the whole point of such a contract is to eliminate uncertainty in relation to otherwise doubtful issues of law and/or fact and to terminate litigation, to put an end to contention. I.J. Hardingham, *supra* note 6, p.157.

with litigation, conciliation and arbitration. According to Michael Moffitt, the choice is not between litigation and compromise as "both have values and functions worthy of celebration and at the same time both also have significant flaws and shortcomings in their ideals and their implementation."[61]Instead, litigation and settlement have come to depend on each other to function properly.[62] In any case, as the social utility of compromise outweighs its shortcomings, it is well settled that the general policy of the law favours compromise.

3. **Ethiopian Legal Framework on Compromise**

In Ethiopia, the applicable rules on compromise are dispersedly found in the special as well as general contract provisions of the Civil Code[63] and the Civil Procedure Code.[64] Noticeably, the legal status of those provisions on compromise are neither repealed nor reformed by Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, Federal Courts Proclamation No.1234/2021 and Federal Court Annexed Mediation Directive No.12/2014 E.C. The new Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, though it explicitly repealed the provisions of the Civil Code and Civil Procedure of Ethiopia on Conciliation and arbitration,[65] does not say anything about the status of the provisions of both laws on compromise. The sensible conclusion is that, in the absence of any contradiction, expressed or implied repeal, the provisions of the Civil Code and Civil Procedure Code continue to be the prevailing legal frameworks regulating compromise in Ethiopia. Moreover, nothing is clearly provided about compromise under ACWP Proclamation No.1237/2021 other than stating settlement agreement is a by-product of successful conciliation with almost the same legal

[61]Michael Moffitt, 'Three Things to be Against ("Settlement" Not Included)', Fordham Law Review, Vol.78, 2009, pp.1203-1206.
[62] *Ibid.*
[63] Civil Code, Article 3307-Article 3317.
[64] Civil Procedure Code, Article 274-Article 277.
[65] ACWP Proclamation No.1237/2021, Article 78(1) & (2).

effect as that of compromise.[66] Similarly, Federal Courts Proclamation No.1234/2021 considers a settlement agreement as an outcome of successful court-annexed mediation.[67] In the face of the silence of current laws to deal specifically with compromise, the reasonable course of action is to look to the Civil Code and Civil Procedure Code laws to determine the legal framework that governs compromise.

3.1. **The Borderline Between the Civil Code and Civil Procedure Code on Compromise**

The sphere of application and relationship between the two laws are not clearly delineated. At times, there seems to be some contradiction between the two laws.[68]Despite this confusion, Article 274(2) of CPC seems to suggest the overriding status of the Civil Procedure Code regarding compromise as it proclaims, "without prejudice to the provisions of this Chapter, the provisions of Arts. 3307-3324 of the Civil Code shall apply to compromise agreements, in particular as regards the effect of, appeal from an invalidation of such agreements."

The above provision states that the Civil Code parts of compromise apply as long as it is consistent with the Civil Procedure Code counterparts. This provision raises several critical issues. The straightforward issue is that there's debate over whether the Civil Procedure Code, which is a decree, can take precedence over the Civil Code, a Proclamation, even though the former was enacted later. The more serious concern is whether procedural laws, especially the Civil Procedure Code, can have priority over substantive laws. The clear answer to this is a resounding no. Hence, to make a reasonable construction out of the message purported by Article 274(2) of

[66] *Id.*, Article 67 & Article 68.
[67]Federal Courts ProclamationNo.1234/2021, Article 45(3) & (4) & Federal Court Annexed Mediation Directive No.12/2014 E.C.
[68] Particularly, in relation to formality requirement, content and effect of compromise See Article 3308(2) of Civil Code and Article 276 & Article 277 of Civil Procedure Code.

the Civil Procedure Code, one has to draw a rational line between the two laws in governing compromise.

The Civil Procedure part of compromise relates to compromise made after the suit has been instituted in court[69] and governs the procedural aspects of compromise. Its application is limited to procedural issues as to what the court has to do when faced with suits subjected to compromise and where objections[70] are raised or when the pending suit itself is compromised. [71]On the other hand, the Civil Code provisions govern mostly the substantive and contractual[72] aspects of compromise and apply to all kinds of compromise whether made before, during or after the commencement of litigation in court. Accordingly, the question of whether a valid compromise has been concluded, between whom, its effect, grounds of invalidation and other substantive matters are determined concerning the Civil Code. It follows that the overriding features of the Civil Procedure Code do not relate to substantive aspects of compromise.

3.2. **Legal Requirements for Making a Compromise Agreement**

Though a compromise agreement must fulfil certain essential requirements of general contract law,[73] here an inquiry is only made in relation to special requirements necessary for a compromise agreement stated under the special contract law.[74]

A. Parties to Compromise Agreement

Ostensibly, those who can enter into a compromise agreement must be capable under the law and have either actual or potential legal disputes. The relevant provisions governing compromise under the Civil Code neither require special capacity nor put

[69] Civil Procedure Code, Article 274(1). See also Robert A. Sedler, *supra* note 36, p.186.
[70] *Id.*, Article 244(2(g)).
[71] *Id.*, Article 274(1).
[72] The Civil Code parts of compromise is found under Book V titled Special Contract.
[73] Civil Code, Article 1676(1& 2) cum Article 1678-1730.
[74] *Id.*, Article 3307-3317.

any limitation on the capacity of parties who can lawfully enter into such agreement.[75] Ethiopian law does not explicitly require any positive special capacity in relation to the subject matter of compromised dispute. Conversely, under French law, in order to compromise, one must have the capacity to freely dispose of the things included in the compromise.[76]

In relation to the limitation on the capacity, Ethiopian law imposed legal restraint on the tutor when concluding a compromise agreement.[77] For instance, the Revised Federal Family Code puts a restriction on the capacity of the tutor to enter into a compromise agreement concerning the interests of the minor.[78] The restriction depends on the monetary value of the disputes concerning the minor. The tutor can freely enter into a compromise agreement whenever the amount of the dispute is less than one thousand Ethiopian Birr. However, for interest in excess of one thousand Ethiopian Birr, the tutor needs court authorization to enter into a compromise agreement.[79] Here the rationale for court authorization is to check whether such an agreement is in the best interest of the minor child who is legally incapable of administering his affairs so that those in charge should not abuse their power to the detriment of the minor interests. In addition to restrictions on guardians or tutors representing incapable persons in suits,[80] some legal system has the same restriction of requiring court authorization for compromise entered in case of a class action or

[75] The Civil Code, however, under Article 3311 does state that a compromise agreement is governed by the doctrine of privity and binds only parties to the agreement.
[76] Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2045. The same requirement is found under the repealed provision of the Civil Code of Ethiopia Article 3326 (1) for parties to arbitration submission.
[77] Civil Code, Article 301. See also Revised Federal Family Code, 2000, Article 288, Proc. No. 213/2000, *Fed. Neg. Gaz.* (Extraordinary), year 6, No.1.
[78] *Id.* Article 288.
[79] *Ibid.*
[80] Likewise, under Indian law the guardian or tutor needs court authorization to enter into a compromise agreement on behalf of a minor child and any such agreement or compromise entered into without the leave of the court so recorded shall be void. See Rule 7(1), Order 32 of Indian Code of Civil Procedure; Rule 7(1), Order 32 of Indian Code of Civil Procedure *Cited in* Jatindra K. Das, *Code of Civil Procedure*, (PHI Learning Private Limited, Delhi, 2014), p.453.

representative suit.[81] Here the need to have court authorization for a compromise agreement is to protect the interests of others who are not named in the suit so that their say should be heard on the fate of the suit. Ethiopian Law should have the same restriction on the compromise of a class action or representative suit.

B. Subject Matter and Scope of Compromise

One of the most important issues not well addressed under Ethiopian law is concerning the kind of subject matter which could be safely resolved by compromise. Unlike Ethiopian law, the position of other countries' laws is explicit in this regard. However, the laws and practices of countries varied in response to what type of disputes, civil or criminal, can and cannot be validly settled through a compromise agreement. Almost all countries prohibit compromises made over criminal matters.[82] On the other hand, the practice of some countries shows that some criminal matters of a private nature can be capable of settlement through a compromise agreement.[83]In relation to civil matters *"*the general principle of law is that all matters [that] can be decided in a suit [before the civil court] can also be settled using a compromise."[84] However, some even legally prohibit compromise agreements in certain civil matters.[85]

[81] For instance, the Indian Code of Civil Procedure provides that no agreement or compromise may be entered into in a representative suit without the leave of the court expressly recorded in the proceeding and any such agreement or compromise entered into without the leave of the court so recorded shall be void. Moreover, before granting such leave, the court must give notice, in such manner as it may think fit, to such persons as may appear to it to be interested in the suit. See Rule 3-B (1), Order 23 of the Indian Code of Civil Procedure. See *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480: (1990) 1 SCC 613, *Cited in* Jatindra K. Das, *Code of Civil Procedure*, p.452.

[82] Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2046. See also Civil Code of the Philippines, Republic Act No. 386, Article 2034.

[83] Compromise can be validly made over offences of a private nature, See *Goldsbrough, Mort & Co. Ltd Vs Black (1926) 29 W.A.L.R.* 37; *Kerridge Vs. Simmonds* (1906) 4 C.L.R. 253*Cited* in I.J. Hardingham, *supra* note 6.

[84] Jatindra K. Das, *supra* note 80, p.446.

[85] For example, Philippines law explicitly declared an invalid compromise made over questions of (1) the civil status of persons; (2) The validity of a marriage or a legal separation; (3) Any ground for legal separation; (4) Future support; (5) The jurisdiction of courts; and (6) Future legitimate. Civil Code of the Philippines, Republic Act No. 386, Article 2035.

Concerning civil matters in Ethiopia, we cannot find any single provision which explicitly prohibits the compromise of such subject matter. The usual limitation put on compromise agreement is the 'lawfulness and the 'public morality' of the settlement.[86] Most civil disputes are settled between parties without getting the attention of courts since it is up to private parties to pursue litigation or not.[87]Seemingly, the law cannot prohibit and punish parties for settling their disputes out of court. Thus, it is possible to argue that almost all civil matters can be settled through compromise under Ethiopian law provided that it is not contrary to law and morality.

Nevertheless, still question remains whether those civil matters the adjudication of which is exclusively vested in court by law such as divorce,[88] existence of marriage[89] and irregular union[90] can be subject to a compromise agreement. Teckle Hagos holds that as those disputes involve strong public interest, they cannot be subject to private dispute settlement mechanisms [including compromise].[91]

Conversely, it is possible to maintain that whether those disputes are legally amenable and subject to settlement through a compromise agreement depends on whether a suit has been already filed before a court or not. About compromise made at the hearing, the provisions of the Civil Procedure Code make no restriction on the kind of subject matter as long as it relates to civil matters in issue between parties in such court. Once the suit is already filed, it is possible to make a compromise on those dispute resolutions which are solely vested in court as the latter (court) can supervise over it. The striking question is whether the court can honour and enforce

[86] See Article 3316 of the Civil Code and Article 277 of the Civil Procedure Code.
[87] Mauro Cappelletti and Bryan Garth, 'Civil Procedure', in Mauro Cappelletti (ed.), *International Encyclopaedia of Comparative Law*, Vol. XVI, p. 21.
[88] Revised Federal Family Code, Article 117.
[89] *Id.*, Article 115.
[90] *Id.*, Article 116.
[91] Tecle Hagos, *supra* note 12, p.18.

the settlement of those civil disputes made out of court if it passes the hurdles of legality and morality. But our law is silent regarding this issue.

This article shows the possibility of a compromise agreement on administrative contracts, divorce and some criminal matters at hearings and before the court. First, though recently settled by the new law,[92] the typical tense debate over arbitrability or otherwise of administrative contracts is not usually heard of when it comes to whether or not disputes over administrative contracts are amenable to compromise. Administrative contracts, including public work contracts, can be (and have been) resolved by amicable settlement of dispute mechanisms including compromise as there is no explicit legal prohibition to that effect.[93] It is commendable if the public body representing the government enters into an administrative contract and reasonably believes that settlement of the dispute through compromise is in the best interest of the public. However, it is worthwhile to mention the fact that the Federal Court Annexed Mediation Directive No.12/2014 E.C. under Article 12 (2) prohibits court-annexed mediation over cases in which one of the parties (as a defendant or plaintiff) in the case is government organ unless both parties to the case are government organs or at least one of them is a public enterprise. It seems that cases concerning the administrative contract between government organs on the one hand and private parties on the hand are not subject to court-annexed mediation. Moreover, as per Article 12(3) of the above Directive, cases involving public interests, whether or not the government organ is party to the case, are also not amenable to court-annexed mediation. It is highly questionable whether the Federal Supreme Court, through delegated law with the status of Directive, has the power to determine cases subject to or excluded from court-annexed mediation.

[92] ACWP Proclamation No.1237/2021, Article 7(7)

[93] See, Federal Public Procurement Directive, Ministry of Finance and Economic Development, June 2010, Article 27.8(c), Article 27.11(c). Public Private Partnership Proclamation, 2018, Article 61-63, Proc. No. 1076/2018, *Fed. Neg. Gaz.*, Year 22nd.

Second, the Federal Revised Family Code recognizes two types of divorce:[94] divorce by mutual consent[95] and divorce by petition.[96] Like compromise, divorce by mutual consent is an outcome of the parties' agreement, which needs to be in writing and submitted to the court for approval.[97] The court also approves the conditions of the divorce agreement between the spouses together with the divorce agreement[98]. This scenario might indicate the possibility of compromise of divorce because, even though the final declaration of divorce and approval is made by the court, the underlying decision of divorce is the product of the two spouses' agreement. Moreover, during the approval of divorce, the same obligation as that of recording of compromise under Article 277 of the Civil Procedure Code is legally imposed on the court as follows:

> 'The court shall approve the divorce agreement only when it believes that the agreement is the true expression of the intention and free consent of the spouses and is not contrary to law and morality.'[99]

However, in the above position, displaying divorce as the subject of compromise seems indefensible. This is because first, the approval by the court of the divorce agreement between the two spouses is a necessary and mandatory condition for the divorce to bring about valid legal effect. Otherwise, a mere compromise agreement over a divorce would not produce any legal consequences. Second, given the strong public policy behind legal and societal protection of family as a fundamental unit of society[100], bestowing exclusive judicial jurisdiction over the pronouncement of divorce matters and thereby excluding alternative dispute settlement mechanisms including compromise over divorce is plausible. As to the practice of courts in

[94] Revised Federal Family Code, Article 76.
[95] *Id.*, Article 77-80.
[96] *Id.*, Article 81-82.
[97] *Id.*, Article 77.
[98] *Id.*, Article 80 (2).
[99] *Id.*, Article 80 (1).
[100] Revised Federal Family Code, Preamble.

Ethiopia, even though the Cassation division of the Federal Supreme Court had an opportunity to decide over the enforceability or otherwise of a divorce agreement made at a foreign embassy, it quickly escaped the matter and diverted the issue to jurisdiction and the appropriate court for registration of compromise.[101] Still, a closer look at the decision of the Cassation Court in this case shows the possibility of compromise of divorce and its effects.[102]

Likewise, it is conceivable to argue that exceptionally some crimes of a private nature are amenable to settlement between parties under Ethiopian law.[103] Those crimes the initiation and continuation of which are dependent upon a private complainant and charge brought by private prosecution can be subject to compromise or reconciliation.[104] Article 151(2) of the Criminal Procedure Code states "before reading out the charge to the accused, the court shall attempt to reconcile the parties." The law goes on to state that where reconciliation is affected, it shall be recorded by the court and shall have the effect of a judgment. Though the above provision uses the term reconciliation instead of compromise, the whole nature, process and result of such reconciliation is similar to compromise. It is worthwhile to note that as per Article 275 of the Civil Procedure Code, a compromise agreement can be made upon the court attempting to reconcile parties and this is one of the instances where the court does the same. Article 151(2) of the Criminal Procedure Code not only indicates the possibility of compromise of some crimes but also states the judgmental status of such compromise after being recorded by the court.

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[101] *Niema Abadga Abawaji vs. Taha Jemal Adem*, Federal Supreme Court, Cassation Bench, File No.85873 (13/07/05 E.C), Vol.15, pp.108-110,

[102] *Ibid*.

[103]Jetu Edosa, 'Mediating Criminal Matters in Ethiopian Criminal Justice System: The Prospects of Restorative Justice', Oromia Journal of Law, Vol.1, 2012, pp.99-143

[104]Criminal Procedure Code of Empire of Ethiopia, 1961, Article 42, Article 44, Article 47 and Article 150-153, Proc. No. 185/1961 *Neg. Gaz* (Extraordinary issue), Year, No. 1.

Concerning the position of the Cassation Bench, one can impliedly make an inference in one case since the court, though not directly, held the situation where parties can enter into a compromise agreement over a criminal case instituted on the private complaint.[105] However, the new Federal Courts Proclamation No.1234/2021 restricts the scope of court-annexed mediation that might end in a settlement agreement only to civil matters.[106]As a recommendation, to avoid confusion and uncertainties, the law governing compromise at least needs to explicitly exclude subject matters that are not legally settled through a compromise agreement.

Concerning the scope of the compromise, the experience in other countries shows compromise may, at parties' wish, (1) relate to the whole suit, (2) relate only to part thereof, or (3) also include matters that do not relate to the suit.[107] In this regard, Ethiopian law suffers from a lack of clarity, especially whether parties can include in their compromise other matters different from the subject matter of the dispute. By citing Article 3308 of the Civil Code, purposes of compromise and Indian law, Robert A. Sedler sustains that Ethiopian Law should be interpreted in a way that allows parties to the suit to compromise any matter whether related to the suit or not in the same agreement. [108]In relation to the subject matter of the dispute before the court, parties are free to terminate their disputes through compromise on the whole subject matter of the suit or some of the matters in issue.[109] Different legal consequences ensue where parties to a suit compromise the whole suit or parts of it because in the former case, once the court records the compromise and passes

[105]*Kedir Haji and Lucy College Sh. v. Amin Usman and Nuriya Jemal*, Federal Supreme Court, Cassation Bench, File No.52752, Vol.9, (16/10/2002 E.C), pp.340-342.
[106]Federal Courts Proclamation No.1234/2021, Article 45(1).
[107] Here it is essential to note that the Indian Code of Civil Procedure (1908) (as amended) which is the material sources of Ethiopian Civil Procedure Code, permits parties to compromise not only the underlying disputes at hearing, but also, they can include in such agreement other matters unrelated to the dispute. See Order 23, Rule 3 of Indian Code of Civil Procedure.
[108] Robert A. Sedler, *supra* note 53, pp.187-188
[109] Moreover, a compromise agreement may settle all accessory matters, in particular as regards costs, damages and execution. Civil Procedure Code, Article 274(1) and Article 276(2).

judgment accordingly, the whole dispute ends there while in the latter case, the suit before court is only terminated partially.

C. Form and Content of Compromise

Most countries require the written form and signature as a formality requirement for a valid compromise agreement.[110] One cannot certainly tell the position of Ethiopian law regarding valid forms of compromise agreement. This unfortunate scenario not only emanates from the different approaches adopted by the Civil Code and Civil Procedure but also from the formality requirement that varies within the same Code itself. For instance, the Civil Code contemplates different forms of compromise depending on the kinds of property, transfer of the rights freely[111] or whether there is renunciation of right,[112]or whether it is an outcome of conciliation.[113] First, the Civil Code proclaims under Article 1723(2) that a compromise relating to an immovable property shall be in writing and registered with a court or notary. Then, Article 3308(2) of the Civil Code provides a distinctive formality requirement for all compromise agreements without distinction as it declares "the forms required by law for the creation, modification or extinction of these obligations without consideration shall be complied with."

This provision of the Code is one of the ambiguous and troublesome provisions regarding formality requirements. First, it creates difficulty and uncertainty by cross-referring issues of form to other substantive laws governing the underlying rights and obligations to be compromised thereby putting much burden on parties. Above all, this provision creates confusion by requiring parties to follow the form required by law for the free transfer of such obligations. There is a critical problem with the practical application of this provision due to the fact that, mostly, Ethiopian law does

[110] Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2044. See also Rule 3. 3-A and 3-B, Order 23 of the Indian Code of Civil Procedure where compromise must be made in writing and signed by parties.
[111] Civil Code, Article 3308(2).
[112] *Id.*, Article 3317(2).
[113] *Id.*, Article 3322(2).

not require different formality requirements for the transfer of rights in consideration or for free. Bezawork Shimelash, commenting on an almost similar legal prerequisite for Arbitral submission, maintained that this formality requirement is not only confusing but also leads to an absurd conclusion, which deviates from the intention of the legislator and imports elements of uncertainty.[114] Moreover, such formality requirement of Article 3308(2) of the Civil Code indicates the possibility of making a compromise agreement orally. Still, a different legal approach is adopted in case of compromise having renunciation of rights. Without making any distinction between transfer for consideration or free, Article 3317(2) of the Civil Code obliges parties to make the compromise in the conditions and forms required by law for the transfer of the right renounced.

On the other hand, the Civil Procedure Code adopts different formality requirements depending on whether a compromise is made out of court or before the court at the hearing.[115] The Code explicitly requires the written and signed requirements of the compromise agreement made at the hearing.[116] Moreover, in such cases, the court is also required to record or enter a compromise agreement in the case file after checking its legality and morality.[117] The Civil Procedure Code is, however, silent regarding the formality requirements of the compromise agreement made out of court during litigation. However, the lists provided under Article 276 of the Civil Procedure Code about the contents of the compromise agreement purport to designate the written requirement of such compromise made out of court.[118]

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[114]Bezawork Shimelash, *'The Formation, Content and Effects of Arbitral Submission under Ethiopian Law'*, Journal of Ethiopian Law, Vol.17, 1994, pp.76-77. See Article 3326(2) of the Civil Code.
[115] Civil Procedure Code, Article 277.
[116] *Id.,* Article 277(1).
[117] *Id.*
[118] Regarding contents of Compromise Article 276(1) of the Civil Procedure Code provides as follows:
A compromise agreement shall contain
(a) the name and place of the court in which the suit is pending;
(b) the title of the action and the number of the suit;
(c) the name, description, place of residence and address for service of the parties; and

To avoid the current legal ambiguities in relation to form and to ensure certainty as well as predictability, it is recommended that Ethiopian law should adopt uniform and the same written formality requirements for all types of compromise. In particular, such an approach is suggested given the execution of compromise in court. The same position is adopted under current French law where all compromise is required to be made in writing.[119]

In relation to content, both the Civil Code and Civil Procedure Code prohibit compromise whose object is illegal or immoral and declare such kinds of compromise as void.[120] Other than this, in principle, parties to a compromise agreement are free to terminate their disputes in any manner they see fit by creating new rights and obligations, modifying the existing ones or extinguishing or renouncing the whole rights.[121] Concerning compromise having renunciation of rights, actions and claims, it has a legal effect of extinguishing such rights, actions and claims which prohibits the holder from exercising them later on unless he/she subsequently acquires such rights, actions and claims from another person in which case he/she can bring an independent claim.[122] Consequently, the law requires a restrictive interpretation of the compromise clause having renunciation.[123]

D. Time of Compromise

As we will see later on, the time or stages at which parties entered into a compromise have countless implications on the legal status and effects of the compromise agreement. The Civil Procedure Code states "[a] compromise agreement may at any time be made by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them."[124] Hence, a compromise agreement

(d) the matters to which the agreement relates.

[119]Civil Code of France, (Ord. no 2004-164 of 20 Feb. 2004), Article 2044.

[120]Civil Code, Article 3316; Civil Procedure Code, Article 277(1).

[121] Civil Code, Article 3308(1).

[122]Civil Code, Article 3310(1) & (2).

[123]*Id*., Article 3309.

[124] Civil Procedure Code, Article 275(1). On the other hand, the Civil Code does not have explicit time indication or limitation in making a compromise Agreement. However, according to the

can be made before the dispute has arisen, after the dispute occurs but before the commencement of litigation, during litigation at the hearing or out of court.[125]

But the critical question is whether parties can make a compromise agreement over a subject matter finally settled by court decision but not executed. Concerning this, Indian law excludes the application of rules regarding compromise at the execution stage.[126] One cannot confidently tell the position of Ethiopian law on this issue as it neither explicitly prohibits nor allows such post-judgment compromise. A closer look at Article 3307, Article 3314 of the Civil Code and Article 275 of the Civil Procedure Code invites different interpretations.

To clearly understand the position of Ethiopian Law, the content of Article 3314 of the Civil Code, superficially looks as if it prohibits compromise at the execution stage asserting the existence of binding judgment as a ground for invalidation of compromise.[127]To prohibit post-judgment compromise as invalid, some requirements must be fulfilled: 1) there must be a final judgment (2) over the same subject matter (disputes), (3) no appeal lies or taken from the judgment and (4) both parties must be unaware of such judgment.

At first glance, it seems this provision prohibits or invalidates compromise entered over a dispute settled by final court judgment. Yet, the title and content of this

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definition, since a compromise is not only made to terminate an existing dispute but also to prevent a dispute from arising in the future, it is possible to make a compromise before or after the institution of a suit. Civil Code, Article 3308.

[125] The phrase during litigation or at hearing under Article 275 of the Civil Procedure Code includes both trial stages of first-instance court and hearing at appeal or by extension cassation stage. Civil Procedure Code, Article 32. *Kedir Haji and Lucy College Sh. v. Amin Usman and Nuriya Jemal*, FSC, Cassation Bench, File No.52752, Vol., (16/10/2002 E.C), pp.340-342. This case shows a situation where parties can enter into a compromise agreement at the appeal stage.

[126] Order 23 Rule 3 of the 1908 Indian Code of Civil Procedure.

[127] See *Article 3314. - 2. Unknown judgment.*

(1) A compromise may be invalidated where the dispute which it was intended to terminate has been settled by a judgment having the force of res judicata of which one or both of the parties were unaware.

(2) Where an appeal lies from the judgment of which one or both of the parties are unaware, the compromise shall remain valid.

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provision do not invalidate all compromises after judgment. Rather, the invalidation of post-judgment compromise applies only where there is unknown court judgment the existence of which both or one of the parties are unaware. A contrary reading of this provision shows if both of the parties know the existence of such judgment and still enter into a settlement agreement, the compromise is still valid. In this context, the provision seems aimed at protecting the parties' free consent rather than outright prohibiting post-judgment compromise, as its application is contingent on the parties' lack of awareness of the judgment.[128]Accordingly, the legal fate of compromise made after the final court judgment existence of which both parties are cognizant of is not clear. Though a contrary reading of Article 3314 seems to suggest the validity of such a compromise, still the law does not explicitly recognize it.

