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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 11. No. 1 of Bahir Dar University Journal of Law. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

On this occasion, again, the Committee would like to make it clear that the Bahir Dar University Journal of Law is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome.

The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. The Bahir Dar University Journal of Law is here to serve as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the Bahir Dar University Journal of Law will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

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Print-Disabled Persons' Right to Access to Copyrighted Works in Ethiopia: An Appraisal of Ethiopian Copyright Law in Light of the Marrakesh Treaty

Asrar Adem Gebeyehu[●] *& Tajebe Getaneh Enyew*[♦]

Abstract

Print-disabled persons face barriers to access the accessible format of copyrighted materials in their day-to-day life due to copyright law restraints. Since copyright laws provide to the owners of a work an exclusive economic right including the right to reproduction, distribution, adaptation, and making available to the public, print-disabled persons face difficulties in getting the accessible format of works. This results in the violation of various human rights including the right to access to information, the right to read, the right to education, the right to participate in cultural life, the right to enjoy the benefits of scientific progress, and the right to employment. With the view of establishing normative standards, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print- Disabled was adopted in June 2013. The primary goal of this Treaty is to facilitate the accessibility of copyrighted works for print-disabled persons in an accessible format by eliminating copyright law barriers. The Treaty realizes the significance of the international copyright system and intends to ensure that the limitations and exceptions in national copyright laws allow print-disabled persons access to published works. Ethiopia has ratified this Treaty on March 13, 2020, to improve access to copyrighted works for print-disabled persons in the country. This article, thus, intends to make a critical appraisal of the preparedness of the national copyright law regime for the effective implementation of the Treaty. The study employs doctrinal legal research and focuses on identification and analysis of the national copyright law regime in light of the Marrakesh Treaty. Finally, the study concludes that the existing national copyright law of Ethiopia is inadequate in realizing the obligations stated under the Marrakesh Treaty. This article, therefore, recommends the amendment of the national copyright law to make it comprehensive and enhance the effective implementation of the Marrakesh Treaty in Ethiopia.

Keywords: Print-disabled persons, Human right, Copyrighted work, Accessible format, Copyright exceptions or limitations

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Introduction

Print-disabled persons cannot access printed works unless they are available in accessible formats such as braille, audio, large print, or accessible electronic format.[1] As the copyright law gives an exclusive economic right to the owners of work, the availability of the accessible format of the work relies on the willingness of the owner.[2] Print-disabled persons cannot reproduce, distribute, or make available the accessible format of the copyrighted work unless the owner permits. Unfortunately, most owners are unable or unwilling to make available the accessible format of their work.[3]

As a result, the world is facing a 'global book famine',[4] which denies hundreds of millions of print-disabled persons access to basic information and knowledge across the board.[5] According to the 2015 World Health Organization (WHO) report, there are around 300 million print-disabled persons in the world, 90% of whom live in developing countries.[6] Studies indicate that in developed countries only 7% of books published were made available in an accessible format to print-disabled persons while