The Cassation Division of the Federal Supreme Court held conflicting positions regarding this issue in three cases. In the case of Tekle Degfe & Others vs. Befkadu Haile & Others*[129]*, the cassation division indicates impliedly that a compromise agreement can be made even after the court passed judgment on the matter and at the execution stage. Specifically, by quoting Article 274 (1) and Article 275(1) of the Civil Procedure Code, the court sustained that at any stage of the proceeding [including execution], parties can terminate their dispute by compromise.[130] It then went on to state that the lower court should have terminated the execution proceeding as long as it was ascertained that the compromise agreement was not contrary to law or morality.

In its later decision, the Cassation Bench puts restrictions on post-judgment compromise.[131] It states that a compromise agreement concluded after court

[128] See the phrase "…which one or both of the parties were unaware" under Article 3314(1) of the Civil Code

[129] *Tekle Degfe & Others vs. Befkadu Haile & Others*, FSC, Cassation Bench, File No.22857, (15/04/00 E.C), Vol.5, p.339.

[130] *Ibid.*, paragraph 6.

[131]*Ananaytu Issa v. Asina Hussen*, Federal Supreme Court, Cassation Bench, File No.98263 (06/05/07 E.C), Vol.17, p.336.

judgment is rendered on the matter and made to set aside it should follow the strict procedure under Article 276 of the Civil Procedure Code and must be registered by the court as per Article 277 of the Civil Procedure Code to have a legal effect.[132] The reasoning of the court indicates that since post-judgment compromise has the effect of threatening the finality of court decisions and becomes a cause for a multiplicity of suits on the same subject matter, it must be registered by the court. Still, in its latest decision (as a third stand), the Cassation Division gives an impression, though not explicitly, that post-judgment compromise is prohibited.[133] The court specifically held that a compromise made at the execution stage with the effect of modifying the court decision cannot be approved and enforced by the court as per Article 277 of the Civil Procedure Code; rather in such cases Article 396 of the Civil Procedure Code is applicable.[134]

Technically speaking, after the court renders final judgment on the matter and if no appeal is taken, such judgment actually settles the underlying dispute between parties. From this point of view, it appears that beyond affecting the principle of finality of a court judgment, it is an unnecessary waste of time and resources to enter into a compromise over a matter that has already been settled by judgment and merely awaits execution. Specifically, a post-judgment compromise that modifies or reverses the final judgment of the court has the potential to invite extra disputes on the matter when parties disagree over the validity or existence of such compromise with attendant ramifications of multiplying suits on the same subject matter. After all, compromise is concluded to prevent or terminate both dispute and litigation. But here, none can be accomplished once parties go through litigation and final judgment is rendered by the court over the same subject matter.

[132]*Ibid.*
[133]*Ato Agmas Umer and W/ro Sebrina Getachew v. Ato Umer Asaye and w.ro Asegad Hassen*, Federal Supreme Court, Cassation Bench, File No.109497, (03/06/2008 E.C), Vol.19, pp.63-65.
[134]*Ibid.*

However, one might still argue that litigation between parties is not over yet since the execution proceeding is independent. Hence, compromise is possible at the execution stage to settle disputes about the enforcement of judgment. To support the above assertion, one might also opine that the purpose of compromise goes beyond preventing or terminating litigation as it has the purpose of maintaining social harmony. The possible counterargument is that some decisions have only a declaratory effect which does not need execution. This article maintained that legal prohibition, or at least restriction on post-judgment compromise, is justified in the interest of preventing a multiplicity of suits.

3.3. **Legal Effects of Compromise**

One of the serious, yet legally unsettled matters under Ethiopian law is the exact legal effects of compromise. Though Article 3312(1) of the Civil Code declares that compromise has a force of *res judicata without appeal* between the parties, this provision does not totally answer all matters about the legal effects of compromise. Apparently, a valid compromise must have a legal force to end disputes over the subject matter. However, it is questionable whether compromise ends disputes in the same way as a binding final court decision. Second, one needs to be certain as to the legal effect of compromise that creates new rights and obligations.

This writer contends that the exact legal consequence of compromise depends not only on the time of agreement but also on whether or not approved by the court. We can possibly classify the legal effects of compromise according to the stages or time it was concluded. Hence, a compromise that occurs before the commencement of litigation has the legal effect of avoiding or preventing suits on the same subject matter. It serves as a res judicata without appeal effects. [135]It is well established legal principle that everyone is entitled to bring justiciable matters before the court of law

[135]Civil Code, Article 3312(1). In this regard, Article 3317 (1) of the Civil Code provides the *declaratory effect of Compromise in relation to the rights, which one of the parties renounces therein.*

and get remedies.[136] When parties enter into a compromise over such matter before the institution of litigation, the legal effect of such settlement is the ability to forgo the right to bring suits against the other party before the court. Consequently, if one of the parties happens to file a suit in court over the compromised subject matter, the other party is entitled to raise a preliminary objection, at the earliest possible time (which otherwise is considered to be waived).[137] Once an objection is raised, the court must go about deciding over the matter according to Article 245 of the Civil Procedure Code by requiring the production of necessary evidence in determining whether a valid compromise has been reached between parties over the subject matter of the suit. This is where the evidentiary benefit of the written formality requirement of compromise comes into the picture. If the court affirmatively finds that parties have a valid compromise over the subject matter of the suit, it must dismiss the case.[138] Accordingly, in this way, compromise has the legal consequence of barring any fresh and subsequent suits over the same subject matter.

However, we need to consider the res judicata without appeal effects of compromise carefully. If disputes arise between parties as to the existence, validity and content of a compromise agreement, the court will likely entertain the matter like any other contract. This means the *res judicata without appeal* effects of compromise are merely related to the underlying subject matter of dispute and not extended to disputes concerning the compromise agreement itself unless approved by the court. So, it is possible that one of the parties can challenge the validity and existence of a compromise agreement in court litigation by alleging grounds stated under Article 3313-Article 3316 of the Civil Code.

On the other hand, if compromise occurs during litigation of the matter, it has the legal effect of terminating or ending the ongoing litigation between parties once the

[136] FDRE Constitution, Article 37.
[137]Civil Procedure Code, Article 244 (2) (b) & (g).
[138] Dismissal of the case is allowed in this case as compromise is regarded as res judicata, Civil Code, Article 3312.

court approves it.[139] Moreover, if the court records the terms of compromise in the case file, it is considered a judgment that can be legally executed as if rendered by the court. This effect of compromise is reiterated by the Cassation court as follows:

> ……. that parties to a suit can settle their disputes through compromise and submit it to the court for approval. Once the compromise is approved by the court it is as binding and executed as a judgment rendered by the court. So, non-participant parties whose interest is allegedly affected by it can bring opposition as per Article 358 of the Civil Procedure Code.[140]

Consequently, the legal effect of compromise concluded after the end of litigation and once final judgment has been rendered over the matter is controversial as it is exposed to various possibilities. For example, if both parties are unaware of the judgment and no appeal is taken, such post-judgment compromise is invalid as per Article 3314 of the Civil Code. Otherwise, post-judgment compromise has the legal effect of modifying court judgment or serves as execution of judgment.[141] Still, the most controversial question is as to the legal effect of compromise that creates new rights and obligations which the following part tries to discuss.

3.4. **Recognition and Enforcement of Compromise**

The res judicata effect of compromise is applied to bar fresh suits on underlying disputes. Nonetheless, numerous issues remain controversial as to the legal status or effects of compromise where it creates new legal rights and obligations.[142] How would parties enforce those new obligations and rights when the other party fails to act according to the agreement? Is the court required to enforce/execute such compromise in the same way as court judgment or the party must institute a

[139] Civil Procedure Code, Article 274-Article 277
[140] *Haji Beya Abamecha Kelifa Abakoyas v. Oromia Forestry and Wild Animal Protection Authority (and Merawa Cooperative Society)*, FSC, Cassation Bench, File No. 114623, (22/06/2009 E.C), Vol.20, pp.124-127.
[141] Civil Procedure Code, Article 276(2).
[142] Civil Code, Article 3308(1).

contractual claim that involves a full-blown trial? Is the court required to register or approve the compromise before execution?

On these and other similar matters, Ethiopian law fails to provide explicit answers because of the diverse positions maintained by the two laws. In certain countries, if one of the parties fails or refuses to abide by the compromise, the other party may either enforce the compromise or regard it as rescinded and insist upon his original demand.[143] If the party opts to enforce and execute the terms of compromise through judicial assistance, such a settlement agreement must be approved by the court.[144]

Under Ethiopian law, the execution or enforcement like-judgment nature of compromise is not clearly stated under the law. But, Article 3317 (1) of the Civil Code states that compromise shall have a declaratory effect as regards the rights which one of the parties renounces therein. However, this provision of the Civil Code is silent as to whether or not judicial recognition or approval is necessary for the execution of the compromise whenever subsequent disputes arise between parties over rights created by the compromise itself. Generally, the answer to the above questions depends on three related things: 1) the time/stages of compromise, 2) the degree of judicial oversight of compromise and 3) whether one regards compromise as a contract or a judgment with regard to enforcement.

In relation to legal status and judicial oversight of compromise made after the institution of the suit, the Civil Procedure Code divides compromise made at the hearing and that made out of court. Article 277 of the Civil Procedure Code proclaims the court's duty to recognize the compromise made at the hearing after verifying its legality/morality and to pass judgments on the same upon request of parties. Accordingly, when a compromise agreement is made at the hearing, the court has four primary tasks. The first duty of the court is to check whether the compromise

[143] See Civil Code of the Philippines, Republic Act No. 386, Article 2041.
[144] *Id.,* Article 2037.

agreement is reduced to writing and signed by the parties as a judicial ascertainment of the voluntary act of the parties. Second, the court is under a duty to check whether the terms of compromise are not contrary to the law or morals which is in line with Article 3316 of the Civil Code. The third duty is to enter or record the contents of the compromise, as indicated under Article 276, in the case file. Finally, the court has to make an order or give judgment in terms of such agreement upon the application of the parties.[145] The consent decree, approved by the court, based on a compromise will be given on the subject matter of the suit when a compromise is made at the hearing. Such consent decree will be recognized and enforced by other courts in the same manner as court judgment. Accordingly, if one of the parties fails or refuses to abide by such compromise, the other party is entitled to enforce his rights through the filing of execution proceedings. Likewise, settlement agreement of conciliation and court-annexed mediation has the same legal effect.[146]

Concerning compromise made out of court over the subject matter of the suit, Article 277(3) of the Civil Procedure Code proclaims "Where a compromise agreement is made out of court, the court shall be informed thereof and the plaintiff may apply to the court for permission to withdraw from the suit*."* The apparent message of the above provision is that when parties to the suit enter into a compromise out of court over the same subject matter, it entails withdrawal of the suit upon application of the plaintiff. However, the wording of this provision raises many unanswered questions[147]; yet the critical one pertains to the apparent meaning and legal effect of

[145] Civil Procedure Code, Article 277(2).

[146]ACWP Proclamation No.1237/2021, Article 68; Federal Courts Proclamation No.1234/2021, Article 45(3 & 4).

[147] For example, the requirements stated under sub-article (1) & (2) of Article 277 apply. In the case of sub-article (3) of Article 277, does the court required to check the written, signed by parties, entering in the file, legality and morality of the compromise agreement before permitting the plaintiff to withdraw from the suit? To start from this, like a compromise made at a hearing the court is required to check the legality and morality of the compromise agreement and other requirements stated under sub-article (1) & (2) of Article 277 of the Civil Procedure Code before allowing the plaintiff to withdraw from the suit. However, it is not clear whether the parties (plaintiff) can apply to the court to make an order or give judgment in terms of a compromise agreement made out of court as *per* sub-article (2) of Article 277 of the Civil Procedure Code.

the phrase "…permission to withdraw from the suit." The issue is whether the use of the term 'withdrawal' here has the same meaning and effect as normal withdrawal of suit with leave to institute fresh suits on the same cause of action as indicated under Article 278 of the Civil Procedure Code.

Normally, the court can grant the plaintiff permissive withdrawal or suspend the proceeding for the purpose of compromise out of court. Here, parties can ask the court for permission to compromise the dispute out of court and withdraw with leave to institute a fresh suit is possible if their attempt is not successful.[148] But, if the parties settle the matter out of court and one of the parties (particularly the plaintiff) informs the court, the appropriate term and legal effect of such compromise should have been discontinuance of suit or dismissal; not withdrawal. Since compromise has res judicata effect of baring fresh suits on the same cause of action, the term withdrawal of suit is not in line with the very nature of compromise itself because permission to withdraw legally allows the plaintiff to institute fresh suits on the same subject matter and entails multiplicity of suits. The term withdrawal under sub-article (3) of Article 277 of the Civil Procedure Code must be interpreted and understood as conditional upon the unsuccessfulness of out-of-court compromise or replaced by dismissal. However, the law is silent as to what would happen if the plaintiff failed to inform the court about an out-of-court compromise. Practically, in such cases, courts apply the usual legal effect of abandonment of suit or non-appearance of parties provided under the Civil Procedure Code.

The essential issue revolves around the legal status and enforcement of compromise made before the commencement of litigation when it creates new rights and obligations. Do our courts have a legal duty to recognize and enforce those compromises without approval? In this regard, different approaches have been

[148] Settlement of dispute out of court can be considered as a sufficient ground for withdrawal with leave under Article 278 of the Civil Procedure Code.

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adopted by the Federal Supreme Court Cassation Bench. In the case of *Niema Abadiga Abawaji & Others* vs. *Taha Jemal Adem*, the Court held as follows:

> በመሰረቱ አንድ እርቅ በፍርድ ቤት ሊፀድቅ የሚችለው ጉዳዩ ስልጣን ባለው ፍርድ ቤት በመታየት ሂደት ላይ እያለ ተከራካሪ ወገኖች ጉዳዩን በስምምነት የጨረሱ መሆኑን ገልፀው ይኼው ስምምነታቸው ለሕግ እና ለሞራል ተቃራኒ ያለመሆኑ ከተረጋገጠ በኋላ እርቁ ወይም ስምምነቱ በፍርድ ቤት ተመዝግቦ ክርክሩ እንዲቆምላቸው ሲያመለክቱ ስለመሆኑ የፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 277 ድንጋጌ ይዘትና መንፈስ ያሳያል። ከዚህ ውጪ ከፍርድ ቤት ውጪ በሚደረግ እርቅ ወይም ግልግል መሰረት ያለመግባባትን ያስቀሩ ወይም ለጉዳያቸው እልባት ያገኙ ሰዎች እርቁ ወይም ግልግሉ እንደ ተፈረደ ፍርድ ሊቆጠርላቸው የሚገባ እና በውጤቱም በፍርድ ቤት ማስመዝገብ ወይም ማስፀደቅ ሳያስፈልገው ራሱን ችሎ ሊፈጸም የሚችል ስለመሆኑ ከፍ/ብ/ሕ/ቁጥር 3312 እና 3324 ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው።[149]

The above position of the court is erroneous in case of a compromise made out of court because without court approval it is difficult to execute such an agreement like a court decree. It is practically questionable whether a compromise agreement, which is not honoured by the court, can be executed in the same manner as a court judgment. Unless the court approved and recorded the terms of compromise by checking its legality and morality,[150] one can surely argue that the latter has only the status of contract, not judgment. Due to this, in the later decision, the Court held that a compromise made after judgment (usually made out of court) must be written, signed and registered in court.[151]

Even if one can assert that compromise can be enforced like judgment, the issue of whether or not it needs to be approved by the court for execution purposes is not settled conclusively. The Ethiopian law ought to have an explicit position on legal

[149] Roughly translated, the Court in the above case decided as follows:
Registration of a compromise agreement is required only when parties decide to compromise at the hearing before the court and thus registration or confirmation by the court is not necessary when a compromise agreement is made out of court. In such a scenario, compromise, in and of itself, can be executed like a court judgment as per Article 3312 and Article 3324 of the Civil Code. [Translation mine]. See *Niema Abadiga Abawaji & Others v. Taha Jemal Adem*, FSC, Cassation Bench, File No.85873 (13/07/05 E.C), Vol.15, p.110

[150] *Id.*, Article 277 of Civil Procedure Code.

[151] *Ananaytu Issa v. Asina Hussen*, FSC, Cassation Bench, File No.98263 (06/05/07 E.C), Vol.17, p.336.

status and execution procedure of compromise that creates new rights and obligations. This writer firmly holds that approval or registration of court is necessary in case of execution of compromise that creates new rights and is made before commencement of suit or out of court. Judicial supervision and approval are legally made mandatory for compromise made at hearing to check various legal requirements, among other things, its voluntariness, legality and morality. For stronger reasons, such judicial checks and balances of compromise are even more important in case it is made out of court. As David Fosket notes in some instances, the approval of the court is necessary for a compromise to be effective.[152] Experience of other countries also indicates that approval of court order is necessary for the execution of a compromise agreement.[153] Generally, this article holds that to be enforced, such compromise must be approved and checked by the court at least as to its legality and morality.

3.5. **Grounds for Invalidation of Compromise Agreement**

The grounds of invalidation of compromise stated under Article 3313-3316 of the Civil Code only include void or false documents[154], unknown judgments[155] and illicit objects.[156] The issue of whether other grounds of invalidations stated under general contract law are excluded or not is contentious. This is because a mistake of right is the only ground of invalidation explicitly excluded under Article 3312(2) of the Civil Code. It is possible to argue that as per Article 1677(1) & (2) of the Civil Code, other grounds of invalidations are also applicable since they are not excluded by the special law of compromise. Considering the contractual nature of compromise, mutatis mutandis application of some grounds of invalidation stated under general contract

[152] David Fosket, *supra* note 8, p.113.
[153] For example, Article 2037 of the Philippine Civil Code states, "A compromise has upon the parties the effects and authority of res judicata, but there shall be no execution except in compliance with a judicial compromise."
[154] Civil Code, Article 3313.
[155] *Id.,* Article 3314.
[156] *Ibid.*

law for compromise agreement must be considered. For instance, some grounds of invalidation such as duress are so serious that there is strong public policy interest behind the prevention of those acts in a contract and hence should be taken as a ground of invalidation of compromise.

Here, it is essential to consider the legal effect of declaring a compromise invalid. Since the purpose and effect of compromise is preventing/terminating disputes, its invalidity entails the underlying dispute to be intact and unresolved which might trigger litigation or other dispute settlement mechanisms. Since the compromise is invalid, the subject matter of dispute it purports to resolve continues to exist between the parties. Still, Ethiopian law is silent about the appropriate court that can entertain the claim of invalidation of compromise when it is made before litigation, at the hearing, at the appeal stage or after judgment.

4. **Concluding Remarks**

Realistically, some disputes of civil matters are practically settled outside of courtrooms either through arbitration, conciliation or compromise. However, a compromise agreement achieves its intended purposes only when it is backed by a robust legal framework that ensures parties' legitimate expectations by clearly governing all legal aspects of compromise i.e. its source, status, legal effect and execution. Above all, the legal rights or interests created by the agreement need to be protected. Otherwise, the gaps, uncertainties, and inconsistencies in the law can create a multiplicity of suits, delay in execution, court congestion and at times unfair decisions.

The overall investigation of the Ethiopian laws on compromise, in this article, shows its incompleteness, ambiguity and inconsistency. This article reveals that Ethiopian laws on compromise are incomplete, ambiguous, and inconsistent. The law lacks clarity on various issues such as the legal status and effect of compromise, whether it is a contract or consent decree, substantive and procedural requirements for

execution of compromise, and on capacity of parties. Moreover, the Ethiopian law suffers from vague provisions about formality requirements for making compromises not only between the Civil Code and Civil Procedure Code but also within the same law. The new Arbitration and Conciliation Working Procedure Proclamation No.1237/2021 and Federal Court Proclamation No.124/2021 neither repealed the provisions of compromise under existing law nor improved it.

Therefore, this article recommends the overall revision of Ethiopian laws on compromise in the manner that requires a written form for the creation of compromise, makes restrictions on compromise in case of class action, explicitly defines the scope by identifying subject matters not amenable to compromise, clearly indicate the legal status and manner of execution of it. The form and content of such law should not only maintain certainty and ensure easy execution but also able to avoid or at least reduce room for recalcitrant and dilatory behaviour as well as the multiplicity of suits.

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Scope of Rights of Creditor Banks over Mortgaged Property in Ethiopia

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Abstract

This article examines the Ethiopian mortgage system focusing on the scope of rights of creditor banks over the mortgaged property including its validity requirements. It employed a doctrinal research method, including the analysis of FSC cassation cases, relevant laws, and literature review. The article highlights that laws and cassation court practices give better rights and protections to banks in the Ethiopian mortgage system. Concerning the validity requirement, banks are exempted from the authentication. Banks also have the right to determine which property shall be sold first when more than one property is mortgaged. Besides, they are entitled to payments first when several creditors claim the same property and sell practically mortgaged property that belongs to the debtor or third-party in the same manner even if the third-party mortgagor is assimilated to a guarantor. Moreover, practically, banks prohibited the sale of mortgaged property by taking over its title deed and securing its injunction. The article argues that the law should empower banks to sell the mortgaged property even when it is transferred to third-party or belongs to third-party mortgagor in the same manner as they would sell properties directly mortgaged by the debtor. Accordingly, it recommends equitable procedural safeguards to all involved parties while addressing liabilities that arise from foreclosure procedures.

Keywords: Bank, Ethiopia, Mortgage, Mortgagee's Rights, Rights of Creditor

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1. Introduction

Banks play a very important role in the economic development of every nation as they have control over a large part of the supply of money circulation. The contribution of banks to growth lies in the central role they play in mobilizing savings and allocating these resources to the most productive uses and investments.[1] Access to credit is crucial for economic growth and is the engine of private sector development.[2] Since creditors may not trust solely the borrower's promise for payment, they often demand collateral. Thus, borrowers guarantee the performance of the credit commitment by offering particular collateral.[3] The various forms of collateral include mortgage, pledge, performance bond, lien, anthicresis, and surety. Each of them has its own particular feature that may vary from the other.[4] The two most commonly used types of security under the Ethiopian legal system are personal and real security.[5] However, this study focuses on the security of real property, i.e., mortgages under Ethiopian laws.

The 1995 Constitution of FDRE and subsidiary laws[6] regulate issues of private property including mortgages of immovable property. Accordingly, every Ethiopian shall have the full right over private properties including the right to use, transfer, or claim compensation when damage is caused to it.[7] These all guarantee the transfer of private immovable property including in the form of a mortgage. As a result, a

[1] Tihitina Ayalew, Legal Problems in Realizing Non-Performing Loans of Banks in Ethiopia (LL.M Thesis, AAU, 2009) p. 1
[2] World Bank, Secured Transactions, Collateral Registries and Movable Asset-Based Financing (Knowledge Guide, November, 2019) p.3
[3] Habtamu Bishaw, Mortgage Valuation in Ethiopia: The case of Commercial Banks (PhD Dissertation, 2021) p.15
[4] Mekuriaw Alemenew, Mortgage on Immovable Property: The Law and the Practice in Ethiopia; with reference to East Gojam Zone Administration, Amhara Regional State, Ethiopia (The International Journal of Humanities & Social Studies Vol.5, Issue 10, 2017) p. 316
[5] Id., p. 318
[6] The specific laws governing mortgage are Arts. 3041 to 3116 of Civil Code, Property Mortgaged with Banks Proc. No. 97/1998 (with its Amendment Proc. No. 216/2000), Arts. 394-449 of Civil Procedure Code and FSC cassation decisions as per art. 26(3) of Federal Courts Proc. No. 1234/2021.
[7] Art. 40 (7) of FDRE Constitution

mortgage is a common way for creditor banks to get their money back by way of foreclosure in case the debtor does not pay such money on the due date. The mortgage gives the bank a stronger right than what it gets under the general law which provides that the rights of creditors are protected by all assets of the debtor.[8] However, if the creditor has mortgaged property, he will have a priority right to be paid first from the proceedings of the mortgaged property.[9] In addition, other contracts entered by his debtor after the creation of the mortgage would not be set up against the claims of the mortgagee.[10]

Several studies have been conducted on the Ethiopian mortgage system, but they did not adequately and thoroughly address every issue. For instance, Adamu Shiferaw studied laws on the power of sale foreclosure in Ethiopia and argued that they are discriminatory and incomplete, enabling banks to cause injustice to both mortgagers and non-bank creditors. He also states that the FSC is reluctant to invalidate sales conducted in violation of these laws.[11] However, this study is limited to one perspective of the power of sale foreclosure, i.e., protection of borrowers, and thereby doesn't address the rights of creditor banks over mortgaged property. Besides, Tihitina Ayalew evaluated the problems faced by banks for non-performing loans. Her findings identify legal gaps and institutional issues that hinder the resolution process, mainly the collateral-based credit system's inadequacy to protect financial securities such as guarantee bonds and negotiable instruments.[12] However, the study is general and doesn't focus on the rights of creditor banks over mortgaged property.

[8] Art. 1988 of Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Negarit Gazeta, 19th Year, No. 25th May, 1960 (herein after, Civil Code).
[9] Art. 3076 of Civil Code.
[10] Art. 3089 of Civil Code.
[11] Adamu Shiferaw, The Law and Practice of Power of Sale Foreclosure in Ethiopia (LL.M Thesis, AAU, 2005)
[12] Tihtina, supra note 1.

Similarly, Sintayehu Demeke examined the validity requirements of mortgages focusing on the requirement of authentication and witnesses.[13] Relevant to mortgage contracts, this study is only limited to the requirements of authentication and witness. Mekuriaw Alemenew also evaluated how, in Ethiopia, mortgage laws on immovable property are applicable by a court of law and other government machinery, and highlighted the practice which violates mortgagors' ability to transfer their mortgaged property.[14] Nevertheless, the current study overlooks the rights of the mortgagee bank over mortgaged property. Furthermore, Habtamu Bishaw addressed mortgage valuation in Ethiopian commercial banks;[15] Bereket Alemayehu examined the concept of security interests, methods, and procedures for the enforcement of pledged property by banks in Ethiopia;[16] Alefe Beza also discussed the rights and obligations of the pledgee and mortgagee under Ethiopian law in general.[17] However, these studies neither show other rights of creditor banks over mortgaged property nor focus on the mortgaged property or the scenario of the right of creditor banks over mortgaged property.

Therefore, this article builds upon these studies to address the existing gaps and issues concerning the legal and practical scope of the rights of Ethiopian banks over mortgaged property from different scenarios. Firstly, to realize mortgage rights, at the outset, mortgage rights shall be validly created, and thus a clear understanding of the validity requirements for mortgage contracts shall be made. Secondly, in the process of enforcement of mortgages, different issues may arise. The issue can be as to whether banks have the discretion of determining a property to be sold when more

[13] Sintayehu Demeke, Mortgage and its Validity Requirements: A Case Based Analysis of the Requirements of Authentication and Witnesses (International Journal of Law and Policy Review (IJLPR), Vol. 5 No.2 July 2016).
[14] Mekuriaw, supra note 4.
[15] Habtamu, supra note 3.
[16] Bereket Alemayehu, The Scope of Banks' Power in the enforcement of security interests Under Ethiopian Law: Lesson from the US and the OHADA Laws (LL.M Short Thesis, Central Europe University, 2018)
[17] Alefe Beza, The Right and Obligation of Mortgagee and Pledgee under Ethiopian Law, The Law and Practice, (LL.B Thesis, St. Mary's University College, 2009).

than one property is mortgaged. Moreover, when several creditors claim the same property, their ranking and whether banks can prohibit the sale of mortgaged property by other creditors of the debtor need clarification. When mortgaged property belongs to third-partyor is transferred to 3rd party, the nature of the right of a bank is worth explaining. From this perspective, the paper addresses the legal and practical scope of rights of Ethiopian banks over mortgaged property. Accordingly, a doctrinal research method was employed where more than 20 FSC cassation cases were reviewed and relevant laws and different literature were analyzed. These discussions are presented in a systemic and organized form, including the meaning, theoretical foundations and validity requirements of mortgages under Ethiopian legal frameworks. In addition, the article provides a detailed exploration of the legal framework and practice on the scope of the rights of banks over mortgaged property in Ethiopia from different views. Finally, it provides conclusive remarks and recommendations.

2. Conceptual Understanding of Mortgage

2.1. Mortgage: Concept and Theory

A mortgage is derived from the French terms - 'mort' and 'gages' which means 'dead pledge'.[18] The notion behind the word is supposed that if the mortgagor fails to repay the loan, the property mortgaged as security is lost, or becomes 'dead', to him or her. As a mortgage secures the repayment of the money, it facilitates money circulation for the ultimate effect of business transactions and contributes to the economic development of a country.[19] The legal theories that underpin mortgages and their application vary from one legal system to another.[20] These differences among legal systems on the essence and nature of mortgage make providing a universally agreed definition a difficult task.

[18] Mekuriaw, supra note 4, p.316
[19] Id, p. 318
[20] Andra Ghent, The Historical Origins of America's Mortgage Laws (Research Institute for Housing America, Special Report, October, 2012) p. 21

Yet, the legal dictionary Black Law defines a mortgage as:

> *…An estate created by a ·conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance.*[21]

This definition displays that mortgage is principally the conveyance (delivery) of title to property given as a security, i.e., it shows that the title to the property has to be transferred to the creditor temporarily until the date of performance of the obligation and extinguishes upon the performance of the obligation.

On the other hand, Marcel Planiol defines a mortgage as:

> *a real security which without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold, in whosoever hand it is found and to get paid from the proceeds by preference to the other creditors.*[22]

This definition shows that a mortgage is a real security, i.e., the right that creates a relation between the creditor and the property given as security; and the right that can be enforced against everybody in the world. Secondly, it indicates that the creation of a mortgage doesn't result in dispossession of the debtor thereby allowing him to use, enjoy, administer, or do anything he wants to do with his property. Thirdly, a mortgage by its nature entitles the creditor to exercise his security right only if the debtor fails to perform his obligation at the due date. Lastly, the definition

[21] Bryan A. Garner, Black's Law Dictionary (St. Paul Minn. West Publishing Co, 8th ed. 2004) p. 793
[22] Gadissa Tesfaye & Mebrathom Fetewi, Law of Sales and Security Devices (Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009) p. 199

provides for the principal rights of the mortgagee creditor, i.e., the right of pursuit and the right of preference.

Unfortunately, regarding the definition of mortgage in our legal system, there is no provision dedicated to the definition of mortgage. However, it is possible to understand the essential features of a mortgage from different provisions of the Civil Code dealing with various aspects of mortgage which is similar to the definition of Marcel Planiol. For instance, art. 3047 of the Civil Code indicates that a mortgage is a juridical act where a mortgagor offers immovable properties as a security for borrowing money. Mortgages can charge immovable properties only. However, certain kinds of movable properties including aircraft, specific types of ships, and vehicles are also considered as a mortgage as per art. 3047(2) of the Civil Code. Moreover, the Commercial Code provides that a person who is capable under civil law and who owns a business may mortgage such a business.[23] Thus, a mortgage can be understood as a juridical act between a creditor and his debtor or a third-party on behalf of the debtor whereby immovable property or in some cases special movable property, without affecting possession and title, is given as a security to guarantee the creditor if the debtor default to take it over and have it sold, in whosever hand it is found and to get paid from the proceeds by preference to the other creditors.[24]

The legal theory underlying mortgage differs from jurisdiction to jurisdiction based on the rights of the mortgagor and the mortgagee on the mortgaged property. The main division is among title theory, lien theory, and intermediate theory. Under the title theory, the title of the property has been transferred from the mortgagor to the

[23] Art. 148 of the FDRE Commercial Code, Federal Negarit Gazette Extra Ordinary Issue, Proc. No.1243/2021 (Here in after, Commercial Code). See also, Arts. 2/27 & 3/1 of Movable Property Security Right Proclamation No. 1147/2019.

[24] See Art. 3047 of Civil Code (as a subject property is immovable and special movable property); Arts. 3l09(1) & 3110(a) of Civil Code (as it is accessory to the principal obligation); Arts. 3084 & 3088 of Civil Code (as it doesn't affect possession & title of mortgagor); Art. 3059 of Civil Code (as it creates rights of preference & pursuit for mortgagee). See also, Gadissa & Mebrathom, supra note 22, p. 197

mortgagee upon the formation of the mortgage under the condition that the mortgagor would get his ownership back when the principal obligation is discharged.[25] Thus, the mortgagee retains the title of the mortgaged property during the mortgage term while the mortgagor would get his possession back when the principal obligation is discharged. Although this type of mortgage was the original form of mortgage, in many common law system countries, it is either abolished or minimized today.[26]

On the other hand, under the lien theory, a mortgage creates only a priority right upon the mortgaged property for the creditor, and the title remains vested in the owner of the property during the duration of the mortgage. The lien theory does not affect the ownership and possessory rights of the mortgagor. The mortgagor remains the owner of the property and in principle, he collects rents and fruits of the mortgaged property.[27] The mortgagor enjoys all rights of an owner including transferring of the ownership of the mortgaged property for consideration or no consideration.

The third theory is the mixture of the two theories which is called an intermediate theory.[28] It has some commonalities with the two theories where the title remains with the mortgagor, but the mortgagee may take back the title of the mortgaged property if the borrower defaults on the loan, i.e., the mortgagee has no right of possession until the mortgagor is in default which makes it is similar to the lien theory. Moreover, the mortgagor cannot transfer or mortgage the property for a second time since he/she is no owner of the mortgaged property, making it identical to title theory.

[25]Andra, supra note 20, p.15
[26] Habtamu, supra note 3, p.16
[27] Andra, supra note 20, p.16
[28] Habtamu, supra note 3, p.17

Regarding the theory incorporated under Ethiopian mortgage laws, it is stipulated under the Civil Code that the mortgagor retains the right to possess full ownership including the right to transfer the ownership of the mortgaged property and even an agreement to limit this right is void under the law.[29] This unequivocally confirms that the mortgagor remains the owner of the mortgaged property after the creation of the mortgage and the mortgage would not affect the ownership rights of the mortgagor. Furthermore, the mortgagor is entitled to collect fruits from a mortgaged property and to become an owner thereof.[30] Therefore, it can be concluded that the Ethiopian mortgage laws are based on the lien theory of mortgage.

2.2.Validity Requirements of Mortgage

Validity requirements are essential conditions that provide legally sufficient circumstances for the valid constitution of a juridical act including mortgage, and its non-fulfilment renders the juridical act unenforceable, as it produces no legal effect.[31] The general contract rules provide that any valid contract must meet basic elements to be enforceable. To this end, parties to the contract must be capable, and give consent sustainable at law. The object of the contract must also be sufficiently defined, possible, lawful, and moral, and must follow the form if the law requires so.[32] Therefore, as with any other contract, a mortgage contract must fulfil such requirements in addition to the following special requirements belonging to it.

2.2.1. **Existence of Mortgaged Property**

The existence of the immovable is a mandatory requirement and a mortgage shall be of no effect where it relates to future immovable.[33] To render a mortgage valid, the act establishing it must state precisely the nature and situation of each of the

[29] Arts. 3084 and 3088 of Civil Code
[30] Art. 3093 of Civil Code
[31] Sintayehu, supra note 13, p. 191
[32] Art. 1678 of Civil Code
[33] Art. 3050(3) of Civil Code

immovable on which the mortgage is granted.[34] Such act shall specify in particular the commune in which the immovable is situated, the nature of the immovable, and where appropriate, the number of the immovable in the cadastral survey plan.[35] Registration of the mortgage requires these descriptions concerning the immovable mortgaged,[36] which in turn also requires existing immovable property.

2.2.2. **Existence of Ownership or Special Authority**

Generally, a security right can be created only when the mortgagor has the power to create a security right.[37] To have a validly established mortgage, ownership title, or a special authority[38] to dispose of the immovable by mortgage is necessary. The mortgage shall be valid where it is created by a person who is the owner of the immovable under a title deed issued to him by the competent authorities.[39] Besides, a person may not secure his debt by mortgage unless he is entitled to dispose of the immovable for consideration.[40] In case the mortgagor is a third-party, it is stipulated that a person may secure the debt of another by mortgage where he is entitled to dispose of the immovable gratuitously.[41]

In Ethiopia, individuals have no ownership over land and thereby cannot sell or dispose of land as they have only possession rights. This can lead us to ask whether it is possible to mortgage land under the current legal framework in Ethiopia; however, the question is partially answered by the urban land lease proclamation which expressly allows urban land acquired by lease to be mortgaged to the extent of the paid lease price.[42] However, it is still arguable whether it is possible to

[34] Art. 3048(1) of Civil Code
[35] Art. 3048(2&3) of Civil Code
[36] Arts. 1605&1606 of Civil Code
[37] World Bank, supra note 2, p. 61
[38] Art. 2205 of Civil Code
[39] Art. 3051 of Civil Code
[40] Art. 3049 (2) of Civil Code
[41] Art. 3049 (3) of Civil Code
[42] Art. 24/1 of Urban Lands Lease Holding Proc. No.721 of 2011, Negarit Gazeta Year 18, No.4. It means a person who acquired a lease right over urban land can mortgage the land to the extent of the

mortgage a right over rural land[43], and urban land that is not acquired by the lease system such as urban lands occupied under the permit system.

Moreover, the mortgagor must have the right or authority to dispose of the property at the time of the creation of the mortgage and thus the title or the authority to subject property in the mortgage will not produce any effect if it is acquired subsequently.[44] Acquiring the right to dispose of the property after the formation of the mortgage contract would not make the mortgage contract valid because the law does not allow future rights to be given as securities.

However, sometimes a person may acquire a title deed mistakenly and his rights might be invalidated later on, then the fate of the mortgage created by the invalidated title deed is questionable. Yet, article 3051 of the Civil Code has enunciated that the mortgage contract will remain valid unless the mortgagee is in bad faith. Furthermore, the FSC Cassation Bench decided on this issue affirming that the cancellation of an ownership certificate by government bodies would not invalidate a mortgage contract duly formed unless the bad faith of the mortgagee is proved.[45]

lease price he has paid not for the unpaid lease price he would pay in future. This is to control speculation in the land market as well as to promote a healthy financial market. Furthermore, this is also in harmony with the Art. 3050/3 of Civil Code disallowance of mortgaging a future ownership right.

[43] In Ethiopia private ownership of land under the FDRE constitution is prohibited. As stated under Art. 40 of the constitution, the land belongs to the state and the public property. As a result, one can only have the right to use it and not to alienate it. Since the security of land for loans has an ultimate effect of alienation when the debtor fails to repay the loan, it can be argued that he is not allowed to mortgage it. But, currently Amhara Regional State's Rural Land Use and Administration Proc. No. 252/2017 under its art. 19 provides that any rural landholder may mortgage his right to financial institution which has been given recognition by the country's National Bank for not more than 30 years. When the borrower is unable to return his debt within the period indicated in the loan contract, the lender will use (develop by itself or transfer by rent) the land for the period specified in the loan contract not exceeding 30 years. More recently, Oromia Rural Land Use and Administration Proc. No. 248/2023, under its arts. 9 (1) (h) and 17, rural landholders are allowed to mortgage their landholding to access credit from financial institutions.

[44] Art. 3050(2) of Civil Code

[45] FSC Cassation Decision Vol. 8, File No. 41388 (The case of Developmental Bank of Ethiopia Vs Mr. Kefyalew Multot).

2.2.3. **Written Form**

General contracts law provides that where a special form is expressly prescribed by law, such form shall be observed.[46] Mortgage is one of the juridical acts that require mandatory writing requirement. The contract creating a mortgage shall be of no effect unless it is made in writing.[47] From the cumulate reading of articles 1723 (1), 1725 (e), and 3045 of the Civil Code a contractual mortgage legally to be formed and to have legal effect has to have written form. The writing formality comprises three elements, i.e., it has to be supported by a special document that has to be signed by all the parties bound by the contract, and it has to be attested by two witnesses.[48] The effect of noncompliance with written formality is that the contract-creating mortgage shall be of no effect.[49] The FSC Cassation Bench also confirmed that, even though a contract concerning immovable properties is concluded before a notary public or court registrar (authenticated), it would not produce any effect as long as two witnesses do not attest it.[50] This decision, therefore, affirms that even authentication cannot exclude written formality, i.e., witness requirements as they are independent requirements for the constitution of contracts concerning immovable properties.

2.2.4. **Specification of the Maximum Claim Secured by the Mortgage**

The act creating a mortgage to be valid has to specify in Ethiopian currency the amount of the claim secured by a mortgage. Unless this requirement is fulfilled, the mortgage shall not have any legal effect.[51] This is important for the mortgagor to get a second-degree mortgage contract from another mortgagee if the first mortgage does not absorb the total eligible value of the immovable properties.[52] Furthermore, the

[46] Art. 1719 (2) of Civil Code.
[47] Art. 3045(1) of Civil Code
[48] Art. 1727 of Civil Code.
[49] Art. 3045 of Civil Code.
[50] FSC Cassation Decisions Vol. 12, File No. 57356 (The case of Meseret Bekele Vs Elsa Somonela).
[51] Art. 3045(2) of Civil Code
[52] Habtamu, supra note 3, p.80

third-party who acquires the immovable has to know the amount of encumbrance he is going to be duty-bound to pay. The emphasis in secured transactions including mortgage is the amount of the claim to which security is furnished as opposed to the total claim which might be a total of secured and unsecured claims.

2.2.5. **Registration of Mortgage**

The Civil Code stipulates that a mortgage, however, created, shall not produce any effects except from the day when it is entered in the register of immovable property at the place where the immovable mortgaged is situated.[53] The validity of the contract shall be completed only where the act of mortgage is registered in the registers of immovable property. Once the registration is kept public and accessible to the public, no one can argue on the grounds of lack of knowledge about any information contained in the register of any type.[54] Thus, the registration of mortgages is important to address claims of third-parties and the priority of mortgages among many mortgagees if more than one mortgagee has a claim on the mortgaged property.[55]

The time of registration is very decisive because an entry relating to a mortgage shall be of no effect where it is made after a third-party, who is not liable for the payment of the debt, has acquired the immovable and registered his rights in the registers of immovable property.[56] An entry relating to an immovable shall also have no effect where it is made after an action for the attachment of the immovable has been brought and entered in the registers of immovable property or after the mortgagor has been declared bankrupt.[57] Thus, the mortgage contract can be registered anytime

[53] Art. 3052 of Civil Code
[54] Aniel W/Gebriel & Melkamu Belachew, Ethiopian Legislation on Immovable Registration, available at: https://www.abyssinialaw.com/study-on-line/395-land-law/7901-ethiopian-legislation-on-immovable-registration, accessed on January 16, 2023.
[55] Habtamu, supra note 3, p.80
[56] Art. 3057(1) of Civil Code
[57] Art. 3057 (2) of Civil Code

with the proviso that at the time of registration, the immovable owned by the mortgagor and is solvent.

The registration is valid for ten years and to extend the validity of a mortgage contract for more than ten years, a new entry shall be made before the expiry of the prescribed ten years.[58] The new entry will have the effect of extending the mortgage contract for an additional ten years. To keep the original date of registration of the mortgage the renewal shall be made before the expiry of the ten years of the first registration. If the renewal is made after the expiry of the ten years, then the renewal is not possible and it would be considered as a new registration. The FSC Cassation Bench also confirmed that the mortgage is effective for ten years from its registration, and to realize the mortgage right, giving default notice by the mortgagee bank within 10 years is sufficient though the property is not sold within 10 years.[59]

2.2.6. **Issues of Authentication of Contract of Mortgage**

General contract rules require authentication[60] for contracts of assignment of rights in ownership or bare ownership or a usufruct, servitude, and mortgage on immovable properties.[61] Therefore, such contracts relating to the immovable property even though reduced into writing are not adequate as long as it is not made before a notary or court registry. The FSC Cassation Bench also held the same position stating that even though the agreement of parties suffices to establish a contract as per Ethiopian law, certain contracts especially those involving immovable properties must follow

[58] Art. 3058 of Civil Code

[59] FSC Cassation Decision Vol.10, File No. 44800 (The case of Mr. Abdurazaki Hamid Vs Commercial Bank of Ethiopia).

[60] Arts. 2/2 cum 2/5 of Authentication and Registration of Documents' Proc. No. 922/2015 defines authentication as signing and affixing a seal by notary witnessing the signing of a new document by the person who has prepared such document or the person it concerns and after ascertaining that this formality is fulfilled; or to sign and affix a seal on an already signed document by ascertaining its authenticity through an affidavit or specimen signature and/or seal.

[61] Art. 1723 of Civil Code.

strict formalities like authentication.[62] This special attention is particularly given because the lawmaker believes that immovable properties are the most valued assets for individuals as well as for the nation. But by subsequent cassation decision,[63] the FSC limited the scope of its precedent with regards to authentication stating that ruling on File No. 21448 regarding the interpretation of art. 1723(1) of the Civil Code does not apply to the situation where parties admit the existence of contracts but challenge their validity for not being authenticated as art. 1723 requires. The Cassation Bench further explained the requirement of authentication under art. 1723(1) of the Civil Code serves the purpose of proof when the litigating parties challenge the existence of the contract. Therefore, if parties admit the existence of the contract, they cannot challenge its validity merely because their undertaking is not authenticated.

At least for two years, File No. 21448 established a very firm precedent regarding the requirement of authentication for contracts concerning immovable properties including mortgages. Later on, File No. 21448 caused the promulgation of Civil Code Amendment Proc. No. 639/2009 which established that banks and micro-financial institutions may conclude a valid contract of mortgage without the need to authenticate it. Accordingly, the Proclamation added the following under Article 1723 of the Ethiopian Civil Code as Sub- article (3);

> *Notwithstanding the provisions of sub-article (1) of this article, a contract of mortgage concluded to provide security to a loan extended by a bank or micro-financing institution may not be required to be registered by a court or a notary.*[64]

[62] FSC Cassation Decision Vol.4, File No. 21448 (The case of Gorfe Workineh Vs Aberash Yitbarek et al).
[63] FSC Cassation Decision Vol.13, File No. 36887 (The case of Alganesh Abebe Vs Gebru Eshetu & Workit Eshetu).
[64] Art. 1723(3) of Civil Code as Amended Proc. No. 639/2009, Federal Negarit Gazeta, No. 46, 30th June, 2009 (herein after, Civil Code as Amended Proc. No. 639/2009).

As a result, when the mortgagee is a bank or financial institution, authentication as a basic requirement of a mortgage has been excluded by an amendment proclamation.[65] The rationale for excluding authentication is that it is believed to exert a negative impact on the efficiency of loan provision service which is the day-to-day activity of banks and micro-financing institutions.[66] Moreover, had it not been corrected in such a way, there would have been a huge loss in public wealth of the banks and the micro-financing institutions due to the missing practice of authentication.

There is a problem with the English version of the amendment proclamation like that of Art. 1723 of the Civil Code as they did not use the term authentication or notarization except in its preamble. Yet, File No. 21448 makes it clear that the apparent contradiction, which seems to exist between the English version of Art. 1723 and 2878 of the Civil Code result from the fact that Art. 1723 employed the word registration while it should have stated authentication or notarization like the Amharic version. Thus, the essence of Art. 1723 (3) of the Civil Code refers to authentication, not registration. If we insist on sticking to the term "registration" than "authentication", Art. 1723 does not only contradict art. 2878 of the Civil Code, but it also contradicts Art. 3052 (on registration of mortgage). If the amendment is to registration, the bank cannot exercise the right to priority or pursuit against the third-partywho acquires the rights over the mortgaged property. Thus, the law relieves the banks from the obligation of making the mortgage contract in front of a court or a notary but not registration.

This amendment proclamation also secures the debt given by the bank and micro-financial institution by providing that the validity of the contract of mortgage concluded before the effective date of this proclamation to provide security to a loan

[65] The implication of this proclamation is that, mortgage contracts concluded by creditors other than banks and micro finance institutions need to be authenticated.
[66] Preamble of Civil Code as Amended Proc. No. 639/2009.

may not be challenged on grounds of authentication.[67] Besides its retroactive effect, the proclamation also rejects court decisions rendered before its date of effect.[68] Consequently, a contract of mortgage concluded to provide security to a loan by a bank or a micro-financing institution, shall not be affected for not being notarized by a court or notary (authenticated) as per Art. 1723 of the Civil Code.

3. Rights of Banks over Mortgaged Property

3.1. General Overview of the Rights of Creditor Banks over Mortgaged Property

In principle, creditors must enforce their security rights by applying to court.[69] However, a large number of states allow the power of sale foreclosures, which are non-judicial foreclosures that are essentially bank-conducted.[70] The power of sale refers to a clause in the mortgage contract in which the borrower agrees ahead of time to a private, non-judicial foreclosure.[71] Ethiopia has also issued a Proc. No. 97/1998 which recognizes power of sale foreclosure for banks.[72] The objectives of power of sale foreclosure law are avoiding the long time it takes to obtain a judgment, from the court of law, for the sale of property mortgaged with banks, avoiding problems in the execution of judgments, and avoiding its adverse effect on public

[67] Art. 3(1) of Civil Code as Amended Proc. No. 639/2009.

[68] Art. 3(2) of Civil Code as Amended Proc. No. 639/2009. As a result, it can be criticized for contraventions to basic legal principles. It is against the constitutional principle of separation of power when the proclamation renders ineffective any court decision regarding a contract of mortgage (either pending or finalized) by banks and microfinance institutions for not being authenticated (notarized). The lawmaker in doing so acts ultra-virus because it has passed the boundary of making laws and acted like a judiciary.

[69] Dominic Griffiths (ed.), Secured Lending Comparative Guide (Mesfin Tafesse & Associates MTA, 05 September 2022) p.19. Available at: https://www.mondaq.com/finance-and-banking/1140250/secured-lending-comparative-guide, accessed on January 12, 2023

[70] Dana David A., Why Mortgage Formalities Matter (*Faculty Working Papers*, *Loyola Consumer Law Review* Vol. 24:4, 2012) p.107

[71] Ibid.

[72] But still, banks use court auctions as an asset disposal method for credit extended on clean bases and credit extended on personal guarantees or when the security held is not enough.

money received by banks by way of saving deposits or acquired from other sources.[73] Furthermore, the law is expected to create a conducive environment for economic development by enabling banks to collect their debts from debtors efficiently and thereby promote a good business culture.[74] The Proclamation provides the power of sale foreclosure as follows;

> *"an agreement authorizing a creditor bank with which a property has been mortgaged or pledged and whose claim is not paid within the time stipulated in the contract, to sell the said property by auction upon giving a prior notice of at least 30 days to the debtor and to transfer the ownership of the property to the buyer or if no buyer appears at the second auction, to acquire the property at the floor price set for the first auction and have the ownership of the property transferred to it, shall be valid*".[75]

This is an exception to the general rule which prohibits an agreement authorizing the creditor, in the event of non-payment on the due date, to sell or take pledged or mortgaged property without complying with the formalities required by law.[76] Thus, the power of banks to sell the mortgaged property emanates from the mortgage contract. Banks can sell the mortgaged property by auction if the debtor fails to discharge his obligation within 30 days after notice.[77] The sale made by the bank is considered a sale made on behalf of the debtor creating agent-principal rights. In this

[73] Preamble of Property Mortgaged or Pledged with Banks Proc. No. 97/1998, Federal Negarit Gazeta, No.16, 19th February, 1998 (herein after, Property Mortgaged or Pledged with Banks, Proc. No. 97/1998).
[74] Preamble of Property Mortgaged or Pledged with Banks, Proc. No. 97/1998.
[75] Art. 3, Property Mortgaged or Pledged with Banks Proc. No. 97/1998 and Art. 2(1) of Property Mortgaged or Pledged with Banks (Amendment) Proc. No. 216/2000.
[76] Arts. 2851 & 3060 Civil Code.
[77] Art.3 of Property Mortgaged or Pledged with Banks, Proc. No. 97/1998. But currently, Art. 654 of the Commercial code by providing general stay of individual enforcement action including for secured creditors, stay power of banks to foreclose properties during observation period. Yet, this doesn't deprive the bank's right to foreclose rather it is to give opportunity to reorganize or rehabilitate business of debtor to enforce payment. Furthermore, as per Arts. 761(3) & Art. 781(1) of Commercial code, the secured bank is paid in priority though the trustee has the power to sell all asset including incumbered property except pledge during bankruptcy.

regard, the FSC Cassation Bench also decided that selling mortgaged property by bank auction doesn't need a court decision or permission.[78] If creditor banks while exercising the power of sale foreclosure caused damage to the debtor, by not following procedures, they are liable. Furthermore, the court decided that when banks bring the suit to the court against the debtor despite the existence of the mortgaged property, it cannot be concluded that the bank waived the power of sale foreclosure. Banks can even seek stoppage of the auction by courts and exercise power of sale foreclosure.

Moreover, the FSC Cassation Bench also passed a binding decision stating that the creditor bank while foreclosing the mortgaged property can also bring the suits to court against the debtor for payment of a loan.[79] The process of foreclosure cannot bar banks from bringing court action for the payment of a loan. In the process of foreclosure, if the property is sold or acquired by the bank, the price of the property will be deducted from the claimed payment during judgment execution. Thus, the court decision clearly shows that banks have the discretion to bring suit to the court and exercise the power of sale foreclosure simultaneously.

One important point about the rights of the mortgagee is that even if at the due date of the secured obligation, the security right (mortgage) becomes ineffective, the creditor is still entitled to proceed against other properties of the debtor as an ordinary creditor, i.e., on equal footing with creditors whose claim is not secured.[80] In other words, the loss of security right in no way entails the loss of the principal right.

In this regard, the FSC Cassation Bench decided on the period of limitation to claim the remaining debt stating that when a bank takes over the mortgaged property upon default of the debtor by following the foreclosure procedure, and if there is still

[78] FSC Cassation Decision Vol.12, File No. 65632 (The case of Hibret Bank Vs Mr. Ali Abdu)
[79] FSC Cassation Decision Vol.10, File No. 44164 (The case of Commercial Bank of Ethiopia Vs Mr. Hassen Ibrahim).
[80] Art. 3059(3) of the Civil Code.

unsettled debt, the remaining debt shall be claimed within 10 years.[81] The court also clarified that a period of 10 years shall be counted from the time the bank can bring the suit which is from the time of taking over of the property or selling of the property and then knowing the remaining debts. Furthermore, FSC Cassation decided concerning the period of limitation to claim for judgment execution for the remaining debts stating that it shall be within ten years from the time of court decision but it can be interrupted by action taken by the bank exercising the right of power of sale foreclosure or judicial enforcement.[82]

3.2. The Rights of Creditor Bank When More than One Property Is Mortgaged

In Ethiopia, it is provided that the mortgage shall charge all mortgaged immovable property together with its intrinsic elements and accessories.[83] However, the law is not clear, whether the creditor bank can proceed against any properties where more than one property is mortgaged.

In this regard, the FSC Cassation Bench decided that where banks mortgaged two or more properties for the same loan, concerning the order of sale of mortgaged properties, the debtor cannot bring an application and the court cannot decide on the order of properties to be sold.[84] Thus, when two or more properties are mortgaged, upon default of the debtor, as to which property shall be sold first is determined by the creditor bank, not by the court or the debtor. Besides, the court decided that the court has no mandate to determine the initial price of the property to be sold by power of sale foreclosure. In addition, in the process of foreclosing, if banks fail to follow the required procedures, especially articles 394-449 of the Civil Procedure Code, and

[81] FSC Cassation Decision Vol.12, File No. 56010 (The case of Commercial Bank of Ethiopia Vs Mr. Qadiro Nure).
[82] FSC Cassation Decision Vol.13, File No. 74898 (The case of Commercial Bank of Ethiopia Vs Mr. Fikadu Tesfaye (et al).
[83] Art. 3064(1) of Civil Code.
[84] FSC Cassation Decision Vol.13, File No. 70824 (The case of Wegagen Bank Vs Biruk Cheka et al).

thereby the debtor sustains damage due to that irregularity, the bank is liable. The debtor is also not entitled to bring a claim to stop the sale due to irregularities rather the debtor can claim the compensation after completion of foreclosing procedure.[85] The FSC Cassation Bench also passed binding decision regarding the period of limitation for a claim of compensation by the debtor against the bank for irregularities during an auction or sale made under the power of foreclosure where the irregularities entail loss on the mortgagor and the fact that the bank is liable for the compensation.[86] The court clarified that the compensation for sustained damage shall be claimed within two years reasoning that the claim arises from the law and thereby considered as extra-contractual claim.[87]

To identify the irregularities that make banks liable, it is important to scrutinize the procedure to be followed by banks during exercising the power of sale foreclosure. The debt recovery law of Ethiopia requires banks to be subject to procedural laws provided under Arts. 394- 449 of the Civil Procedure Code to execute their right of debt recovery.[88] The bank is liable for any damage it causes to a debtor in the process of selling by auction without following procedural laws.[89] In realizing the mortgaged property, the main things to be handled by the bank are giving 30 days default notice, advertisement of auction, fixing the value of the asset to be sold by auction, and sale of mortgaged property to the highest bidder.

In this regard, the FSC Cassation Bench elucidated the essence of the power of sale foreclosure stating that if the debtor is not willing, the bank has the right to take over the property with the assistance of the registrar and police, and sale by giving 30

[85] Ibid.
[86] FSC Cassation Decision Vol.13, File No. 68708 (The case of Mr. Nasir Abajabir (et al) Vs Commercial Bank of Ethiopia).
[87] The decision of the court is based on cumulative reading of Art. 7 of Property Mortgaged or Pledged with Banks Proc. No. 97/1998, Arts. 2035 and 2143(1) of Civil Code.
[88] Art. 6 of Property Mortgaged or Pledged with Banks Proc. No. 97/1998.
[89] Art. 7 of Property Mortgaged or Pledged with Banks, Proc. No. 97/1998.

days default notice.[90] The court also decided that whether the debtor is in default is determined by the foreclosure rules of the bank and if it is determined that the debtor is in default, the bank can pass a foreclosure decision and then give 30 days' default notice for the debtor after which the advertisement for auction is made.

As per the power of sale foreclosure laws and the practice, the mortgaged property will be sold to the highest bid, but if there is no bidder in 1st and 2nd auction, the bank will acquire the property at the estimated value. The FSC Cassation Bench clarified that in the process of auction, the price of sale at the second auction is not only to the highest bidders above the estimated value of the property but also to the highest price offered by bidders even if it is below the initial price.[91] FSC Cassation Bench also affirmed that the bank shall take over the mortgaged property at the initial price of 1st auction if there is no buyer at 1st and 2nd auction.[92] Furthermore, the court decided that the bank could not compete as a bidder reasoning that as per art. 430(1) of Civil Procedure Code judgment creditor cannot bid without permission of the court, and also while selling the property by auction, the bank acts as an agent of the debtor as per art. 5 of Proc. No. 97/98.

However, in Ethiopia, the substantive and procedural law is silent about the criteria to be followed by banks in fixing the price of the asset to be auctioned. Moreover, there is no valuation framework or regulatory institution for valuation and professional valuation firms.[93] Furthermore, the law does not give any direction on what should be done if banks are not interested in receiving the property by estimated value. Also, there is no specific time that is provided under the foreclosure law

[90] FSC Cassation Decision Vol. 7, File No. 16218 (The case of Development Bank of Ethiopia Vs Ms. Askale Hunde (et al).
[91] FSC Cassation Decision Vol.15, File No. 89088 (The case of Commercial Bank of Ethiopia Vs Mr. Molla Irke).
[92] FSC Cassation Decision Vol. 7, File No. 19283 (The case of Ms. Medahanit Hailu (et al) Vs Construction and Business Bank).
[93] Habtamu Bishaw (et al), Understanding the Bases and Approaches of Mortgage Valuation in Ethiopia (Journal of African Real Estate Research Vol., 5 Issue 1, 2020) P.64

regarding how much time banks can spend without issuing the auction. In this regard, the FSC Cassation has clarified that there is no legal base neither for the debtor nor the heirs to require the sale of the property held as security by the bank to be relieved from their obligation.[94] The court further decided that the proclamations on foreclosure only give the banks the right to issue two auctions, but do not limit them to only two auctions and that they are not obliged to take the property even after the second auction. So, the choice is left to the banks under the law.

3.3. The Rights of a Creditor Bank When There Are Several Creditors

Secured creditor bank has the priority right or the right of preference which is the right to be paid from the proceeds of the sale of the mortgaged property in priority to other creditors. The priority may be either in reference to unsecured creditors or secured creditors.[95] Unsecured creditors have rights to be paid after all secured creditors, i.e., all having mortgage contracts with the mortgagor are paid, if, surplus money exists from the sale of the immovable. Recent law of Ethiopia has also clarified the priority rights of secured creditors over preferred creditors. It provides that secured creditors shall have an exclusive/absolute right over the encumbered assets, after deduction of costs and expenses for the realization of such encumbered assets under Ethiopian bankruptcy law.[96] Specifically over mortgaged property, creditor banks have also priority over preferred creditors including the claims of employees and tax authorities.[97] But tax authority has priority over creditor bank for claims of withholding tax, value added tax, turnover tax, excise tax, and payment under a garnishee order excluding interest and penalties on these claims.[98] These

[94] FSC Cassation Decision File No. 15711 (The case of Ethiopian Commercial Bank Vs Ms. Tesfalem Agegne et al) 1999
[95] Alefe, supra note 17, p.28
[96] Cumulative reading of Arts. 785(1) & 781(1) of Commercial Code.
[97] Art.786 of Commercial Code. And also, Federal Tax Administration Proc.No.983/2016 under its art.39(2&7) provides that if the notice of security is registered over the property mortgaged by the banks, the priority of banks in relation to secured claims applies so long as the banks, before lending any amount, confirm that the taxpayer has a tax clearance certificate from the Authority.
[98] Cumulative reading of Arts. 33(1) & 39 of Federal Tax Administration Proc. No.983/2016; Art. 786(7) of Commercial Code.

priority tax claims represent claims for payment of taxes from a debtor who collected and has been holding the taxes in trust on behalf of the government and does not even form part of the debtor's estate.

The issue of priority may also arise in reference to secured creditors. The mortgagor can have the right to create two or more mortgages in a similar period on a given immovable property of him, hence several creditors may secure their loan on a single property. When one property is mortgaged to several creditors a priority between secured creditors is determined according to the principle of first-in-time doctrine.[99] Thus, if several creditors secured their claims on the same immovable, their rank is determined according to the date on which the contract of mortgage was registered but the date on which the claim is certain or eligible is not considered in the ranking.[100] That means the person whose claims are registered first gets paid first, and the second one gets paid second, and so on. Nevertheless, where the claims against the mortgaged properties are the legal mortgage of the seller and the contractual mortgage, the legal mortgage ranks before the contractual mortgage.[101] Where creditors whose claims have been registered on the same date, it shall rank equally and be paid in proportion to the amount of their claim.[102]

Upholding these rules, the FSC Cassation Bench decided that the same property can be mortgaged by several creditors and the priority among several creditors is made based on the date of registration of the mortgage.[103]

The FSC Cassation Bench also elaborated the scope of the rights of a bank over mortgaged property stating that the bank shall have the right to preference over the

[99] Habtamu, supra note 3, p. 24
[100] Art. 3081 of Civil Code
[101] Art. 154(3) of the Commercial Code.
[102] Art. 3081of the Civil Code
[103] FSC Cassation Decision Vol. 7, File No. 25863 (The case of Development bank of Ethiopia Vs Commercial Bank of Ethiopia).

mortgaged property.[104] The court further decided that any creditors (secured or unsecured) can claim for payment by attaching and selling any of the properties of the debtor including the mortgaged one. If other creditors of the debtor claim for the attachment and sale of the mortgaged property, the bank shall claim for its payment in priority to other creditors. The court further decided that if the bank failed to claim for priority payment and the property was sold for judgment execution of other creditors, the bank has no right to follow from the buyer who bought the property by auction.[105] In the same manner, in another file, the FSC Cassation Bench decided that it is possible to sell mortgaged property for the execution of the judgment of other creditors and the bank cannot reject the sale rather it has the right to claim for payment in priority to other creditors from proceeds of the sale.[106]

In the question of priority, any mortgagee may pay a creditor having priority with the consent of him or where the immovable mortgaged is attached at the request of the creditor without his/her consent and the creditor who has paid shall get the status of subrogation over the creditor to whom the payment has been made.[107] That is to mean if another person who may be a creditor fully pays the debt subject to a mortgagee, the latter shall transfer the rights arising from the mortgage along with its benefits effective from the registration date of the mortgage to that person.

3.3.1. The Priority Rights of a Bank in Terms of Claims

An important issue here is the extent (limit) of priority right. The first claim that the creditor can demand to be paid in priority to other creditors is the principal claim itself.[108] Secondly, the creditor can demand to be paid in priority the contractual interest to be calculated on the principal claim that is stipulated in the contract as far

[104] FSC Cassation Decision Vol.9, File No. 36013 (The case of Ms. Zemzem Nuru Vs Development bank of Ethiopia).
[105] Ibid
[106] FSC Cassation Decision Vol. 7, File No. 26553 (The case of Bahirdar Special Zone Finance Office Vs Construction and Business Bank (et al).
[107] Art. 3083 of the Civil Code.
[108] Art. 3076 of the Civil Code.

as it is not above the maximum amount stipulated in the contract of mortgage. However, the mortgagee can claim only two years of interest to be paid in priority from the proceedings of the mortgaged immovable. The law has put a mandatory restriction that only two years of interest should be covered by the mortgage contract and parties cannot agree to include more than two years of interest payments within the protected debt amount.[109] As a result, if there is an interest that has been calculated for more than two years, then as regards the payment of such interests the creditor will assume the position of an ordinary creditor i.e. he can't claim to be paid such interest in priority to other creditors.

The third claim of the creditor which is covered by preferential payment is the expenses it incurred for the maintenance of the mortgaged immovable, insurance premiums, and cost of attachments.[110] Also, legal interests (which will be calculated over the sum of the principal claim + the agreed interest on the principal claim + necessary expenses for preservation + insurance premium+ cost of attachment) from the date of attachment until sale by auction, are the last claims which the creditor can demand to be paid preferentially.[111]

3.3.2. The Priority Rights of a Bank in Terms of Property

Another aspect of priority rights is the property to which the priority right applies/extends. In the first place, the priority right of the creditor applies to the immovable itself including the intrinsic elements from which the immovable is made and some objects that may be fixed to the immovable as accessories.[112] However, the mortgagor may transfer some of the intrinsic elements or accessories to third-parties separately from the immovable itself. Now, the question is, whether the mortgagee creditor can challenge such acts of transfer, by the mortgagor, of intrinsic

[109] Art. 3077 of the Civil Code.
[110] Arts. 3078 & 3079 of the Civil Code
[111] Art. 3080 of the Civil Code
[112] Art. 3064 of the Civil Code

elements or accessories to a third-party. The law clearly provides that the creditor cannot follow the intrinsic elements or the accessories in the hands of a third-party.[113] This is because the intrinsic elements and the accessories, when independently considered, are principally movable and anybody who acquires movables in good faith is entitled to legal protection as such.[114] Hence, the mortgagee creditor cannot proceed against such third-parties if the mortgagor transfers some of the intrinsic elements or accessories to the third-parties.

On the other hand, the transfer of intrinsic elements or accessories separately from the immovable reduces the value of the immovable and this in turn affects the security right of the mortgagee. Hence, the law provides an alternative remedy for the mortgagee whose security right has been reduced by the transfer of the intrinsic elements and accessories of the mortgaged immovable. These remedies are: the creditor can demand the debtor to provide another property that can replace the intrinsic elements or accessories transferred to third-parties; and if the debtor cannot provide such property, the creditor has a right to demand immediate performance of the part of the principal claim which turns out to be unsecured because of the reduction in the value of the mortgaged immovable which resulted from the transfer of the intrinsic elements or accessories.[115]

Besides, the law considers the priority right as extending to improvements that may be made to the mortgaged immovable.[116] Another property to which the security right extends is the rent which may be collected from the mortgaged immovable. Once the due date of the secured obligation arrives, the debtor failed to pay it, and the immovable is attached to satisfy the claim of the creditor, any rent collected after

[113] Art. 3065 (1) of the Civil Code
[114] Art. 1161 of the Civil Code. See also, Gadissa & Mebrathom, supra note 22, p.216
[115] Arts.3065 (2), 3073, 3074 & 3107 of the Civil Code.
[116] Art. 3066 of the Civil Code.

the attachment of the immovable forms a part of the property to which the priority extends and, hence the creditor will have priority right on such rents too.[117]

The priority of the creditor also extends to any compensation that is paid for the loss or expropriation of mortgaged property.[118] In this regard, the FSC Cassation Bench decided that although the insurer shall pay compensation for mortgaged property for the mortgagee creditor bank, the insurer cannot claim payment of unpaid premium from the mortgagee rather it can claim from the insured/mortgagor.[119]

3.4. The Rights of Creditor Banks in Cases of Third-Party Involvements

3.4.1. When Mortgaged Property is Transferred to Third-Party

As the Ethiopian law of mortgage is based on a lien theory, the mortgage contract will not preclude the mortgagor from transferring the ownership of the immovable to a third-party or from creating a right in rem on the mortgaged property. The law even goes to the extent of prohibiting any agreement that restricts the right of the mortgagor to transfer the ownership of the mortgaged property.[120] It is also not possible to enter into agreements that restrict the right of the mortgagor to create a usufruct, servitude, or any other right in rem on the mortgaged property.[121] In the same way, third-parties can deliberately acquire a property subject to a mortgage by checking whether the mortgage contract is registered or not in a public registry.

Fortunately, the transfer of the ownership of the mortgage would not relieve the original debtor from his obligation unless the person who acquired the mortgaged immovable undertakes to pay the debt and the creditor does not object to the release of the original debtor within one year since he has been informed about the agreement between the original debtor and the third person to release the original

[117] Art. 3068 of the Civil Code.
[118] Art. 3069 of the Civil Code.
[119] FSC Cassation Decision Vol.20, File No. 115763 (The case of National Insurance Company Vs Commercial Bank of Ethiopia).
[120] Art. 3084 (2) of Civil Code.
[121] Art. 3088 of Civil Code.

debtor from his obligation.[122] Thus, no arrangement between both parties (transferor and transferee) can discharge the liability of the mortgagor to the mortgagee without the consent of the latter.

Moreover, the law has given the mortgagee a right to attach the mortgaged property in the hands of a third-party acquirer whose rights have been registered after the registration of the mortgage.[123] Registered rights of rem on an immovable mortgaged property shall not affect the mortgage where such have been registered after the mortgagee registered his mortgage and the mortgagee may cause the immovable to be sold as though such rights had not been created. Thus, the creditor has the right to follow the property and satisfy his claim in whosever hand the property may be found. This is because the mortgage is a real right in the sense that the security right of the creditor is against the mortgaged immovable and shall be enforced by disregarding all the rights of third-parties which have been created and registered after the registration of the mortgage.[124] Moreover, the mortgagor or transferee cannot demand that the mortgage claim should be proportionally reduced to the property she/he owned because the mortgage entails indivisible obligation.[125]

Besides, where the thing mortgaged is transferred for whatever reason to a third-party, and the third-party acquirer destroys or reduces the value of the mortgage, the mortgagee may demand new security or discharge of the debt mortgaged to the extent of distraction or reduction.[126] This right is commonly labelled as the right of acceleration. Where the mortgagor or third-party acquirer intentionally or by negligence reduces or endangers the value of the immovable mortgaged, the mortgagee may demand new securities.[127] When the mortgagor fails to vanish such

[122] Art. 3086 of Civil Code.
[123] Art. 3085 of Civil Code.
[124] This shows that it is the duty of third-party, before entering into contract of sale, to check what rights have been already created and registered on the immovable subject to the pain of being ousted from the immovable.
[125] Art. 3087 of Civil Code.
[126] Art. 3107 (2) of Civil Code.
[127] Arts. 3073 & 3074 of Civil Code.

securities within the period reasonably fixed to him by the mortgagee, the mortgagee may demand that an adequate part of the debt be discharged.[128] However, the mortgagee may not demand new securities nor that part of the debt be discharged where the actual or possible reduction in the value of the immovable mortgaged is due to unforeseen causes (not by negligence or intentional act).[129]

On the other hand, the law considers the acquirer of mortgaged immovable as a guarantor who can raise all possible defenses including the defense of benefit of discussion, and defend himself against the action brought by the creditor who claims to have security right on the immovable.[130] Thus, if the mortgagee is to face all defenses available for the guarantor from the acquirer of the mortgaged property, one may question the purpose of having real securities like a mortgage which creates rights in rem. These protections of the third-party acquirer cause a very serious challenge as it changes the real right of the mortgagee to the personal right as the mortgagee is going to face all the defenses that may be raised against a creditor who proceeds against his guarantor.

Practically, to overcome these challenges, banks take over the title deed of mortgaged property during the mortgage so that the mortgagor cannot transfer the mortgaged property before settlement of the loans.[131] In this regard, there is no legal provision that requires to hand over the title deed to the mortgagee during the mortgage and neither any prohibition to hand over the title deed.

Previous research focusing on Ethiopian Banks also reached the conclusion that practically where a creditor enters into a mortgage contract, and an application is made to be registered, a municipality would give assurance through a written letter

[128] Art. 3073 (2) of Civil Code.
[129] Arts. 3075 & 3092 (1) of the Civil Code of Ethiopia
[130] Arts. 3090 cum 1920-1952 of Civil Code.
[131] My personal observation and Interview with Mr. Worku Dirissa, Litigation and Foreclosure Team Manager at CBO, in March 2023) revealed that the practice of CBO shows that the bank takes over the title deed of mortgaged property during the mortgage until settlement of the loan.

that the mortgaged property shall not be sold or transferred from the date of registration except being confirmed by the creditor upon the completion of the payment of the debt.[132]

My observation also confirmed that banks, upon entering into a mortgage contract to secure loans, send a letter to the urban land development and management office requesting the office to assure that the property to be mortgaged is free from any encumbrance, and then register the mortgage and injunct the property from any transfer until letter showing payment of the debt is written by the bank. Then, the office writes a confirmation letter stating that the mortgaged property is prohibited from any transfer or encumbrance until the bank confirms the debt is fully paid. In this regard, the law clearly, under arts. 3084 and 3088 of the Civil Code, even go to the extent of prohibiting any agreement that restricts the right of the mortgagor to transfer the ownership or create rights in rem over the mortgaged property.

In general, practically, banks have systematically overcome the challenges they will face from third-party acquirers of mortgaged property by precluding the mortgagor from any transfer or encumbrances and thereby preventing possible disputes.

3.4.2. When Third-Party is Mortgagor

The issue here is the rights of the creditor bank when the third-party is a mortgagor, i.e., where the immovable is given as security by a third-party on behalf of the debtor. The law refers to such third-party as a guarantor under arts. 3106 cum 3090, and arts. 3105 – 3108 of Civil Code. This third-party is not liable for the payment of primary debt. It is because of his good faith or because of his good relation with the debtor or the creditor that he is securing the debt of another person.

Hence, the law provides that the maximum liability of the third-party mortgagor is limited to the immovable that he has given as security, and thus other properties of

[132] Mekuria, supra note 4, p.326

the third-party mortgagor are not liable.[133] In other words, if the value of the immovable that the guarantor has given as security cannot settle the whole claim, the creditor cannot proceed against the third-party mortgagor rather s/he can proceed against the debtor for the unsettled part of the claim.

Moreover, the third-party mortgager can avail himself of all the defenses that are available for any third-party who acquires the immovable mortgaged from the debtor including defenses of the benefit of discussion.[134] But she/he cannot resist producing new security when by his (or third-party that acquired immovable from him) intention or negligence reduce or endanger the value of the mortgaged property.[135] Hence, the mortgagee had to argue with the third-party mortgagor and could not directly enforce the mortgage right because of the remedies the law provides for the third party mortgagor.

However, practically in this regard, the FSC Cassation Bench decided that when out of two mortgaged properties; one property belongs to the debtor and the remaining one property belongs to a third-party, the order of property to be sold first by foreclosure shall be determined by the bank, not by the mortgagor or the court.[136] Moreover, the cassation court decided that the third-party mortgagor has no right to claim for the sale of property of the debtor before the sale of his/her property as in the mortgage contract the mortgagor agreed that once the debtor is at default the mortgagee can sale the property by auction upon giving 30 days default notice. Furthermore, the court stated that the defense of benefit of discussion is against ordinary mortgagees (not applicable for banks and microfinance) as it is against the

[133] Art. 3105 of Civil Code.
[134] Art. 3106 of Civil Code.
[135] Arts. 3107 & 3108 of Civil Code.
[136] FSC Cassation Decision Vol.13, File No.70824, supra note 84.

aim of power of sale foreclosure laws which are intended to help banks for easy and speedy re-collection of public money disbursed for development purpose.

Thus, it can be concluded that third-party mortgagors can raise all possible defenses available for guarantors against all mortgagees except banks and microfinance. In other words, banks and micro finances can sell mortgaged property be it belonging to the debtor or third-party in the same manner by following the rules of foreclosures.

4. Conclusion and Recommendation

Although Ethiopian law doesn't define the term mortgage, it can be understood as a juridical act between a creditor and debtor or a third-party on behalf of the debtor whereby immovable property or in some cases special movable property, without affecting possession and title, is given as a security to guarantee the creditor, if the debtor default, to take it over and have it sold, in whosever hand it is found and to get paid from the proceeds by preference to the other creditors.

Furthermore, mortgage as a juridical act has its peculiar validity requirements such as the requirement of written form, the existence of the mortgaged property, the need for ownership or special agency by the mortgagor, specification of the maximum secured claim, registration, and issues related authentication (which is exempted for banks and micro-financial institutions). Once the mortgage is validly established, parties assume their respective rights and obligations. This paper mainly addressed one of the principal effects of mortgage which is the right it creates for the mortgagee bank from the following perspectives: -

Firstly, though the law is not clear with the mandate of banks, the FSC Cassation practice shows that when two or more properties are mortgaged, upon default of the debtor, determining as to which property shall be sold first is the right of the creditor bank, not of the court or the debtor. However, in the process of foreclosing, if the bank fails to follow the required procedures, especially Arts. 394-449 of the Civil Procedure Code and thereby the mortgagor sustains damage, the bank is liable. Yet,

the mortgagor is not entitled to bring a claim to stop the sale due to irregularities rather s/he can claim compensation after completion of the foreclosing procedure.

Secondly, where there are several creditors, the secured bank that registered the mortgage first has the right of preference in payment including over preferred creditors. The claims that the creditor can demand to be paid in priority to other creditors are the principal claim, agreed interest on the principal claim, necessary expenses for preservation, insurance premium, cost of attachment, and legal interests. These bank's priority claims are extended to the mortgaged property with its intrinsic and accessories, the improvements to the mortgaged property, the rent, and compensation paid for the loss of mortgaged property. However, it is possible to sell mortgaged property for the execution of the judgment of any other creditors, and thus, the mortgagee bank cannot reject the sale rather it has the right to claim for payment in priority to other creditors from proceeds of the sale. Moreover, if the bank fails to claim for priority payment and the property is sold for judgment execution of other creditors, the bank has no right to follow from the buyer.

Thirdly, when mortgaged property is transferred to 3rd party, the creditor has the right to follow the property in the hands of third-parties whose right is registered after the registration of the mortgage. On the other hand, the transferee is assimilated to the guarantor and thereby can invoke any defenses available for a guarantor including the defense of benefit of discussion against the secured creditor. Practically, to overcome these challenges, banks take over the title deed of the mortgaged property and secure its injunction from any transfer during the term of the mortgage. In this regard, legal provisions neither require nor prohibit handing over the title deed to the mortgagee though the law prohibits the restriction on full ownership of the mortgagor.

Fourthly, when the mortgaged property belongs to 3rd party, the mortgagor can raise all possible defenses available for the guarantor including the defenses of benefits of

discussion against mortgagees. But practically, banks and microfinance are impliedly exempted from such defenses under the guise of power of sale foreclosure. As a result, banks and micro finances are selling mortgaged property whether it belongs to the debtor or third-party in the same manner by following the rules of foreclosures.

Based on these findings, this article suggested addressing the identified gaps and harmonizing the mortgage system specifically the rights of banks over the mortgaged property. Particularly, it recommends that the foreclosure law should empower banks to sell the mortgaged property when it is transferred to third-party or the mortgagor though the property is at the hand of the debtor and belongs to the debtor. As amended, Art. 1723 (3) of the Civil Code, which intends to exempt banks and micro-financial institutions from requirements of authentication for the formation of mortgages, should also employ words like authentication or notarization rather than registration. As it seems, it relieves the banks from the obligation of registering the mortgage contract in the appropriate office.

A Critical Analysis of the Regulation of Civil Society Organizations (CSO) Engagement in Income-Generating Activities under Ethiopian Laws

Abdata Abebe Sefara♣

Abstract

The Civil Society Organizations Proclamation [No. 1113/2019] (CS Proclamation) accompanied by the Directive enacted by the Authority for Civil Society Organizations (ACSO) to implement the Proclamation, and Directive to Determine the Conditions under which CSOs are Engaged in Income-Generating Activities [Directive No. 937/2022] (IGA Directive), allows CSOs to conduct business as per relevant business licensing and registration requirements. Under the CS Proclamation, interested CSOs can operate businesses through different modes, notably by starting new businesses (companies), owning shares in existing businesses, soliciting public contributions, or being a sole proprietorship. IGA Directive has also provided the modes of the CSO's engagement in business activities. However, the provisions of the CS Proclamation and IGA Directive governing the modes of engagement of CSOs in income-generating activities suffer from ambiguities and discrepancies. It is unclear from these provisions whether CSOs are permitted to establish only company forms or all types of business organizations recognized by the Revised Commercial Code (RCC) to operate businesses. Besides, the laws do not specify the details of how a CSO can pursue a business as a sole proprietorship. Thus, this article critically examines these ambiguities and discrepancies in governing CSOs' engagement in income-generating activities and proposes their possible amendments.

Keywords: Authority of Civil Society Organizations, Civil Society Organizations, Commercial Activities, Ethiopia, Fund, Registration

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1. Introduction

Civil society organizations (CSOs) play a vital role in society by fulfilling human needs and supporting profitable firms and governmental activities.[1] However, they are now engaging in commercial activities to generate income to support their primary objectives.[2] Since CSOs are not entities established to pursue profit-generating activities, securing the necessary funds to pursue their objectives may become a challenge at some point in their life span. Hence, in a way, allowing them to engage in some income-generating activities under some limitations contributes to their sustainability. One online newspaper published in 2020 pointed out that Ethiopian CSOs face challenges such as declining funding, lack of information on calls for proposals, weak coordination, and limited staff capacity.[3] A study conducted earlier also revealed that CSOs in Ethiopia face financial unsustainability by due to inadequate funding and lack of understanding and practice in strategic fundraising and governance.[4] In this regard, addressing internal capacity limitations, improving transparency in funding decisions, and fostering positive relationships with stakeholders were some of the mechanisms believed to tackle these financial challenges.[5] CSOs in developing nations, like Ethiopia, have greatly benefited from foreign funding.[6] Nonetheless, as foreign funds may be inadequate or, at times, unreliable, CSOs need to diversify their funding base and minimize dependence on a few donors.[7] With this assumption that CS Proclamation and IGA Directive have provided wider opportunities for CSOs to engage in business activities to address financial challenges and reduce CSOs' dependency on a few donors.

[1] Domingo Soriano & Miguel-Ángel Galindo, 'An Overview of Entrepreneurial Activity in Nonprofit Organizations in the International Context', *Small Business Economics*, Vol. 38, No. 3, (2012), PP. 265-269.
[2] Salamon Lester M. and Helmut K. Anheier, 'The International Classification of Nonprofit Organizations', ICNPO-Revision 1, the Johns Hopkins Institute for Policy Studies (1996) Working Papers of the Johns Hopkins Comparative Nonprofit Sector Project, Vol-19 P-3, available at: <https://asauk.org.uk/wp-content/uploads/2018/02/CNP_WP19_1996.pdf> Accessed on December 7, 2023.
[3] Sosena Lemma, 'In Ethiopia, Exit Presents Real Challenges for Civil Society Organizations', (November 2, 2020), <https://www.intrac.org/in-ethiopia-exit-presents-real-challenges-for-civil-society-organisations/>, available at: Accessed on May 30, 2024.
[4] Sisay Seyoum, 'Financial Sustainability of Ethiopian Resident Charity Organizations: Challenges and Opportunities' (Executive Master of Business Administration (EMBA) Degree Thesis, AAU, and June 2015), available at: <https://communityresearch.org.nz/wp-content/uploads/formidable/Sisay-Seyoum.pdf> Accessed on May 30, 2024.
[5] Ibid
[6] Yntiso Gebre, 'Civil Society and Income Generation Activities in Ethiopia', (2012) Tracking Trends in Ethiopia's Civil Society (TECS) Research Paper, P. 23, available at: < https://www.ajol.info/index.php/asr/article/view/163707> Accessed on May 25, 2024
[7] Ibid

It should be also mentioned that Ethiopia is not unique in permitting CSOs to engage in revenue-generating activities. Legislation in a large number of foreign national jurisdictions permits CSOs—or entities comparable to them that may go by different names depending on the jurisdiction in question—to participate in various forms of commercial activity. However, there are differences in the ways that different nations regulate CSO participation in revenue-generating ventures. While some nations have no restrictions on charity conducting commerce, others only allow it under very rigorous guidelines.[8] CSOs can engage in business activities under three basic models: the non-primary purpose business model, which allows CSOs to operate without limitations; the relatedness rule, which requires a relationship between business activities and the organization's purpose; and the exclusive doctrine, which prohibits CSOs from engaging in business activities.[9] Countries like France, Venezuela, Slovakia, Germany, Denmark, Kenya, and Montenegro adopt this model but strictly regulate it from various perspectives.[10] Some countries also require CSOs to establish subsidiaries for unrelated activities, and[11] the relatedness rule requires business activities to be related to the organization's statutory purpose, auxiliary to the primary purpose, and identified in establishing documents.[12] Other limitations include legal form, purpose qualification, registration as a for-profit entity, and income utilization limitations.[13] The exclusive doctrine also prohibits CSOs from engaging in business activities, but the number of countries applying this model is decreasing.[14]

Under the Revised Commercial Code[15], in principle, only traders and business organizations are allowed to engage in business activities upon fulfilling the necessary legal requirements.[16] Conversely, associations are organizations created in accordance with the Civil Code, as amended by Charities and Societies Proclamation No. 1113/2019[17], and are meant to run

[8] Lester M. and Anheier (n. 2) 3
[9] Klaus Hopt *et al.*, 'Feasibility Study on a European Foundation Statute', Final Report to the European Commission (2015), P-52. Available at: <https://efc.issuelab.org/resources/15835/15835.pdf> Accessed on March 5, 2024.
[10] Belete Addis Yemata, 'The Income Sources of Civil Society Organizations (CSOS) Under the Ethiopian CSO Laws: A Lesson Drawing Analysis', (2020) Jimma University Journal of Law, Vol. 12, pp. 5-8.
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid
[15] Commercial Code of Ethiopia, 2021, Arts. 11-27, Proc. No. 1243/2021, *Fed. Neg. Gaz.* (Extraordinary Issue), Year 27, No. 23. [Hereafter, the Revised Commercial Code (RCC)].
[16] Id, Art-5
[17] Organizations of Civil Societies Proclamation, 2019, Proc. No. 1113/2019, *Fed. Neg. Gaz.* Year 25, No. 33 [Here in after the 'CSO Procl.'].

non-profit-making activities. In principle, they are not permitted to engage in any income-generating activity, unlike business organizations, and any violation of this rule will result in their dissolution.[18] The laws governing CSOs do, however, permit them to engage in commercial activities to some extent and subject to certain requirements, notwithstanding the RCC's general prohibition. Art. 63/1/b of the CSO Proclamation allows CSOs to engage in income-generating activities in accordance with the relevant business license and registration laws. In a similar fashion, the Preamble of IGA Directive[19] permits CSOs to engage in income-generating activities. Pursuant to these two legislations, CSOs may carry out income-generating activities through different modes, notably by establishing new businesses (companies), holding shares in existing businesses, collecting public contributions, or conducting business as a sole proprietorship.[20] However, the provisions of the CS Proclamation and IGA Directive governing the modes of engagement of CSOs in income-generating activities suffer from ambiguities and discrepancies that necessitate further clarification.

This article critically analyzes the legal regulation of CSOs' engagement in income-generating activities under the relevant Ethiopian laws using a doctrinal legal research approach. It aims to identify legal gaps and ambiguities in the CSO Proclamation and IGA Directive and suggest recommendations for improving the legal regulation of CSOs' income-generating activities. Accordingly, the article is structured as follows: after the introduction, Section 1 provides an overview of the conceptual and legal aspects of CSOs in general and their regulation in Ethiopia; Section 2 gives critical scrutiny of the regulation of CSO engagement in income-generating activities under Ethiopian laws. Then, the article ends with a succinct conclusion and suggestion.

[18] RCC Art. 25 and CC Art. 461. Thus, professional associations and other non-governmental organizations are not, as such, permitted to operate a business. Even a resort by such an organization to profit-making activities would be a ground for dissolution.

[19] The Federal Democratic Republic of Ethiopia Authority for Civil Society Organizations, Directive To Determine The Conditions Under Which Civil Society Organizations Are Engaged In Income-Generating Activities, Directive No. 937/2022 **(**referred to as the 'IGA Directive' hereunder)

[20] Ibid

2. The Conceptual, Legal and Institutional Framework of Ethiopian Civil Society

2.1. Definition and Features

Although there are multiple ways of defining a CSO, it is often defined as an entity that is concerned with its activities toward the realization of a social value-adding mission.[21] CSOs, in principle, seek to realize such a mission, often through funds collected through donations from donors, either in the form of money, other assets, or volunteer work that the donor delivers to the supported CSO.[22] However, there are multiple and possibly confusing expressions utilized in different legislation to refer to CSOs in Ethiopia. The Civil Code and the RCC refer to them as 'associations', while the CSO Proclamation utilizes the expression 'civil associations or organizations.[23] However, for this work, 'associations' are organizations formed to operate non-profit-making activities and established under Art. 404-549 of the Civil Code as amended and/or modified by the CSO Proclamation.[24] The CSO Proclamation defines a CSO as 'a non-governmental, non-partisan, not-for-profit entity established at least by two or more persons on a voluntary basis and registered to carry out any lawful purpose, and includes non-government organizations, professional associations, mass-based societies, and consortiums'.[25] This definition accommodates local and foreign CSOs, professional associations, mass-based societies, consortia and charitable entities, trade unions, religious institutions, and traditional or cultural institutions such as *Edir* and *Equb.*[26]

Also, in order to have a better understanding of the nature of CSOs, it is crucial to make a quick distinction between CSOs and cooperative societies and business organizations (for-profit organizations) in this case. CSOs and for-profit businesses differ significantly from one another in addition to being subject to distinct legal frameworks. A CSO is a type of organization that is prohibited from distributing its net earnings to its members, officers, directors, or trustees.[27] While

[21] CSO Procl. Art. 63
[22] G. Michalski, G. Blendinger, Z. Rozsa, A. Cierniak-Emerych, M. Svidronova, J. Buleca, and H. Bulsara, 'Can We Determine Debt to Equity Levels in Non-Profit Organizations? Answer Based on the Polish Case' (2018) Inzinerine Ekonomika-Engineering Economics, Vol. 29, pp. 526–535.
[23] A reader should note that the expression 'CSO' used in this contribution refers to the same institutions referred to as 'associations' in the RCC and the Civil Code, as well as those referred to as 'civil associations and organizations' in the CSO Proclamation.
[24] Henry B. Hansmann, 'The Role of Nonprofit Enterprise', (1980), The Yale Law Journal, Vol. 89: No-5, P-838.
[25] CSO Procl Art-2/1
[26]Id Art-3/2
[27] Hansmann (n 20)

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a CSO is earning a profit, it is barred from distributing it.[28] The net earnings must be retained and devoted to financing further production of services.[29] In cases of dissolution, CSO assets are not distributed to members or owners but may be transferred to a CSO working in the same area or another CSO to continue serving the public, depending on the law or legal system.[30] Cooperative societies, on the other hand, are autonomous associations democratically controlled by individuals united voluntarily to meet common economic, social, and cultural needs.[31] They are not meant to pursue profit-making activities like business organizations, but they can collect and distribute incidental profits earned in pursuing their primary objectives. Cooperative societies work mainly to bring economic benefits to their members[32], unlike CSOs, which focus on human rights, politics, and charity. The primary objective of cooperative societies is to provide economic benefits for their members.

2.2. The Civil Society Laws of Ethiopia

Ethiopia has a long tradition of informal community-based organizations like *Edir* and *Equb*—self-help associations that operate at the local level and offer mutual socio-economic support to their members.[33] Yet, a formal civil society with a legal personality is a recent development.[34] It was only after the downfall of the *Derg* regime in 1991 that CSOs substantially increased in number.[35] Following this, in 2009, Ethiopia enacted the Proclamation to Provide for the Registration and Regulation of Charities and Societies, as the first comprehensive law governing CSOs.[36] However, this proclamation and its associated directives were generally blamed for violating international standards relating to freedom of association and were eventually replaced by the CSO proclamation.[37]

[28] Ibid
[29] Ibid
[30] Ibid
[31] Art. 2/1 of the Cooperative Societies Proclamation, 2016, Proc. No. 985/2016, *Fed. Neg. Gaz*., Year 23, No. 7
[32] Id, art-4
[33] Civic Freedom Monitor 'Ethiopia' (8 May 2023), available at: <https://www.icnl.org/resources/civic-freedom-monitor/ethiopia> Accessed on September 20, 2023.
[34] Ibid
[35] Ibid
[36] Ibid
[37] Ibid

In general, there are three sets of laws in Ethiopia that govern nonprofit organizations: the Civil Code of Ethiopia, the RCC, and the CSO Proclamation and its implementing ACSO Directives. In the current set-up of the federal system in Ethiopia, the laws governing CSOs are found at both the federal and regional levels. The CSO Proclamation governs organizations operating in two or more regional states in Ethiopia.[38] This means an organization operating in only one region is governed by the laws of that region if the region has adopted its own CSO laws or by the relevant provisions in the 1960 Civil Code if the region has not adopted its own CSO laws.[39] The federal laws governing CSOs, *inter alia*, include the FDRE Constitution, the CSO Proclamation, Council of Ministers Charities and Societies Regulation No. 168/2009[40], and several directives enacted by the Civil Society Organizations,[41] Labor Proclamation 1156/2019, Definition of Powers and Duties of the Executive Organs Proclamation No. 1263/2021, Federal Income Tax Proclamation No. 979/2016, and several legislations having direct or indirect application on CSOs.[42] Of course, it

[38] Article 3/2 of Cooperative Societies Proclamation No. 985/2016 states that: "For the purpose of this provision, organizations operating in two or more regional states mean an organization that implements its main mission in two or more regional states, an organization that has a permanent office in two or more regional states, an organization that has permanent members and operates in two or more regional states, or an organization that collects funds in two or more regional states permanently."

[39] Concerning regional state laws, at the time of the writing, the writer was able to access the laws of only two regional states, i.e., Amhara and Oromia. Amara National Regional State Charities and Societies Registration and Administration Proclamation No. 194/2012, Charities and Societies Registration and Administration Determination, Council of Regional Government Regulation No. 117/2013, and the recently enacted Oromia State Civil Societies Registration and Administration Proclamation No. 254/2024.

[40] A draft CSO Regulation intended to implement the CSO Proclamation is currently being considered by the Council of Ministers. It is anticipated that Charities and Societies Regulation No. 168/2009 will be replaced by the draft CSO Regulation. Art. 88/1 of the CSO Proc. allows the application of the former Regulation only up to one year from the time of promulgation of the Procl. Yet the writer was unable to verify if the speculated draft CSO Regulation was officially promulgated.

[41] The authority *of civil society organizations* refers to a federal government body that was established in accordance with Article 4 of the proclamation and that was re-established by Proclamation No. 1263/2021 (as amended) to determine the powers and functions of the executive bodies of the federal government. It replaced an entity referred to as the Civil Societies Organizations Agency in the CS Proclamation. The authority has issued several directives by the power given by Art. 89/2 of the CS Proclamation No. 1113/2011. A non-exhaustive list of these directives includes the following: Civil Society Organizations Audit and Performance Reporting Guidelines No. 972/2023; Local Organizations Registration and Management Directive No. 938/2022; Directive No. 939/2022 on Avoiding Conflicts of Interest; Civil Society Organizations Income-Generating Activity Directive No. 937/2022; The Authority for Civil Society Organizations' Board Appeal Procedure; Complaint Review Committee Appointment; and Rules of Procedure Directive No. 970/2023. Directive No. 936/2022 on the Merger, Division, Conversion, and Dissolution of Organizations, Liquidators, Procurement, Sale, and Disposal of Assets of Civil Society Organizations No. 850/2021 and Civil Society Organization's Administrative Expenses Implementation Directive No. 847/202

[42] Several federal laws, such as those governing elections, media, taxes, political parties, etc., have implications for the operation of CSOs. Hence, it is impractical to provide an exhaustive list of federal laws governing CSOs in this short work.

should be noted that the list of federal legislation provided here is merely an illustrative list, as many of the laws indirectly touch upon certain aspects of CSOs in Ethiopia.

2.3. Formation, Registration, and Licensing of CSOs

Ethiopia is one of the countries where registration is mandatory.[43] The processes of formation and registration are subject to the general principles provided by the law.[44] The proclamation requires the authority to register any CSO,[45] and it bans CSOs that are not registered from engaging in any activity.[46] The requirement of legal registration applies to all forms of CSOs without exception.[47] Yet, the documentary and procedural requirements for registration vary with the respective legal forms. The specific requirements for registration for each type of local CSO are stated under Local Organizations Registration and Management Directive No. 938/2022. The law puts no explicit restrictions on who can be founders of a CSO, and there is no limitation on the number of founders.[48] Accordingly, natural or legal persons can establish a CSO. ACSO is authorized to refuse registration to CSOs whose aims or activities are contrary to public morals.[49] A CSO will acquire legal personality once it has registered and satisfied the registration procedures outlined in this proclamation.[50] Among the rights that come with acquiring legal personality are the ability to sue, be sued, and enter into contracts; the freedom to operate in any industry as long as certain legal requirements are met; and the ownership, management, and transfer of both immovable and movable property.[51]

[43] Id, Art-57/1
[44] Id., Art. 16; also see Art. 4 of Local Organizations Registration and Management Directive No. 938/2022.
[45] Ibid
[46] Ibid
[47] Id. Art. 6/9 indicates that the CSO sector in Ethiopia consists of four main legal forms, i.e., foreign organizations, charity organizations, professional associations, and local organizations.
[48] Debebe Hailegebriel, 'Defending Civil Society Report on Laws and Regulations Governing Civil Society Organizations in Ethiopia', (2008), P. 8. Available at: https://www.eia.nl/documenten/00000443.pdf, Retrieved on: September 12, 2023
[49] Under Art. 59/1 of the CSO Proc., the Authority may also refuse to register a charity or society because 'the proposed charity or society is likely to be used for unlawful purposes or the purpose of prejudicial to public peace, welfare, or good order in Ethiopia'. The proclamation further provides that the agency may refuse registration if the name under which the proposed charity or society is to be registered is considered to be contrary to public morality or is illegal.
[50] CSO Procl., *Art. 61(1*)
[51] Id, Art-61/2/3

2.4. Institutional Frameworks

Different regulatory bodies are entrusted with the supervision of CSOs in Ethiopia. The main institutions include the Ministry of Justice, the Authority of Civil Society Organizations, the Civil Society Board, and the Council of Civil Society Organizations. The CSO Proc. also establishes the Civil Societies Board under the Authority with several powers and functions.[52] The board has a supervisory and advisory role in the administration of CSOs.[53] In addition, it has the power to hear appeals against the decisions of the Director-General.[54] The Board shall, when necessary, set up an independent complaint review committee to investigate the appeal brought to it.[55] To foster the self-regulation of CSOs, Art. 85 of the CSO Proclamation establishes a Council of Civil Society Organizations governed by the full participation of all civil society organizations. The Ethiopian Civil Society Organizations Council (ECSOC), established in 2019, represents over 4,000 CSOs in Ethiopia.[56] As an independent institution, it coordinates the civil society sector and establishes an environment for non-state actors to engage in lawful activities like democracy, human rights, elections, and peacebuilding.[57] The council's functions include enacting a Code of Conduct, advising ACSO on CSO registration and administration, and representing and coordinating the sector.[58] Its powers and functions are to enact the Code of Conduct for the sector, devise enforcement mechanisms in consultation with the agency, donors, and other stakeholders, advise the agency on the registration and administration of organizations, and represent and coordinate the civil society sector.[59]

2.4.1. Authority of Civil Society Organizations and CSOs in Ethiopia

Since the fall of the Derg regime in 1991, CSOs have expanded their operations, registering religious institutions, philanthropic organizations, NGOs, and associations through the Ministry of

[52] Id Arts-8-9
[53] Ibid
[54] Id Arts-9, 57(3), 59(5), 70(2), 77(4), and 78(4); Directive on the Appeal Procedure of the Authority for Civil Society Organizations' Board No. 970/2023, The Authority for Civil Society Organizations' Board Appeal Procedure, Complaint Review Committee Appointment, and Rules of Procedure Directive No. 970/2023.
[55] Id, Art-9/2
[56] Ethiopian Civil Society Organizations Associations, available at: < https://www.ecsoc.net/> Retrieved on May 12, 2024
[57] CSO Proc. Art-9/2
[58] Id. Art. 85/5 (a, b, and c)
[59] Ibid

Interior.[60] In 2009, the Ministry of Justice conducted structural reform and established a separate implementing agency for charitable organizations and associations, establishing the "Charities and Civil Societies Agency." In April 2018, the agency was renamed "Authority for Civil Society Organizations (ACSO).

The ACSO is a national body in Ethiopia that oversees civil society organizations, ensuring freedom of association, public benefit, and efficient goal achievement. It supports self-regulation and self-administration, strengthens positive working relations with the government, and encourages organizations to have transparent, accountable, and participatory internal governance systems.[61] This authority is accountable to the Ministry of Justice, which is in turn accountable to the Council of Ministers.[62]

The authority is entrusted with several objectives, powers, and functions.[63] The power of licensing, administering registration, operation, and dissolution, and supervising CSOs is given to a special body of the executive branch, established as a separate legal entity called the Authority of Civil Society Organizations.[64] A website of ACSO indicates that, after the reform (2019), more than 2974 new CSOs were registered based on Proclamation No. 1113/2019.[65] Of the 4938 ACSO-registered organizations, more than 4395 are local and more than 543 are foreign organizations.[66] More than 415 CSOs are professional associations, and more than 165 CSOs are disability organizations.[67]

[60] Ethiopian Civil Society Organizations Associations, available at: <https://acso.gov.et/en/about-us> Retrieved on May 12, 2024
[61] Ibid
[62] Definition of Powers and Duties of the Executive Organs Proclamation, 2021, Art. 98/1, Proc. No. 1263/2021, *Fed. Neg. Gaz.*, Year 28, No. 4
[63] CSO Procl Arts 4,5 and 6
[64] CSO Procl. Art. 6
[65] (n. 60)
[66] Ibid
[67] Ibid

3. The Regulation of Civil Society Organizations' Engagement in Income-Generating Activities under Ethiopian Laws

3.1. An Overview of CSOs' Activities and Income Sources

CSOs in Ethiopia engage in various initiatives aimed at social development, poverty alleviation, and meeting the basic needs of specific population segments. Likewise, the income sources of these CSOs vary widely.[68] CSOs engage in a wide range of activities, some of which have political and philosophical goals, politics, sports, hobbies, belief systems, self-help organizations, and community groups.[69] CSOs are vital for the protection and promotion of human rights as they provide legal aid and several other services to individuals who have been affected by violations of human rights.[70] Additionally, they offer aid for growth and relief.[71] Generally, their activities can be categorized into general, economic, and political activities. First, once CSOs acquire legal personality, they will have the capacity to engage in all activities of legal persons, such as entering into contracts, suing and being sued, and owning, administering, and transferring movable and immovable property in their own name.[72] Second, CSOs may engage in any lawful economic activity to accomplish their objectives[73] upon obtaining the necessary permit from the government body overseeing the sectors they are engaged in.[74] Last, CSOs also engage in political activities**.** The Proclamation does not forbid CSOs from participating in political activities, even if it defines those CSOs as "non-partisan".[75] Contrastingly, the proclamation prohibits foreign organizations

[68] Yosalem Negus, 'The Formation and Registration of Civil Society Organizations under Proclamation 1113/2019', (LL.M. Thesis, AAU, 2021) PP-9-10, available at: <http://etd.aau.edu.et/handle/123456789/30527> Accessed on February 2, 2024

[69] Ibid

[70] 'NGO Laws in Sub-Saharan Africa, (2011) Global Trends in NGO Law, Volume 3, Issue 3, P. 1.

[71] Ibid

[72] CSO Procl. Art. 61

[73] Id Art-62/1

[74] Id Art-62/10. In principle, CSOs may solicit, receive, and utilize funds from any legal source, including foreign sources, to fulfill their objectives. This includes, in the language of CS Proclamation, 'the right to engage in any lawful business or investment activities, under relevant trade and investment laws, to raise funds to fulfil their objectives'. As will be discussed later, income generated from such activities must be used to cover administrative and program costs of the organization and may not be distributed to members or workers of the organization. CSOs engaging in income-generating activities may do so by establishing a separate business organization (i.e., a company), acquiring shares in an existing company, collecting public donations, or operating their business as a sole proprietorship.

[75] Id. Art. 2/1. It remains to be seen what types of activities the government will view as "partisan" and "non-partisan" and how this interpretation will impact organizations that engage in "partisan" activities.

and local organizations established by foreign citizens residing in Ethiopia from engaging in lobbying political parties, engaging in voters' education, or making election observers."[76]

The Ethiopian government aims to transform civil society organizations into a service sector by regulating funding sources and CSOs' use.[77] The Proclamation allows CSOs to receive monetary and non-monetary donations from domestic and foreign donors. They can generate money from various sources, including businesses, passive investments, and gifts. A comprehensive examination of how the income sources of CSOs are regulated in Ethiopia in light of the dominant international practices is provided in a recent publication and won't be repeated here.[78] CSOs have the right to engage in lawful business or investment activities to accomplish their objectives, subject to relevant trade and investment laws.[79] This includes, in the language of the CSO Proclamation, 'the right to engage in any lawful business or investment activities in accordance with relevant trade and investment laws and to raise funds to fulfill their objectives'.[80] This provision reveals three key aspects of the right to do business activities. The first one is the requirement that the business or investment activity be lawful.[81] Second, CSOs engaging in business activities be subject to the application of relevant trade and investment laws. It is clear that the CSO law is not expected to provide special laws governing the business activities of CSOs as it is reasonable to make cross-references to the governing commercial and investment activities. Finally, the primary aim of CSOs engaging in a business is to fulfill its principal objectives. Hence, engagement in business activities remains supportive of the CSOs' initial goal.

3.2. Modes of CSOs Engagement in Income-Generating Activities

Once it is established that a CSO has a right to engage in any lawful business and investment activity in accordance with the relevant trade and investment laws, The ACSO has already issued the IGA Directive, which regulates CSOs' involvement in business. The detailed rules on the implementation of CSOs right to do business are prescribed by IGA Directive.[82]The following

[76] Id. Art. 62/5
[77] Dina Lupin, 'The Limits of "Good Law": Civil Society Regulation in South Africa and Ethiopia', *Journal of African Law*, 66, 2 (2022), 229–255, P-236.
[78] Belete (n 10)
[79] CSO Procl Art-63/1/b
[80] CSO Procl Art-63/1/b
[81] This requirement is not unique to CSOs only, as business organizations too are allowed to operate businesses based on lawful activities.
[82] The IGA Directive, under its Preamble, states that: 'Whereas, it is stipulated under Article 63(1)(b) of Civil Society Organizations Proclamation No. 1113/2019 that an organization engaged in income-generating activities, in

sub-headings critically address issues pertaining to the modes of engagement through which CSOs take part in income-generating activities.

3.2.1. Establishment of a Business Organization

As stated earlier, the CSO Proclamation and IGA Directive provide different modes for CSOs that wish to engage in income-generating activities. Accordingly, the first mechanism is through establishing a separate subsidiary business organization. On this specific mechanism, Art-64 of the CSO Proclamation reads 'an organization which engages in income generating activities in accordance with Article 63(1) (b) of this Proclamation may do so by establishing a separate business Organization (company), acquiring shares in an existing company, collecting public collections or operating its business as a sole proprietorship' whereas, Art-4/1 of IGA Directive states that; any civil society organization authorized to engage in income-generating activities by its bylaws may establish an independent business organization that generates income for the organization in accordance with the relevant commercial law and the commercial registration and licensing law'.[83]

However, a careful reading of these two provisions reveals an ambiguity about this mode of engagement. Art. 64 of the CSO Proclamation utilizes the expression 'by establishing a separate business organization (i.e., a company). The expression 'business organization' creates the impression that CSOs may utilize any form of business organization recognized under the RCC. Nonetheless, the provision, after stating the generic term 'business organizations', adds the expression 'company' in a parenthesis, potentially creating doubt about whether CSOs are allowed to use partnership forms of business organizations recognized under the RCC or whether they are restricted to using company forms only. The English version of the IGA Directive repeats the same ambiguous statement by stating, 'a civil society organization may establish a business company by selecting one of the types of business specified in the commercial law'.[84] This provision has a connotation that any form of business organization recognized by our RCC[85] could be utilized.

accordance with the relevant business license and registration laws, may carry out income-generating activities by establishing new businesses (companies), holding shares in existing businesses, collecting public contributions, or conducting business as a sole proprietorship'

[83] IGA Directive, Art-4/1

[84] IGA Directive, Art-5/1

[85] General Partnership, Limited Partnership, Limited Liability Partnership, Joint Venture, PLC, One Member PLC, and Share Company

Still, Art. 4/2 of the same Directive utilizes the ambiguous expression 'business company' to refer to a business organization that can be established by a CSO to pursue income-generating activities. The overall intent of the laws, however, seems to suggest that any type of business organization recognized by the RCC may be used, even despite this ambiguity. IGA Directive also states, 'any CSO authorized to engage in income-generating activities by its bylaws may establish an independent business organization that generates income for the organization in accordance with the commercial law and the commercial registration and licensing law.[86] From this specific provision, one can be tempted to rule out the doubt mentioned above by concluding that any form of business organization recognized by the relevant laws can be utilized by CSOs. Nonetheless, a clear position can only be realized through careful drafting of the laws in future amendments.

The operation of business via establishing a business organization is subject to some mandatory statutory regulations. Firstly**,** a plan to form a business organization should be authorized by the bylaws of the concerned CSO.[87] Yet, a decision taken by an authorized body of a CSO will suffice in the absence of any express authorization provided by the bylaws.[88] Secondly**,** the established business organization should be independent and must have a different name from the CSO(s) establishing it.[89] This aspect of the independence of the business organization from the CSO that formed it is manifested in many aspects. For instance, when appointing a member of the management of a CSO as a member of the board of directors of a business organization, it should be ensured that the activities of the CSO will not be disrupted. Besides, the use of assets and resources by the CSO and the business should not be mixed in any way. Here it is imperative to note that, even though the business entity formed by a CSO to engage in income-generating activities has a separate legal personality distinct from the CSO that formed it, when a CSO dissolves, in principle, the BO dissolves as well, except that when continuity is deemed necessary, it may be transferred to another CSO.

[86]IGA Directive, Art-4/1
[87] Id, Art-4/2
[88] Sisay Habte, 'Doing business via non-profits: a look at the newly enacted directive on income-generating activities' <https://tbestlaw.com/doing-business-via-non-profits-a-look-at-the-newly-enacted-directive-on-income-generating-activities/#:~:text=Any%20CSO%20may%20engage%20in,the%20Organization%20will%20be%20sufficient> Accessed on January 23, 2024.
[89] IGA Directive, Art-4/1

Thirdly, the concerned CSO is not free to determine how to secure the necessary initial capital to establish a new BO as well as the extent of debt incurred by the new business organization. A CSO is required to cover funds used for the establishment, registration, and enforcement of related issues.[90] The financing of the initial capital can be made by the CSO or from other financing sources like banks; yet, it cannot exceed more than 30% of the program costs.[91] The initial capital of a civil society business organization may be paid from a program, from money borrowed from a bank, or from another source.[92] It should be ensured that the budget allocated for income-generating ventures does not affect the organization's mission and work activities.[93] When any CSO desires to establish a business organization, it must ensure that the debt incurred by the business organization or the business it intends to conduct does not hinder or contradict the purpose of the organization.[94] Also, the CSO must make sure that the debt the organization incurs or the business it plans to undertake will not interfere with or conflict with the organization's mission.[95]

Fourthly**,** although CSOs are not required to secure the approval of ACSO beforehand to engage in business, a CSO that has established a business organization must notify ACSO within fifteen days of starting commercial operations.[96] However, it's unclear what exactly the notification's goal is—for example, if the authority has the power to ban a CSO from performing business.[97] According to one author, the lawfulness of the activities is the only thing that the authorities might be able to verify.[98] Finally, a CSO who has successfully established a business organization is not totally free to offer its services and goods to all members of society, as the services and goods provided by the business should take into consideration the disabled and community members who need special support. .

[90] Id, Art-4/4
[91] Id, Art-6
[92] Id, Art-6/1
[93] Art. 6/2 of IGA Directive and Art. 6/3 of Directive No. 937/2022 require that the capital allocated for the establishment of a business be allocated as a program or project cost. However, if the capital is found to be more than the amount mentioned in paragraph 1 of this article, the cost above this amount shall be charged as administrative costs.
[94] Id, Art-5/2
[95] Ibid
[96] CSO Proc Art. 64 (7) and IGA Directive Art-4/3. It must also submit the organization's business license, any necessary certifications of qualification, articles of association, and bylaws in addition to the notification letter.
[97] Belete (n 10) 11. Perhaps the authority may check whether the services or goods it provides target the disabled and community members who need special support pursuant to Art. 4/5 of IGA Directive.
[98] Ibid. Well, lawfulness can also be checked by the organs in charge of registering and licensing the IGAs

3.2.2. Buying Stock from an Existing Business Organization

The second mode of CSOs' engagement in income-generating activities speculated under Ethiopian laws is through 'buying stock from an existing business organization'. Any organization can buy shares from an existing business established by another organization or from any other business. If the business finds it profitable, it can use the profit from the shares it buys to buy more shares.[99] Again, just like the first mode of engagement, a CSO is not allowed to venture into buying shares of existing businesses without restrictions. A balance must constantly be struck between the degree of engagement in business activities and the core non-profit goals of a CSO. Most of the requirements that CSOs must meet for their business operations by establishing a subsidiary business organization also apply to their stock investment.[100] Besides, a CSO that has purchased shares must notify the authority of the purchase within fifteen days.[101]

A comparable lack of clarity about the first method of involvement mentioned above is found in the IGA Directive regarding CSOs' use of "acquiring company shares" as a means of conducting business. The provision states that 'any organization can buy shares from an existing business established by another organization or from any other business'.[102] This first statement utilizes the expression 'existing business', which arguably seems to accommodate both company and partnership forms as targets. Nonetheless, the second segment of the provision states 'if the business finds it profitable, it can use the profit from the shares to buy more shares'[103] refers to company forms only. Here, it is useful to look at how the title of Art. 16 of the IGA Directive is framed. Its English version reads 'buying stock from an existing business' whereas its official Amharic version reads '**ከነባር የንግድ ድርጅት አክሲዮን ስለመግዛት**', an expression that is the same as the former. It's uncommon to refer to 'shares' in partnership firms as 'stock' or **አክሲዮን**. Therefore, unlike the ambiguity of expressions regarding what type of business firm can be set up by a CSO to engage in income-generating activities, the second mode of engagement seems to strongly favour company forms only.

[99] IGA Directive, Art. 16
[100] Belete (n 10) 22
[101] IGA Directive, Art-16/2
[102] Id, Art-16/
[103] Ibid

3.2.3. Cost Sharing and Collecting Public Contributions as Modes of Engagement

As stated above in Art. 63(1)(b), the CSO Proclamation provides for the establishment of a separate business organization (company), acquiring shares in an existing company, collection of public contributions, and operation as a sole proprietorship as modes of CSOs' engagement in income-generating activities. A literal reading of this provision shows that the mechanisms speculated by the Proclamation are treated similarly. However, the content, organization, and spirit of the IGA Directive that are enacted to implement the Proclamation by regulating the income sources of CSOs show that the modes speculated under Art. 63(1)(b) of the Proclamation are rather treated differently by the IGA Directive. In this regard, Part Two of the IGA Directive (Articles 4–16) that carries the title 'Business Conducted by the Civil Society Organization' governs only when a CSO engages in business activities through the establishment of a business company and buying stock from an existing business. Although the IGA Directive fails to define 'business', it appears to stand for profit-earning activities. On the other hand, the provisions of the IGA Directive governing public contribution are placed under Part III (Articles 17–26), whereas cost sharing is placed under Part IV (Articles 27–30). This organization of the Directive potentially gives a connotation that CSOs engage in profit-earning ventures by utilizing only the first two modes of engagement.[104] This view is supported by the Directive's provisions, which set forth particular requirements for each mode of engagement. Besides, it seems that the prerequisites for obtaining business licenses and registering do not apply to cost sharing and collecting public contributions.

2.2.3.1. Cost Sharing

Sometimes CSOs may engage in commercial endeavors just to recover their expenses. This practice, referred to as "cost-sharing" occurs when CSOs levy fees and levies to recover all or a portion of the expenses incurred in rendering services to their beneficiaries—without making a surplus or profit.[105] These initiatives are particularly crucial for CSOs that work in underprivileged areas where customers cannot afford to pay for their services.[106] In these situations, the wisest course of action is to at the very least demand payment from those who can afford the services.[107]

[104] Of course, the Directive has failed to provide specific provisions concerning the use of sole proprietorships to venture into profit-making activities.
[105] CSO Proc Art, 64 (1).
[106] Belete (n 10) 12
[107] Id, p-2

It is imperative to note that this arrangement is not available to all CSOs. It is available only to a CSO that is prohibited, either by its donors or bylaws, from setting up a separate business organization.[108] A CSO that plans to operate this scheme needs to secure permission from the authority.[109] This option allows a CSO to charge a fee for the products or services it offers.[110] Yet, there are several pre-conditions that a CSO needs to fulfill, as well as the legal restrictions imposed on a CSO that utilizes this mechanism to raise funds. In the first place, it must prepare an initial document that includes the purpose, the cost-sharing plan and the method used for the cost sharing, the identity of the beneficiaries and their number if possible, the method to identify the beneficiaries, the methods of obtaining free services or goods as gifts or in other ways, the target customers and the reasons, and the sustainability of the program.[111] Besides, the law provides that the fee paid by the user for the service or the goods must not exceed 25% of the minimum market value of the service or the goods.[112] It is also expected of the CSO to submit, along with its annual activity and audited statements, an annual financial statement, the method used to determine the price of the service or item, the number of users who provided or purchased the service or item, the price at which it was sold to users, and the total income and how the income was spent.[113] Non-compliance with the provisions of the IGA Directive entails measures ranging from a warning to an order to dissolve the business.[114]

3.2.3.2. Collecting Public Contributions

A collection of public donations or contributions, either in cash or in kind, can be conducted in a variety of ways, including planning and organizing events like concerts, bazaars, and exhibitions; placing donation boxes at hotels, malls, and the offices of foreign organizations.[115] The task of collection can be done either by a concerned CSO itself or through a commission.[116] The primary purpose of a public donation is to collect donations for charitable purposes or the benefit of the general public, and such charitable purposes include medical services, care and support for the

[108] IGA Directive, Art. 28/1
[109] Id, Art-28/2
[110] Id, Art 29/1
[111] Id, Art-28/2
[112] Ibid
[113] Id, Art-30
[114] Ibid
[115] Belete (n 10) 26
[116] IGA Directive Arts 25 and 26

disabled, the elderly and children, the incapacitated and the weak, the unemployed, and support for those affected and displaced by natural or man-made disasters.[117] Collecting public contributions is limited to raising funds for the objectives specifically listed under the IGA Directive.[118] As to the modes of collection of public contributions, any contribution can be collected by post, box or receipt, mobile phone, short message service, bank, or any other method.[119]

As pointed out above, a CSO that either establishes a subsidiary business organization or purchases shares of existing companies needs to comply with Art. 60(2)(g) of the CSO Proclamation, which mandates that the CSO's internal rules specify whether or not the CSO will engage in income-generating activities via a subsidiary business organization or purchase shares of existing companies. Nevertheless, it is unlikely that holding fundraising activities is subject to an explicit statement in its internal rules.[120] The only requirement provided for this mode of engagement under the IGA Directive is the obligation to notify ACSO in writing at least 5 days in advance to collect public contributions.[121] However, the Directive does not tell what the authority is expected to do after being notified or the consequences of failure to notify. It is not incorrect to assume that the authority has the power to verify the compliance of the planned publication contribution with the relevant laws and either allow, ban, or modify the planned public collections. Finally, a concerned CSO that has successfully carried out the collection of public donations or contributions has an obligation to submit a report on the public contribution to the authority after its completion.[122]

3.3. Regulation of Resulting Incomes and Taxation Issues

The other key concerns in the discourse of CSOs' engagement in business activities are how the resulting income should be administered and the tax liability questions. Besides, it is important to note that when a CSO becomes a partner of a partnership organization or shareholder of a

[117] Ibid
[118] Id, Art-17
[119] Id, Art-20
[120] Belete (n 10) 27. The same writer argues that, first of all, this is included in the optional list; according to Art. 60(1) of the Proclamation, there are required elements that must be included in the internal rules. Furthermore, this is not a requirement to carry out fundraising efforts according to the other pertinent regulations that deal directly with the fundraising difficulties.
[121] Ibid. IGA Directive, Art-18
[122] IGA Directive Art. 24

company under the RCC or operates a business as a sole trader. This is impliedly subject to the rights and obligations prescribed for traders, partners, and shareholders under the RCC. In other words, for any legal purposes related to their income-generating activities, CSOs will be subject to the relevant tax, commercial registration and business licensing, and investment laws.[123] This sub-section provides a brief discussion about the regulation of resulting incomes and the taxation thereof.

3.3.1. Regulation Incomes Generated from Business Activities

As pointed out above, in principle, CSOs in Ethiopia are granted the right to engage in business activities to raise funds for the fulfillment of their objectives.[124] Nonetheless, there are several legal restrictions on the administration and/or utilization of the incomes earned. These restrictions are rooted in the view that CSOs are not formed principally for profit-making activities. Thus, in principle, profits from the activities of the business organization should be used for the charitable programs of the organization or administrative costs.[125] Yet, the IGA Directive allows some portion of the profit to be used for the business where it benefits the organization, and a decision to that effect was made by the authorized body.[126]

Also, CSOs are prohibited from distributing profits obtained from business or investment activities to members or employees of the organization.[127] The CSO law requires the earned income to go to the principal objective(s) for which a CSO was established instead of being distributed to members and/or workers. Nonetheless, the incomes may be distributed to members or employees for payment of 'legally permitted service fees' such as employees' salaries.[128] The provision fails to explicitly mention founders, officers, or board members of CSOs. However, it can be argued

[123] CSO Procl. Art. 64/2. It is important to point out that CSOs engaged in income-generating activities are under obligation to submit their annual performance report and financial statement to the authority in relation to income-generating activities. This report should include the method used to determine the price of the service or item, the number of users who provided or purchased the service or item, the price at which it was sold to users, and the total income and how the income was spent. Besides, CSOs engaged in income-generating activities must keep a separate bank account and track their business expenses separately in compliance with relevant commercial and tax laws. Income-generating activities will be subject to the relevant tax, commercial registration and business licensing, and investment laws. See IGA Directive *A*rt-30, CSO Procl. Arts-64/2 and 64/3.
[124] CSO Procl Arts (61/4, 63/1/b, and 64/4)
[125] IGA Directive, Art. 9
[126] Ibid
[127] Id Arts: 61/4, 63/1/b, and 64/4
[128] Id Art-60/1/d

that, owing to the nonprofit nature of CSOs, the non-distribution principle is expected to apply to these individuals as well.[129] Unless the expression 'legally permitted service fees' is clearly defined, there is always the risk that incomes earned from business activities can be indirectly distributed to the leaders of CSOs via the payment of excessive salaries.[130] This concern is partly addressed by a provision of the CSO Proclamation that mandates that income from income-generating activities should be used to cover administrative and program costs of the organization.[131] Of course, a CSO is not free to spend the earned income for the objective of covering administrative and program costs without limitations.

A CSO established for the benefit of the general public or third parties is prohibited from expending more than twenty percent of its total income on administrative expenses.[132]The Proclamation clearly defines administrative costs as including, among other things, rent, bank fees, attorney fees, and the salary of administrative staff.[133] It excludes expenses for networking, research, and training.[134] IGA Directive too clearly states that profits from a business established by the organization, whether as dividends or in any other way, should be fully used to cover the program or administrative expenses of the organization.[135] Yet, it is possible to spend some of the profit for the business by the decision of the body authorized by the relevant law or the by-laws of the business company, which is more beneficial to the organization.[136]Again, this is in line with the basic principle that CSOs are not meant principally for profit-making ventures. Nonetheless, conditions attached to re-investment of profits earned from engagement via establishing a business organization do not apply to re-investment of profits earned from buying shares of existing businesses.[137]

[129] Belete (Supra N.10)
[130] Ibid
[131]Art. 63(2) of the CSO Proclamation considers the salaries and benefits of administrative employees as administrative costs. Previously, Art. 6(1) Income Generating Activities by Charities and Societies Directive No. 7/2011 prohibited incomes generated from business activities to be used to cover administrative costs.
[132] Id, art-63/2. This 80/20 rule, which states that a CSO may only spend 20% of its revenue on administrative expenses, has replaced the 70/30 rule under the former legislation.
[133] Ibid
[134] Ibid
[135] IGA Directive Art-9
[136] Ibid
[137] Id,Art-16/1

3.3.2. Taxation of Incomes Earned from Business Activities

The CSO Proclamation does not specify which taxes CSOs are required to pay. However, it can be construed from other legislation governing specific aspects of CSOs and the existing tax legislation. Art. 64/3 of the Proclamation states that 'CSOs may engage in income-generating activities but are subject to laws concerning registration and licensing requirements for activities related to trade, investment, or any profit-making activities.[138] This provision, in effect, calls attention to the application of tax laws to incomes earned from the business activities of CSOs. This is about the application of tax laws on major types of taxes, i.e., income tax, VAT, customs duties, turnover tax, etc. Regarding income tax liability, the law makes a clear distinction between the sources of income of CSOs from business activities and incomes from other sources. Thus, CSOs are exempt from income tax for incomes generated from their core functions[139] and incomes from grants and membership fees.[140] However, CSOs' income from economic or business activities is subject to the same taxes as income generated by business entities.[141] Besides, donations made to CSOs by business organizations or individuals are considered non-deductible expenditures.[142]

CSOs that engage in business activities may also be required to pay value-added tax (VAT) or turnover tax (TOT). However, unlike income tax, VAT and TOT taxation depend on the value of the CSO's annual transactions. The VAT Proclamation requires the business organizations that make transactions of over 500,000 Ethiopian Birr within the scope of one year to register for VAT and collect the VAT from their partners.[143] This provision accommodates CSOs that engage in income-generating activities earning over 500,000 Ethiopian Birr within the scope of one year. Yet certain supplies of goods and services are exempt from VAT, including the rendering of educational and medical services, among others.[144] On the other hand, unlike VAT, TOT is an

[138] CSO Procl. Art. 64
[139] Art. 65/1/m of the Federal Income Tax Proclamation No. 797/2016 It is to be noted that other individuals and business entities enjoy income tax deductibility for their charitable donations made to Ethiopian charities and societies. Yet, the total deduction allowed to the tax payer shall not exceed 10% of the taxable income of the tax payer for the year (Art. 24).
[140] Ibid
[141] CSO Procl. Art. 64
[142] Art. 24/1/a Federal Income Tax Proclamation No. 797/2016
[143] Art. 16/1 Value Added Tax Proclamation
[144] Art. 8(2)(a)-(p) of the VAT Proclamation

indirect tax that applies to business organizations whose annual transactions fall below 500,000.[145] Hence, a CSO may have to pay the TOT when they purchase goods or services from businesses whose annual transactions are less than 500,000 birr.

4. Conclusion

In Ethiopia, ACSO has issued a new directive, the IGA Directive, recognizing the right of CSOs to engage in lawful business and investment activities to raise funds and fulfill their objectives. The directive allows CSOs to establish a separate business organization, acquire shares in existing companies, collect public donations, or operate as sole proprietorships. Although the recognition of CSOs' engagement in income-generating activities to fund their primary objectives is a welcomed development, an analysis of the governing legal regime reveals several shortcomings that could potentially impede the effective implementation of CSOs' right to engage in income-generating activities.

First, Art. 63(1)(b) of the CSO Proclamation, which provides specific modes of engagement by CSOs in a business, suffers from ambiguity. It is unclear if CSOs are permitted to establish company forms alone or all types of business organizations recognized by the RCC. Similarly, the IGA Directive has maintained the same ambiguity concerning the mode of engagement of CSOs in business activities. Despite its attempt to provide some conditions that need to be complied with by CSOs planning to do business forming business organizations, it fails to be precise on the form of the business organizations that can be potentially utilized, especially concerning partnership businesses.

Second, although IGA Directive was expected to provide detailed regulation on how CSOs can utilize a sole proprietorship to engage in income-generating activities, it is lacking in providing detailed provisions on the utilization of' sole proprietorship recognized by the CSO Proclamation as one mode of CSOs engagement in commercial activities.

Last, while the IGA Directive has attempted to provide detailed regulations on 'the collection of public contributions and cost-sharing' as modes of generating income, it has failed to provide detailed regulations on key aspects such as the differential treatment of these two modes from the

[145] Art. 4 of the Turnover Tax Proclamation, the turnover tax rate is 2% on goods sold locally; 2% on services rendered by contractors, grain mills, tractors, and combine harvesters; and 10% on other services.

establishment of a subsidiary business organization and the purchase of other business organizations' shares by a CSO.

The author proposes legislative reforms and recommendations to address legal gaps and ambiguities, aiming to mitigate negative impacts on CSOs' income-generating activities.

Primarily, the key legal ambiguities and inadequacies identified above require legislative measures either by the House of Peoples Representatives (HPR) or ACSO. Regarding issues that concern the CSO Proclamation, ACSO should take the initiative to bring these legal ambiguities to the attention of HPR so that the existing legal ambiguities are addressed through the amendment of the existing legislation. The consortium of CSOs, as well, has the potential to bring this issue to the attention of the ACSO. The point of emphasis on the CSO Proclamation should be clear incorporation of a legal provision allowing the CSOs interested in doing business through the establishment of a subsidiary business organization to be able to use all forms of business organizations recognized in the RCC.

In addition, the legislative power to issue or amend the Directive is vested with ACSO to rectify ambiguities and/or inadequacies of the IGA Directive identified above. Concerning the IGA Directive's collection of public contributions and cost-sharing as modes of engagement in business activities, ACSO must initiate amendments to the Directive to provide detailed regulations on the differential treatment of these two modes of engagement. That is from the establishment of a subsidiary business organization and the purchase of other business organizations' shares. Regarding the inadequacy of IGA Directive provisions on how CSOs could utilize a sole proprietorship to engage in income-generating activities, ACSO can rectify it through amendments to the Directive that can either make cross-references to the relevant provisions of the RCC governing sole businesses or by adding detailed provisions to IGA Directive on how CSOs could utilize a sole proprietorship.

Furthermore, concerning the IGA Defective's ambiguity on a form of business organization that can be potentially utilized, especially partnership forms, there are two potential solutions for ACSO to consider. The first and presumably easier option is to amend the provisions of the Directive in a way that makes cross-references to the principal law governing business organizations, i.e., the RCC, instead of trying to prescribe special rules. The second possible option

is to clarify the confusion through future amendments to the relevant provisions of the IGA Directive and prescribe special rules. Here, it is necessary to make sure that these provisions comply with the provisions of the RCC.

Finally, it is imperative to point out future research directions or areas for further study related to the regulation of CSOs in Ethiopia. Future research will focus on the empirical study of the practical implementation of the legal regime governing CSOs' engagement in doing business. Besides, it is equally important to address areas that also possibly affect the potential of CSOs to engage in income-generating activities, especially in the areas of taxation of incomes from business activities. Similarly, it is important to consider regulations that address the practical challenges the CSOs face while trying to secure the necessary licensing and registration to commence the desired income-generating activities, as well as the necessity of balancing the commercial activities with the primary objectives for which CSOs are established.

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Efficiency of Ethiopian Telecom Consumers Protection Law: Lessons from Safaricom's Previous Experiences in Kenya

Samuel Lijagegnehu Biru[♣]

Abstract

This article assesses the efficiency of Ethiopia's telecom consumer protection laws in protecting consumers from potential infringements, particularly through the previous experiences of Safaricom's telecom consumer rights violations in Kenya. It employs a comparative research approach, analyzing the consumer rights infringements in Kenya and assessing how they would be treated under Ethiopia's current legal framework. The central question of this article is whether Ethiopian law can effectively safeguard consumers if similar infringements occur in Ethiopia. It draws cases against Safaricom's consumer rights violations, including the rights to privacy of service users, suspension of telecom services without sufficient cause and provision of poor-quality services with high tariff rates and limited networks in Kenya. The Ethiopian telecom consumer protection law has the deficiency to redress the recurrence of similar violations in Ethiopia, mainly the absence of legal regimes for high tariffs, governing M-Pesa transactions and the mandate to provide awareness for consumers by the Ethiopian Communication Authority (ECA). Besides, the absence of clear and sufficient guidelines to determine and control service providers' conduct, in addition to the weak practice of an organized participation of the consumer associations shows the legal framework's poor capacity to defend the possible rights violations. Therefore, this article suggests legislative interventions to address the identified gaps, mainly regulating service tariffs, governing M-Pesa transactions, and empowering ECA and consumers to organize and participate in their rights protections.

Keywords: Consumer Protection, Consumer Rights infringement, Ethiopia Communication Authority, Telecom Consumer, Safaricom

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1. Introduction

Communication between people was once severely limited by geographical lag. Today, thanks to ongoing advancements in telecommunications we live in an information age where distance is no longer a barrier to communications.[1] The earliest forms of telecommunication included smoke signals and drums, however by the late 18th century the first telegraph lines were constructed. From there, telecommunication developments steadily expanded the ways people could communicate over long distances.[2] The introduction of telecommunication services in Ethiopia dates back to 1894. Consequently, Ethiopian telecom consumers have been receiving services since that time.[3] However, the telecommunications sector in Ethiopia has faced significant challenges since its inception due to the very low penetration and quality of telecommunications and information communication technology (ICT) services. Additionally, there was only one state-owned operator Ethio-telecom controlling telecommunications infrastructure with exclusive rights to provide fixed and mobile phone, internet and data services.[4] This monopoly on extending telecom services to users restricted consumer interests and hindered the growth of the telecommunications industry.[5]

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[1] Anton Huurdeman, The Worldwide History of Telecommunications, available at https://www.wiley.com/en-us/The+Worldwide+History+of+Telecommunications-p-9780471722243, last accessed on March 31, 2023

[2] Global Tech Communications, Short History of Telecommunications, available at https://globaltechwv.com/2021/01/a-short-history-of-telecommunications/, last accessed on March 31, 2023

[3] Alemeshet Getahun Kassa, Telecom *Voice Traffic Termination Fraud Detection Using Ensemble Learning; The Case of Ethio Telecom,* (Thesis Presented to The Faculty of Informatics Of St. Mary's University In Partial Fulfillment of the Requirements for the Degree of Master of Science Computer Science July 27, 2020), pp. 1

[4] Candidate number 8004, *The Regulation of Telecommunications in a Monopoly Market Structure: The Ethiopian Experience*, (Thesis Submitted in Partial Fulfillment of the Degree of Master of Laws in Information Communications Technology (ICT) Law University of Oslo Faculty of Law, 12.2012), pp. 1.

[5] Deyu Liu, *Research on Economic Law Protection of Telecom Consumer Rights*, 3rd International Conference on Economics, Social Science, Arts, Education and Management Engineering, volume 119, August 2017, pp.5

In 2018, to address these sectorial issues, the Ethiopian government decided to restructure the telecommunications market and introduce competition in the provision of telecommunications services.[6] Based on this government policy, Safaricom Telecommunication Company was awarded a license to operate in Ethiopia. This license became effective on July 9, 2021, and is valid for a fifteen (15) year term from the effective date with the possibility of renewal for additional fifteen (15) year terms subject to fulfilling all license obligations.[7] Before commencing service in Ethiopia, the company had a history of operating in Kenya, where it was involved in various consumer rights violations. To mention a few, in the case of Adrian Kamotho Njenga versus Safaricom, this company was accused of disclosing the personal data of millions of subscribers to unauthorized individuals. According to this case, these consumers' data has been transferred from Safaricom servers to publicly accessible Google Drive repositories and other unsecured devices that have been irregularly subjected to analytical and data mining scripts in a manner not sanctioned by law.[8] Another Kenyan court case involved Joshua Kiprop Kisorio, who filed a petition on November 4th, 2019, claiming that "an unauthorized party, Abdinajib Adan Muhumed, was able to access my Safaricom phone's call data records, along with those of three other unknown individuals". The petitioner argues that this constitutes a violation of his right to privacy, as protected under Article 31 of the Kenya Constitution.[9]

Furthermore, Safaricom Telecommunications Company was accused of consumer rights violation by suspending telecom services without sufficient cause in Kenya.

[6] Communications Service Proclamation No. 1148/2019, August 2019, preamble 1

[7] Dickson Otieno, Safaricom to operate in Ethiopia as "Safaricom Ethiopia PLC", July 15, 2021, available at https://tech-ish.com/2021/07/15/release-safaricom-ethiopia-plc/, last accessed on March 25, 2023

[8] Kenya insight, Safaricom Faces Class Action Suit Over Massive Data Breach as Case Lands on CA's Desk, February 8, 2021, available at https://kenyainsights.com/safaricom-faces-class-action-suit-over-massive-data-breach-as-case-lands-on-cas-desk/, accessed on march 20, 2023

[9] Joshua Kiprop Kisorio v Safaricom Plc & 4 others; Abdinajib Adan Muhumed (Interested Party); 2019, the high court of Kenya at Nairobi, constitutional & human rights division petition no. 448 of 2019

For instance, Wilfred Nderitu and Charles Kanjama filed a case at the Kenyan high court by alleging that their SIM cards were suspended and that they were forced to re-register to enjoy services and products offered by Safaricom.[10] In 2014, most telecom consumers complained about the company's service with poor quality, high tariff rates and limited network services to certain locations in Kenya; consequently, the telecom company's services were inefficient and accused of infringing its consumers' rights in Kenya.[11] The likelihood of the recurrence of these consumer rights violations in Ethiopia is high due to several socio-structural factors. The social factor that made this happen in Ethiopia is the similarity of the illiteracy level of telecom consumers in both countries. In addition, an institutional factor that makes the risk possible to occur in Ethiopia is the resemblance of institutional set-up. In Kenya, a communication commission safeguards telecom consumer rights. Here in Ethiopia, a similar institution exists under a different name. Since the company is currently providing telecom services in Ethiopia, it became important to evaluate the capacity of Ethiopia's telecom consumer protection law in safeguarding and resolving consumer claims in the event of rights violations or claims occurring in Ethiopia. [12]

Therefore, this article assesses whether Ethiopia's telecom consumer protection laws are sufficient to protect and address consumer claims in Ethiopia if consumer rights infringements and claims similar to those that occurred in Kenya materialize in Ethiopia. Based on the relative importance they have a part from the aforementioned

[10] Business daily, Safaricom CA face second class action suit over SIM listing, available at https://www.businessdailyafrica.com/bd/corporate/companies/safaricom-ca-face-second-class-action-suit-over-sim-listing-4016004, last accessed on march 31,2023

[11] Ketry Kubasu, *Factors influencing customer satisfaction with services offered by Safaricom mobile cellular network*, (Thesis submitted to Strathmore Business School (SBS) Strathmore University, 2018), pp. 5

[12] In Ethiopia telecom consumer law includes , Telecommunications Consumer Rights and Protection Directive No. 832/2021, telecommunications lawful tariffs directive no. 797/2021, telecommunications licensing directive no. 792/2021, telecommunications service dispute resolution directive no. 796/2021 , telecommunications quality of service directive no. 794/2021, SIM Card Registration Directive No. 799/ 2021, Telecommunications Interconnection Directive No. 791/2021, Telecommunications Wholesale National Roaming Directive No. 800/2021 and Telecommunications Infrastructure Sharing and Collocation Directive No. 793/2021,

points; this article seeks to highlight the rights and duties of telecom consumers under Ethiopia telecom consumer's protection law. Additionally, the article attempts to identify gaps and pinpoint loopholes in Ethiopia's consumer protection laws, particularly in comparison to those of other countries such as Kenya and Nigeria. The selection of Kenya and Nigeria jurisdictions is based on strategic considerations. Kenya was chosen due to Safaricom's presence, allowing for valuable insights into successful company management practices. Nigeria, on the other hand, was selected for its well-established telecom industry, positioning it as one of the leading markets in Africa. This decision aims to leverage lessons learned from both countries to foster growth within the Ethiopian telecom industry.

2. Telecom Consumers and Rights Infringements: meaning and trends

2.1. Who is a telecom consumer?

The term "telecom consumer" lacks a universally accepted definition; it varies across jurisdictions. [13] Safaricom Ethiopia's draft consumer rights and protection code defines a consumer as any individual utilizing its services.[14] A kin to this definition in Kenya, telecom consumers are defined as "any person who uses the services or purchases the products of a particular telecom services provider without necessarily being a subscriber to the provider".[15] This definition encompasses those who use a service with authority from the customer. However, the Ethiopia Consumer Protection law defines a consumer as a "natural or legal person who receives or has received telecommunication services from an operator through a service subscription agreement".[16] This definition is also affirmed by other laws of telecom consumer

[13] Mekdes Bekele Tefera, *Consumer Protection in Ethiopia's Telecom Sector: New Beginnings and Prospects*, (Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws (LL.M.) in Business Law, September 2021), pp. 10

[14] Safaricom Telecommunication Private Limited Company Draft Consumer Rights and Protection Code of Conduct, January 2023, Article 3 (3)

[15] See Kenya information and communications (consumer protection) regulations, 2010, article 2

[16] Telecommunications Consumer Rights and Protection Directive No. 832/2021 article 2 sub article 6

protection in Ethiopia.[17] The definition provided by Safaricom Ethiopia's code and Kenya's telecom consumer protection law is broader compared to the definition of the directive, Article 2(6). Under the code of the company and Kenya law, merely using or requesting a service qualifies someone as a consumer, regardless of a formal subscription. However, the Ethiopian consumer protection law narrowly encompasses users with direct contractual relationships with the service provider, excluding those who utilize services without a formal subscription to the service provider. For example, family members or employees of a business consumer who access the telecom network or service with the consumer's permission are not considered direct consumers. This limits their ability to exercise certain sector-specific consumer protection rights.[18] In this article, a "telecom consumer" shall be defined as a telecom user who utilizes or requests a service and does not include individuals lacking a contractual relationship with the service provider.

2.2. **Service providers' infringements of telecom consumer rights**

Telecom consumers across the globe enjoy certain fundamental rights regarding their privacy, fair treatment and protection from deceptive practices. However, several service provider actions can infringe upon these rights. Understanding these service provider actions that infringe upon telecom consumer rights empowers consumers to be vigilant and take steps to protect themselves. The following discussions analyze these common infringements, including disclosure of customer information, price discrimination, telemarking, slamming, and cramming.

Disclosure of customer information is the principal infringement act of telecom service providers. Authorized telecom service providers are obligated to safeguard customer privacy which entails adhering to the principles of data minimization, collecting only the information necessary to provide services. Furthermore, they

[17] See telecommunications quality of service directive no. 794/2021, article 2(6) and Telecommunications Service Dispute Resolution Directive No. 796/2021, article 2 (4)
[18] Supra note 13, pp. 36

must refrain from disclosing this personal information to third parties without the customer's express and informed consent.[19] Information of consumers prohibited to transfer to third parties, among others includes Calling Line Identification (CLI), CLI is data that is generated at the time a call is established and passed through the carrier's network. Such data includes the number of the party being called, the calling party's number, the date and time of the call, the call's duration and routing information.[20] Oftentimes, service providers transfer such sensitive data to third parties without obtaining express consumer consent which finally leads to a violation of consumer rights. Most countries established different legislations to prevent this from happening. For instance, authorized service providers in Ethiopia are obliged to develop a policy for the protection of consumer privacy for the proper collection, use, and protection of information collected from consumers.[21] Similarly, Kenya's consumer protection law prohibits telecom companies from disclosing or allowing unauthorized monitoring of subscriber communications and data.[22] However, most countries allow exceptions for legal investigations upon court order, to strike a balance between privacy rights and national security concerns. [23]

Price discrimination, which refers to the practice of charging different customers with varying prices for the same service, is also another form of infringement of the rights of telecom users. This strategy is often employed by monopolies to maximize profits at the expense of consumer welfare.[24] However, telecom regulations in most countries generally require service providers to adhere to non-discriminatory pricing, charging equivalent fees for identical services to all customers regardless of their

[19] Telecommunication Authority of Trinidad and Tobago, *Consumer and Customer Quality of Service standards for the Telecommunications and Broadcasting Sectors of Trinidad and Tobago*, (July 2014), pp. 50
[20] Ibid
[21]Telecommunications Consumer Rights and Protection Directive, supra note 16, article 15 sub article 4
[22] Kenya information and communications (consumer protection) regulations, 2010, article 2, Supra note 15, article 2
[23] Supra note 19, pp.50
[24] Ibid pp.52

socio-economic background.[25] For instance, Ethiopian telecom consumer protection laws uphold this principle by mandating that service providers ensure equal and similar prices to services for all consumers.[26] This fosters a fair and competitive market environment, benefiting both consumers and service providers.

Further, telemarketing is another consumer infringement practice where the service providers or independent telemarketing agencies utilize a telecommunications service to promote and sell products or services. For instance, they use text messaging services to notify consumers of product sales and promotions. Telemarketing practices can be employed by the service provider or by authorized third parties acting on the service provider's behalf[27] that affect the consumer in various ways.[28] It may bombard consumers with unwanted telemarketing messages infringing upon their right to privacy and quiet enjoyment. Besides, telemarketing can be associated with scams, pyramid schemes and deceptively overpriced products/services causing financial harm to consumers. They also may use aggressive tactics to pressure consumers into purchases creating a stressful and manipulative environment that can be a nuisance, especially at inconvenient times, interfering with consumers' daily routines and right to rest.[29] To overcome such challenges, most countries have regulations to limit these abuses, which include a prohibition on service providers from any telephone solicitation to any residential or mobile telephone subscriber on specified periods such as sleeping time.[30]

Moreover, slamming, which refers to an illegal practice of switching a customer's service from one provider to another without the explicit and informed consent of

[25]Martin Lundborg, Ernst-Olav Ruhle, Christian Bahr, *discounts and price discrimination in the telecommunications regulation of NGA networks*, 21st European regional ITS conference Copenhagen, September 13-15, 2010, pp. 5
[26] Telecommunications Consumer Rights and Protection Directive, supra note 16, article 8
[27] Supra note 19, pp.52
[28] Ibid, pp.53
[29] Telemarketing, available at https://www.ftc.gov/business-guidance/advertising-marketing/telemarketing, last accessed on April 14, 2023
[30] Supra note 19, pp.54

the customer, is a major issue in telecommunications, particularly in the context of telephone and internet services. Slamming is not only illegal but often results in higher costs for the consumer and a disruption of their service. It can occur as a result of misleading advertising, a lack of understanding of contract terms, or even a malicious attack on the consumer.[31] Most legal regimes condemn and aspire to prevent such practices, but slamming continues to be a consumer concern.[32]

Another common type of fraud and abuse by telecommunications service providers is cramming. Cramming is the practice of placing unauthorized, misleading or deceptive charges on a customer's bill. These charges can be difficult to detect and come in various forms such as charges for unauthorized phone services (call waiting, voicemail) or charges for third-party services unrelated to phone services (stock market updates, chat lines, etc.). [33] It is often hard to detect unless a customer carefully reviews his or her bill.[34]

3. Rights and Obligations of Telecom Consumers under Ethiopia Laws

3.1. Telecom Consumers' Rights

3.1.1. Pre-contractual rights

Telecom service contracts fall under the purview of Ethiopia's Civil Code.[35] The requirements of general contract law like consent, capacity, object of contract and

[31] Jessica, What Is Slamming in Telecommunications, Feb 14, 2023, available at https://www.openworldlearning.org/what-is-slamming-in-telecommunications/, accessed on April 24, 2023

[32] EveryCRSReport, Slamming: The Unauthorized Change of a Consumer's Telephone Service Provider, available at https://www.everycrsreport.com/reports/RL33598.html, last accessed on April 16, 2023

[33]Telecommunications: Update on State-Level Cramming Complaints and Enforcement Actions (Letter Report, 01/31/2000, gao/rced-00-68), available at: https://www.govinfo.gov/content/pkg/GAOREPORTS-RCED-00-68/html/GAOREPORTS-RCED-00-68.htm, accessed on April 16 2023

[34] Supra note 13, pp.54

[35] Ibid, pp. 43

form are also important here.[36] Thus, Ethiopian general contract law plays a crucial role in protecting consumers from coercion, misrepresentation and unfair practices during negotiations.[37] First, the consumer has a right to affirmatively select her/his service provider when multiple options exist.[38] After the consumer selects her/his service provider before entering into a contract, s/he has the right to receive comprehensive pre-contractual information, free of charge, in a clear, understandable and accurate format, in a language that is clear, understandable, helpful and accurate in Amharic, English and where requested, in one of the official regional working languages in Ethiopia.[39] The pre-contractual information provided by a service provider to consumers includes a list and description of the equipment and services it offers, including the rates, terms, and conditions for that equipment and services; service quality levels offered; the waiting time for initial connection; and where applicable, service areas and coverage maps for subscription services, a sample contract for the services provided, and specific and clear information regarding contract cancellation, and where contracted quality service levels are not met.[40] This information is provided to a consumer in two ways: in print format upon request and through email, text message or other preferences as agreed by the consumer.[41]

Consumers are only bound by the service provider's terms and conditions upon signing the service agreement or explicitly accepting them through any communication channel.[42] As contracting parties, this prevents consumers from being bound by a transaction to which they have not agreed.[43] The Ethiopian Civil

[36] Civil Code of the Empire of Ethiopia, Article 1679-1710, Article 1711-1718 and Article 1719 – 1730, Proc. No. 165/1960, Fed. Neg. Gaz. (Extraordinary issue), Year 19, No. 2
[37] Ibid article 1705
[38] Southern Africa Development Community, *Consumer Rights and Protection Regulatory Guidelines in the Electronic Communications Sector in SADC*, Revised 2021, pp.13
[39]Telecommunications Consumer Rights and Protection Directive, Supra note 16, Article 9
[40] Ibid article 9 sub article 2
[41] See ibid article 9 (1) and Article 10 (3) cumulatively
[42]Civil Code of the Empire of Ethiopia, supra note 36, Article 1679 and 1693(2)
[43] Telecommunications Consumer Rights and Protection Directive, supra note 16, article 12 sub article 1

Code further reinforces these protections by ensuring the services and goods purchased are durable, of good quality, and accompanied by fair contractual terms.[44] Generally, the service provider must furnish the consumer with clear and easily understandable terms and conditions including, among other things, services, price, contract duration and notice period.[45]

3.1.2. Right to privacy

The Ethiopian constitution generally recognizes the fundamental right to privacy by encompassing protection against unlawful searches of personal property or residences, seizure of personal possessions, and violation of the confidentiality of correspondence, including postal letters, telephone communications, and electronic messages.[46]

More specifically, consumer privacy concerns are addressed under consumer protection law. This law safeguards the proper collection use, and protection of consumer information.[47] The key protections under the law include restrictions on processing and storing personal data beyond purposes originally communicated to consumers, prohibition on selling, sharing or exposing consumer data to third parties without explicit consent, and implementation of appropriate safeguards to prevent unauthorized access and use of consumer data. [48] In case of data breaches, the service provider is also obliged to notify both the consumer and the Ethiopian Communication Authority (ECA) within 72 hours. The service provider is further obliged to take immediate action to secure the network and protect consumers from any adverse consequences.[49]

[44] Civil Code of the Empire of Ethiopia, supra note 36, article 2282
[45] Jochen Homann, *More protection and transparency for consumers*, (30 November 2021), pp.2
[46] Federal democratic republic of Ethiopia constitution, proclamation no 1/1995, Negarite Gazetta, article 26
[47]Telecommunications Consumer Rights and Protection Directive, supra note 16, Article 15 sub article
[48] Ibid article 16 sub article 2
[49] See Ibid Article 15 (3 & 4)

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Infringement of these privacy rights can incur both civil and criminal liabilities. Unlawful search and publication of personal information without consent can result in civil suits. [50] Furthermore, the Federal Criminal Code of 2004 criminalizes the violation of privacy of correspondence or consignments, including email and telecommunications, punishable by up to six months of imprisonment or a fine. [51]

3.1.3. Right to access

All Consumers have the right to access basic telecommunications services.[52] This access right includes inbound and outbound dialling capabilities for voice, data and inbound and outbound texting services at reasonable prices and minimum service requirements as determined in the Ethiopia Communication Authority (ECA) quality of service directive.[53] Moreover, consumers have the right to access emergency services like services of local emergency service entities such as police, ambulance, rescue and fire-fighting and other services as determined from time to time by the ECA free of charge.[54] Consumers also have the right to benefit from service continuity and have the right to get due notice where any interruption is envisaged.[55]

3.1.4. Right to get quality services

The right to access high-quality services and goods is a critical right of consumers among others.[56] Telecom consumers are entitled to the right to get communications services that meet quality of service parameters without outages.[57] When services

[50] Civil Code of the Empire of Ethiopia, supra note 36, article 28
[51] See the Criminal Code of Ethiopia, Proclamation No. 414/2004, Federal Negarit Gazeta 2005-05-09, article 604, 605/606
[52] Kinfe Micheal Yilma and Halefom Hailu Abraha, *The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce, and the New Media*, available at: http://dx.doi.org/10.4314/mlr.v9i1.4 Mizan Law Review, vol. 9, No.1, pp. 152
[53] Telecommunications Consumer Rights and Protection Directive, supra note 16 article 7 sub article 1
[54] Ibid Article 13 (1)(a)
[55] Ibid article 7 (3)
[56] Tessema Elias, *Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia*, Mizan law review, Vol. 9, No.1, pp. 106
[57] Telecommunications quality of service directive no. 794/2021, July 2021, Article 5

are in ways to outage, telecommunications operators are obliged to issue the public advanced notice of planned major outage of services at national, regional and/or city levels, by publishing the news on their website, social media pages, and electronic media with wide coverage at least forty-eight (48) hours before the planned outage.[58] In the event of any unplanned service degradation and service outages, the service providers are obliged to notify affected customers of any major service degradation or service outages which extend beyond four (4) hours in an area corresponding to regions and cities through SMS, social media and electronic communication media options.[59] Any affected customers by service outage will be compensated by telecommunications operators in terms of tangible service benefits to the customer including, but not limited to additional airtime or data allowance. However, such compensation will not be awarded to consumers when the non-performance is due to an event of force majeure.[60]

3.1.5. Right to clear and accurate billing

The consumer has a right to accurate and clear bills for products and services they have consumed.[61] To this effect, service providers are obliged to present the consumer with billing statements that are accurate, timely, and verifiable for post-paid accounts.[62]

3.1.6. Right to remedy

Due to the likelihood of disputes between consumers and service providers in their relationships, the consumer has the right to receive a fair settlement of bona fide claims against the service providers.[63] Telecom consumers can fill their claim for

[58] Ibid article 15 sub article 1
[59] Ibid article 16 sub article 2
[60] Ibid article 21 sub article 2
[61] Supra note 38, pp. 14
[62] Telecommunications Consumer Rights and Protection Directive, supra note 16 article 12 (2)
[63] Supra note 38, pp. 13

resolution with the ECA in written or electronic submission using forms available on the ECA website.[64]

3.2. Obligations of telecom consumers

While telecom consumers enjoy a wide range of rights, they also have corresponding obligations. Consumers are obliged not to use any equipment or related facilities provided by the service provider for reasons other than those related to normal service conditions and not do anything that interferes with the functioning of such equipment or facilities, without prior written authorization from the service provider. This prohibition includes the use of virtual private network (VPN) application to access blocked websites by service providers.[65] In addition, obligations include unauthorized manufacturing, assembly, import or offer for sale of any telecommunications equipment is prohibited in Ethiopia.[66]

Under the law, modification or attachment of any unauthorized device to the service provider's equipment or facilities is prohibited without prior written authorization from the service provider.[67] Furthermore, consumers are prohibited from re-sell of any service provided by the service provider except as permitted by the service agreement of the service provider and subject to any applicable licensing or authorization by the Authority.[68] Additionally, consumers are obliged not to misuse or abuse public telecommunications services, including by dishonestly obtaining telecommunications services, possessing or supplying equipment that may be used to obtain telecommunications services dishonestly or fraudulently, and using

[64] Telecommunications Service Dispute Resolution Directive No. 796/2021, July 2021, Article 7 (2)
[65]Telecommunications Consumer Rights and Protection Directive, supra note 16, Article 22
[66] See Telecom Fraud Offence Proclamation 761/2012, September 12, Art 3 (1), Computer Crime Proclamation No.958/2016, Art.32, Revised Anti-Corruption and Special Procedure and Rules of Evidence Proclamation No.434/2005, Art.42 and Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, Art.34 and Art.42 (5)
[67]Telecommunications Consumer Rights and Protection Directive, supra 16 article 22 sub article 2
[68] Ibid article 23 sub article 1

telecommunications services to send obscene messages, threatening or otherwise contrary.[69]

Another prohibition on consumers is concerned with illegal telecom operations. It is prohibited to establish any telecommunication infrastructure other than that established and to bypass the telecommunication infrastructure and provide domestic or international telecommunication services.[70] In this regard, according to Article 3(3) of the Telecom Fraud Proclamation, the Ministry of Science and Technology is obliged to prescribe types of telecom equipment the manufacturing, assembling, importation, sale or use of which may not require permits, and set their technical standards. However, some studies show that even the Ministry of Science and Technology must list out and prepare technical standards for telecom equipment that would be assembled, imported for sale or any use without prior notice of the authority, which it has not done yet over more than seven years of its establishment.[71] The Consumer has also duty to ensure the appropriate disposal of wastes from the utilization of ICT goods and services such as scratch cards and damaged equipment.[72] Finally, consumers are prohibited from using equipment or devices that interfere, in any way, with the normal operation of a telecommunications service, including any equipment or device that intercepts or assists in intercepting or receiving any service offered by the licensee that requires special authorization.

4. Safaricom's Consumer Right Infringements in Kenya and the Efficiency of Ethiopian Telecom Consumers Protection Law

By building on these discussions of consumer rights and obligations, in this section, this article analyzes the previous consumer right infringement cases against Safaricom Telecommunication Company in Kenya, evaluates and analytically

[69] Ibid article 23 (2) (a-c)
[70]Telecommunications Consumer Rights and Protection Directive, supra note 16, Art. 9(1)
[71] Hana Teshome, *telecom fraud law and the practice in Ethiopia, challenges and the way of forward*, (thesis submitted in partial fulfillment for LL.M degree AAU, March 2021), pp. 4.
[72]Supra note 38 pp. 16

discusses whether Ethiopian telecom consumer protection laws are sufficient to address such infringements if they happen in Ethiopia.

4.1. **Consumer data breach**

In a well-known case of Safaricom against its former employees and a third-party Mr. Benedict Kabugi in a Kenyan Court of Milimani, civil case number 194 of 2019, consumer data breaching problems were established against Safaricom. The company admitted that consumer's data was in the hands of third parties and they have been unable to access Google drive where the data is stored by one of the employees.[73] In Ethiopia, consumer protection laws, specifically the Special Consumer Protection Directive in Article 15, attempt to address such scenarios in detail. This article states that service providers shouldn't sell and expose consumer data to third parties and the obligation is put on their shoulders to protect consumer data from unauthorized access and use. Besides, authorized service providers are obliged to refrain from disclosing the personal information of their customers to third parties without express, affirmative approval to do so for means that are expressly specified. If a similar claim arises in Ethiopia as it did in Kenya, it would be entertained under this provision. However, this provision may not be comprehensive enough. Article 15 (4) of the directive requires service providers to notify consumers within three days of any disclosure of their data, which may not align with the principles of consumer privacy rights. Technological data can spread rapidly across the globe within minutes, and providing a three-day notice period might be unreasonable.

Furthermore, the directive fails to specify the measures that service providers should take to address data breaches. While it mentions "appropriate safeguards", this term is open to subjective interpretations. Even when subsequent articles attempt to define what appropriate safeguards entail, the specificity may still not be sufficient to

[73] Supra note 10.

effectively address the issue. In conclusion, while Ethiopia has laws in place to entertain data breach claims, the current provisions may not be extensive enough to prevent potential data breaches effectively. Further refinement and clarification may be necessary to adequately protect consumer data in the digital age.[74] There is a law in Ethiopia by which data breach claims could be entertained; however, it is not adequate to avert possible data breaches.

4.2. **Misinterpretation and non-disclosure of facts about services**

Regarding misinterpretation and non-disclosure of facts about services, three claims arose over Safaricom. In one of the cases between Mr. Nehemy versus Safaricom Nanyuki Branch which was submitted to Kenya Communications Commission, Mr. Nehemy argued that the company's employee sold the product to him with non-disclosure of facts about their service and product, in a detailed manner. He stated that "I bought a Lenovo phone from Safaricom Shop in Nanyuki which was defective and they were taking too long to resolve the problem". The Authority initiated investigations into the allegation and the commission by analyzing the claim from Section 55 (a) (i) False or Misleading Representation Section 56 (2) (a) Unconscionable Conduct Section 64 (1) Defective Goods, and decided that the defendant needed to resolve the issue by providing a new phone to the complainant consumer.[75]

In addition, in another case filed to the Communication Commission of Kenya between Mr. Joseph versus Safaricom, Mr. Joseph argued that "the one GB data bundle advertised by Safaricom is not one GB; therefore, that was misleading and fraudulent to consumers.[76] In other court proceedings, the plaintiffs, Gichuki Waigwa, Lucy Nzola, and Godfrey Okutoyi, are seeking KES 305 billion in damages from Safaricom and other defendants for fraudulent misrepresentation, material non-

[74]Telecommunications Consumer Rights and Protection Directive, supra note 16, Article 16 (1-6)
[75] Kenya Communication Commission, *Consumer Protection Cases*, page 1
[76] Ibid

disclosure of facts, illegal and unlawful investment of M-Pesa account holders' funds, predatory lending practices, and charging of exorbitant interest rates. According to the lawsuit, the three accused Safaricom of fraudulent misrepresentation and material non-disclosure of facts related to the risk assessment audit of the M-Pesa Service.[77] In Ethiopia, similar consumer protection issues are addressed under Article 9 of the Telecom Consumer Protection. Under the provision, it is stated that contracts shall be made available to consumers which outline all relevant provisions under which services are to be provided. Where telecommunication service providers promote services to customers according to subscriber contracts, they are obliged to ensure that such contracts are made available and clearly and accurately explained by representatives of the authorized provider before the customer commits to the relevant service. To make it simple, consumers have the right to receive clear, correct and complete information in service contracts, including details relevant to service provision.

This right is widely constructed to include consumers' right to be adequately informed about the quality, quantity, potency, purity, standard and price of goods and services which in return would protect them from unfair trade practices. They have also the right to be respected by business persons and to be protected from such acts of the business person as insult, threat, frustration and defamation, and the right to be compensated for damages they suffered because of transactions in goods and services.[78] The provision also stipulates that service providers should provide a list and description of equipment and services offered, along with terms and conditions. Generally, the provisions outlined in Article 9 of the Ethiopian Telecom Consumer Protection Directive address issues of non-disclosure of facts about services and equipment, ensuring that consumers are adequately informed and protected from

[77] Brian Murimi and Mwanawanjuguna, https://ntvkenya.co.ke/news/safaricom-sued-for-kes-305-billion-over-fuliza-seravice / accessed on April 19, 2023

[78] Dessalegn Adera, *The Legal and Institutional Framework for Consumer Protection in Ethiopia, (*thesis Submitted in Partial Fulfillment of the Requirements for the Master of Laws Degree at the School of Law, Addis Ababa University, Addis Ababa June 2011), pp. 69

unfair practices. Should similar claims arise in Ethiopia as seen in Kenya, this regulation provides a framework for addressing consumer grievances effectively.

4.3. **Access and transfer consumer's money from m-Pesa account without their consent**

Relevant to this point in Kenya, there is a well-known case involving Joseph Gitonga Kihanya and a lobby group called Uzalendo. They want to know if Safaricom staff can access the PINs of people with M-Pesa accounts and if the money in those accounts is safe. This lawsuit started after a story revealed that M-Pesa details of individuals named Benson Akasi and Alfred Marenya were accessed and shared publicly. Mr Kihanya says, "Safaricom customers face big risks because employees leaked their information," and he believes this issue needs urgent attention to prevent money loss. The case is still ongoing.[79] Without an adequate legal framework and the complex historical background of the company, at the national launch of Safaricom Ethiopia in Addis Ababa, Ethiopia's Finance Minister, Ahmed Shide, announced that the mobile money platform, M-Pesa, had been approved to start its services across the country.[80] So far, the country lacks legislation to guide the M-Pesa transactions and conduct of service providers. Drawing on the experience from Kenya, the forthcoming law should prohibit access to consumer accounts by staff members of the company. Furthermore, the forthcoming law should state strong penalties for non-compliance with obligations since most internet users in Ethiopia are new to the technology and could be described as naïve users compared to the more experienced operators who use different complicated techniques to cheat their victims.

[79] Business Daily, Users allowed to sue Safaricom over clients bank details access, available at https://www.businessdailyafrica.com/bd/economy/users-allowed-to-sue-safaricom-over-clients-bank-details--4092154, last accessed on April 20, 2023

[80] Victor Oluwole, Safaricom gets approval to launch M-PESA in Ethiopia, available at https://africa.businessinsider.com/local/markets/safaricom-gets-approval-to-launch-m-pesa-in-ethiopia/tmttz4b, accessed April 20, 2023

4.4. **High charge for services**

In Kenya, Safaricom dominates the Kenyan mobile market and sweeps up more than 90 percent of revenues in areas such as voice calls and text messaging. In addition, Safaricom also enjoys dominance of the network infrastructure, owning the bulk of cellphone towers in marginal and low-populated areas. This unfair competition in the industry has led to the exit of Yu (India‘s Essar Telecoms) from the Kenyan market. The regulator in Kenya has failed to come up with a winning formula that guarantees effective competition in the telecommunication sector. Using market dominance, Safaricom Limited in Kenya has over the years continued to charge high prices for its services, especially in M-Pesa transactions, messages, data and voice making the lives of consumers very miserable.[81]

The author strongly believes that Ethiopia could face a similar fate because the country's laws lack specific provisions to constrain excessive tariffs. Lawful Tariffs Directive No. 797/2021 merely states that service providers should charge "justifiable and reasonable" rates. This vague language leaves room for subjective interpretation and could allow service providers to exploit consumers with high prices. As seen in the case of Kenya, unregulated services charge can result in consumers being charged exorbitant fees. To prevent such a scenario in Ethiopia, it is imperative for the law to explicitly set tariffs for services. In situations where monopolies are unavoidable, price regulation is essential to ensure a fair return for the firm while protecting consumers from excessive charges.[82]

Despite its shortcomings, the law in Ethiopia provides some safeguards against excessive pricing. Article 6(2) of Lawful Tariffs Directive No. 797/2021 requires service providers to transparently publish all charge and discount information.

[81] Vincent O. Nyagilo, *the role of Communication Authority of Kenya (CAK) in telecommunication industry: the case of dominance of players in the industry in Kenya* (serial publishers, 2017), ISSN 2616-1818, pp. 618

[82] Ahmed Galal and Bharat Nauriyal, *Regulation of telecom in developing countries: outcomes, incentives and commitment*, December 1994, pp.4

Additionally, Article 15 entrusts the Ethiopian Communications Authority (ECA) with the responsibility of ensuring tariff certainty. Furthermore, the directive stipulates that tariff changes must be notified to the ECA, which has 15 days to respond to the notification. These measures aim to prevent unilateral and unjustifiable price increases. [83]

4.5. **Suspension of services without sufficient reason**

Regarding the suspension of services without sufficient reason, there are several cases in which Safaricom is made a defendant in Kenyan courts. However, the popular case is between Wilfred Nderitu and Charles Kanjama and Safaricom. According to this case, counsel Wilfred Nderitu and Charles Kanjama say in a case filed at the High Court that their SIM cards were suspended on October 15 and that they were forced to re-register to enjoy services and products offered by Safaricom. Mr. Nderitu says that he gave his identity card to an authorized dealer and was successfully registered when he registered his line over two decades ago. But he received a message telling him to register his number on October 15 and thought it was a mistake. He says, "this does not rhyme with my legitimate expectation that once I have registered and been on-boarded onto the platform, the 1st defendant (Safaricom) has to ensure that I enjoy unfettered access to the products and services for as long as I pay the predetermined rates." In another case, Mr Kanjama says he has been a Safaricom subscriber for more than 20 years, but "That I learnt on 15th October 2022 with utter shock and dismay that my SIM card was suspended. As a result, I could not make calls, send messages, access my M-Pesa wallet or make any payments." The lawyers say they are aware of numerous people who have the same claim and might be willing to join the case.[84]

For such type of violation, Ethiopia's legal framework offers clearer protections for consumers. The Telecommunications Consumer Rights and Protection Directive

[83]Lawful Tariffs Directive No. 797/202, July 2021, Article 7 (1)
[84] Supra note 10

mandates service providers to give customers 48 hours prior notice in writing before service disconnection.[85] This provision empowers consumers to prepare for the disruption and potentially rectify any issues that might have triggered the suspension. The directive further emphasizes the service provider's obligation to deliver services free from disconnection, except in specific circumstances outlined in the contract or authorized by law. This strengthens the consumer's position and discourages arbitrary suspension practices.[86] If a similar case arises in Ethiopia, the consumer will likely find stronger legal backing under the telecommunications consumer rights and protection directive. The 48-hour prior notice requirement and the emphasis on uninterrupted service would also strengthen their protection.

5. Gaps of Telecom Consumer Protection Laws in Ethiopia

Ethiopia's telecom consumer protection law is marred by significant loopholes. Based on the analysis of the comparative experiences from Kenya and Nigeria telecom consumer protections experiences, the following discussions highlight the gaps in the telecom consumer protection laws of Ethiopia.

In countries like Nigeria,[87] consumer associations are well recognized and can freely operate as legitimate representatives of consumers' interests. They are invited to participate as stakeholders in policy formation and to communicate on behalf of consumers in the marketplace. However, telecom consumer protection law in Ethiopia has failed to include such associations, so poor and not well-informed telecom consumers in Ethiopia are left in the industry without any advocate who stands for their rights.

[85] Telecommunications Consumer Rights and Protection Directive, supra note 16, Article 7 (3)
[86] Ibid article 15 sub article 1
[87] See Dr. D.A. Akhabue, *Regulatory Framework for Consumers of Telecommunication Services in Nigeria*, International Academy Journal of Business Administration Annals Volume 7, Issue 1, PP 24-41, and ISSN: 2382-9175, April, 2019, pp.33.

In most countries, a bureau of Standards is established;[88] however in Ethiopia, even though the Trade Competition and Consumer Protection Authority was established to undertake the task of establishing a bureau of standards, the authority has failed to do so.[89] Such absence of a well-established Bureau of Standards creates difficulties for consumers in choosing between service providers offering seemingly similar services.

In Nigeria, the Nigeria Communication Commission (NCC) appoints an industry group to create a consumer code. This code needs the Commission's approval before it becomes effective. However, in Ethiopia, the service providers themselves create the consumer protection code. This can result in a code that gives more rights to the service providers and imposes more obligations on consumers.[90]

In addition, the lack of clear rules governing the ECA enforcement procedures surrounding consumer privacy violations creates a transparency deficit. Without an independent investigative team, the regulator relies solely on evidence provided by service provider, which in turn raises questions about effective enforcement.[91]

Besides, the consumer protection directive's mandate for service provider codes to be available only in English and Amharic excludes a significant portion of the Ethiopian population.[92] In Ethiopia, about 88 languages are spoken currently and so many consumers do not understand what is written in Amharic and English, so the

[88] For instance, in Tanzanian Bureau of Standards (TBS) is established and responsible for setting standards and issuing certification marks across multiple sectors of the economy in Tanzania. The one motive behind standardization bodies and certification marks is to help consumers be confident and make informed choices in the market while ensuring that suppliers maintain standards. As a result, in Tanzania, consumers are usually more confident when purchasing products with the TBS mark. see Hilda Mwakatumbula, *consumer protection in the telecommunication markets in the post-liberalization era – the case of Tanzania*, (PhD thesis in graduate school of Asia-Pacific Studies, Waseda University, march 2017), pp. 44.45

[89] The Ethiopian Trade Competition and Consumer Protection Proclamation No.813/2013, March 2014, Art.36 (1)

[90]Telecommunications Consumer Rights and Protection Directive, See supra note 16, article 5 sub articles 1.

[91] Supra note 13 pp. 56

[92]Telecommunications Consumer Rights and Protection Directive, supra note 16, Article 6 sub article 2

fate of those consumers is questionable. Are they illegitimate to understand their rights and duties?[93]

Moreover, the NCC in Nigeria establishes procedures or guidelines for the making, receipt and handling of complaints of consumers regarding the conduct or operation of licensees and may, at its discretion, institute alternative dispute resolution processes for the resolution of the complaints.[94] However, the legal framework in Ethiopia offers no clear guidelines on how consumers can lodge complaints with the ECA.[95] Uncertainty regarding submission channels, email, website or other means is high which creates barrier for consumers seeking redress for grievances.[96]

In Kenya, the Telecommunications Regulator Communications Commission of Kenya (CCK) runs a consumer consultation forum. The forum invites shareholders for discussions held in different public places across the country.[97] Consumers can only make robust choices between competing suppliers and services if they clearly understand the terms and conditions of the service they pay for. In this regard, consumer education and awareness creation play an important role.[98] However, in Ethiopia, there is no legal provision under the consumer protection law that obliges ECA to provide education for consumers.

The ECA is accountable to the Prime Minister, who can appoint the board and designate the chairman. Its budget is also allocated by the government (though it can also charge fees for services).[99] These provisions call into question whether it will

[93] World Population Review, What Languages do People Speak in Ethiopia, https://worldpopulationreview.com/countries/ethiopia/language, accessed on April 20, 2023
[94] Nigerian Communications Act, 2003, section 73
[95] Telecommunications Consumer Rights and Protection Directive, See supra note 16, Article 19 (2)
[96] Teferi Tibebu, *the consumer rights under Ethiopian laws: are they human or democratic rights*, (Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Bachelor of laws (LL. B) at the school of law, Wolkite university, unpublished) page 33
[97] Hilda Mwakatumbula, *consumer protection in the telecommunication markets in the post-liberalization era – the case of Tanzania*, PhD thesis in the graduate school of Asia-pacific studies, Waseda University, march 2017, pp.49
[98] Cullen International, *Specialize in consumer protection in the telecoms sector*, pp.5
[99] Communications Service Proclamation No. 1148/2019 supra note 6 Article 3 (2)

be able, in practice, to operate independently from the government, or whether it will be susceptible to political pressure. In such a scenario, the authority will fail to protect consumer interest in the industry.

Telecom consumers are defined under Kenya Consumer Protection Regulations 2010 as "any person who uses the services or purchases the products of a particular telecom services provider without necessarily being a subscriber to the provider". However, in Ethiopia's consumer protection laws, consumers are defined as only users who are consumers of the service provider and exclude those who use a service with authority from the consumers.[100] Although consumers such as family members or employees of a business person who receives a telecom network or service from the provider are also users, they are not considered as a customer and are not eligible to exercise several sector-specific consumer protection provisions.

6. Conclusion and Recommendations

This article analyses and discusses the efficiency of the Ethiopian telecom consumer rights protection to redress the possible infringements of consumer rights, based on the experiences of Safaricom in Kenya. Firstly, it defines a telecom consumer as an individual receiving services from a provider, excluding those who use authority over the consumer. The article identifies various acts that infringe on telecom consumers' rights in the industry, such as disclosing customer information, price discrimination, telemarketing, slamming, and cramming. It also outlines different rights of telecom consumers, including the right to privacy, the right to access clear and accurate billing, and the right to a remedy. In addition to rights, the article highlights obligations of consumers such as not using the service provider's equipment for purposes other than normal conditions and not reselling any services provided.

[100] Telecommunications Consumer Rights and Protection Directive, See supra note 16, Article 2(6).

While Ethiopian telecom consumer protection laws show strength in protecting consumer data breaches, the article identifies several gaps. For instance, the laws do not specify service tariffs, which could allow Safaricom Ethiopia to dominate the market and impose high tariffs without regulation, like in Kenya. Despite the licensing of Safaricom Ethiopia to conduct M-Pesa transactions, no laws have been legislated to guide these transactions. Furthermore, the laws fail to specify measures that service providers should take to prevent data breaches of consumer information. The narrow definition of a telecom consumer is another gap in the law. In contrast, countries like Nigeria and Kenya have established bureaus of standards and consumer associations to safeguard consumer interests in the telecom industry. However, Ethiopia has not established such bodies yet. The article also points out the lack of clear rules governing how the Ethiopian Communication Authority (ECA) determines whether an operator has violated consumer rights, especially concerning consumer privacy.

Therefore, to enhance the protection of telecom consumers in Ethiopia and ensure a fair and transparent telecom industry, this article provides specific suggestions targeting primary stakeholders mainly the legislators, the Trade Competition and Consumer Protection Authority, and the Ethiopian Communications Authority (ECA). The article demands the legislator expand the narrow definition of a telecom consumer to include those using services with the authority of the consumer. Additionally, laws should be legislated to establish consumer associations, and the telecom consumer code should be written in at least three to five working languages to ensure consumers across the country understand their rights. Moreover, the notice period for data breaches should be reduced from 3 days to 30 minutes. Given that Safaricom Ethiopia is allowed to undertake M-Pesa transactions in Ethiopia, there should be laws guiding these transactions, including clauses to prevent data breaches and prohibit the transfer of consumer information to third parties. Furthermore, the general terms in the lawful tariff directive should be amended to specify the tariff rates that service providers can charge.

Concerning the Trade Competition and Consumer Protection Authority, the article suggests establishing a bureau of standards to help telecom consumers distinguish between high-quality and low-quality services, similar to other countries' experiences such as Nigeria. This would enhance the ability of consumers to make informed choices about the services they use. Furthermore, it recommends that the Ethiopian Communications Authority (ECA) should establish a clear process for consumers to lodge complaints about service providers and conduct consumer education forums to inform telecom consumers of their rights and obligations. The responsibility of preparing the consumer protection code should also be shifted from service providers to consumer associations or other independent bodies without vested interests in the telecom industry. The ECA should establish an independent body to assess violations of telecom consumer privacy, rather than relying solely on information provided by service providers.

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The Use of Force against Individuals in War under International Law: A Social Ontological Approach, by Ka Lok Yip, Oxford, Oxford University Press, 2022, 336 PP, ISBN: 9780198871699

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Sometime in 2022, I was invited to take part in a book launching event as a discussant because the topic the book addresses, i.e. legality of the use of force against individuals in war under international law, is directly related to the area of my current research engagement. Initially, I was wondering what new issues would be presented in this latest book on this subject matter since a lot has already been said and is being said by notable experts in the field. Yet, when I was provided with a digital copy of the book by the organizers of this event, I came to the understanding that Dr Yip, the author of the book, has approached to examine the topic from a unique perspective indeed – A Social Ontological Approach.

Utilizing an interdisciplinary methodology, the book presents a multifaceted perspective by bringing together social theories, legal analysis, and practical case studies to provide a comprehensive study. This multidisciplinary approach, which emphasizes the interaction between social theory and international law, is admirable because a large portion of well-known legal research on international law in general and international human rights and humanitarian laws, in particular, tends to shy away from engaging in theoretical discussions that are sparked by other academic disciplines, like social theory.

As the author noted, simply stated, the central problem this book examined is: how can the use of force against individuals in war be considered legal? In other words,

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This review paper was previously presented at the event launching the Book, organized by the College of Public Policy at Hamad Bin Khalifa University (HBKU), Doha, Qatar.

the book inquires whether it is legal (under international law) to kill, or capture and confine, a person in war? This question sounds simple, but in reality, it is not. This is because the ascertainment of something being 'legal' in armed conflict (war) is fraught with difficulty since different branches of international law could be applicable to the same situation but with different normative prescriptions to regulate the situation (*jus ad bellum (international law* regulating the legitimacy of the resort to force), international humanitarian law (IHL), international human rights law (IHRL)).

So, the question is, should the 'legality' of the use of force be ascertained based on the normative prescription under any one, some, or all of these legal norms from the different branches of the law? What if something is 'legal' under one but illegal under another?

This book addresses these concerns to the significance, applicability, and rationality of discussing the 'legality' of the use of force against civilians in war by reinvigorating the link between legal theory and society. Finding their relationship helps clarify the meaning of the law, pinpoint its practical relevance, and possibly make its intervention sensible because the law both emerges from and shapes the social reality at the same time. Hence, in presenting discussions on various issues related to the topic, I can say that the book is thought-provoking.

First, the book discusses the overlapping legal standards on the legality of using force against individuals in times of war. To examine various conceptualizations of the link between these legal norms, the chapter engages with a variety of jurisprudence and summarizes the various methods for creating these connections into three major groups: positivist approaches predicated on a particular conception of public international law as a unified legal system; substantive approaches that place an emphasis on substantive considerations rather than formal rules; and critical approaches driven by worries about hegemony under the guise of universality. In so

doing, it sets the way for the social-ontological approach suggested in this book, which tries to expose the law's presuppositions about social reality, by drawing attention to the reductive nature of each of the existing approaches.

Second, the book attempts to explain the concept of 'legality' under international by analyzing six different conceptions of something being 'legal': namely 'Positive Legality', 'Negative Legality', 'Neutral Legality', 'Simple Legality', 'Compounding Legality', 'System-wide Legality'. By doing so, it establishes the conceptual framework for a doctrinal examination of the complex notion of 'legality' and its varied applications in the context of the use of force against individuals in war.

Next, in the third Chapter, the taxonomy of 'legality' concepts established in the book is utilized to determine which 'legality' concept is referenced in the IHRL framework that has generated the most heated debates on the topic. In this regard, it highlights a gap between IHRL and *jus ad bellum*/IHL that has not received enough attention and demonstrates that the cross-referential legality required by IHRL encompasses both Positive Legality and System-wide Legality using accepted interpretation techniques and IHRL jurisprudence.

Then, the book makes an emphasized analysis of 'Compounding Legality', which refers to the conception that legality under one legal norm has the effect of reproducing legality under another legal norm, through the use of legal techniques. In relation to this, it explores the tension generated by the profound and extensive requirements of legality envisaged under IHRL in situations governed also by IHL and *jus ad bellum*, which do not impose the same level of 'legality' requirements. In addition, it critically analyzed the arguments for and limitations of the two legal strategies—*lex specialis* and systemic integration—that have been employed to overcome these issues. In so doing, the book refutes the assumption that one standard is meant to take precedence over or not be in conflict with another by highlighting the differences between the regulatory goals of IHRL and *jus ad bellum*/IHL, and it

criticizes the abuse of both legal techniques based on this assumption. Accordingly, it offers alternate viewpoints by reintegrating the law with social reality after pointing out the limitations of 'techniques of legal reasoning' for addressing the tensions among the various rules regulating the use of force against individuals in war.

As such, in the fifth Chapter of the book, Dr Yip examines the use of force against individuals in war from a social ontological standpoint by referring to social theories. In it, the author contends that social forces present in other strata of social reality, which have the capacity to collectivize, instrumentalize, and structure persons and their actions, limit and shape human agency during times of war, regardless of the roles they may play. The chapter specifically proposes that any use of force against individuals in conflict is always the outcome of a combination of structure and agency that, despite their mutual interaction, is analytically different and potentially subject to regulation by legal rules addressing them.

Following this discussion, the book introduces a novel method for interpreting the law that makes use of social ontology in opposition to methods that minimize or reject the existence of a social reality that shapes and is shaped by the law while nevertheless existing independently of it. In addition, the book makes an interesting demonstration of how different attempts to procure the convergence of IHL and IHRL in the regulation of the use of force against individuals in war result in the conflation of ontologies in reality by applying insights from the social-theoretical exploration to the Israeli–Palestinian conflict, particularly during the 'Knife Intifada' in 2015/16. In the end, the book makes a general conclusion and presents a summary of the implications of the study on the legal regulation of the use of force against individuals in war, which the author asserted are threefold: theoretical, methodological, and practical.

In conclusion, the importance of this book as a contribution to the scholarly literature on the subject matter it addresses primarily lies in the fact that it employs an interdisciplinary investigation that combines the methodologies of doctrinal analysis, social theorizing, and empirical case study. In other words, the book brings together law, social theories, and actual practices to create a methodological framework that triangulates the phenomena investigated and the conclusions drawn. Based on my review, I can say that the book has delivered what it has set out to deliver, and by engaging on the topic in a trending debate and providing novel insights based on an interdisciplinary approach, it made a real contribution to the field.

I hope this review inspires others – scholars, legal and operational practitioners, and others interested in this vital but often cryptic topic of international law – to share insights from the intellectual labour of Dr Yip through this book.

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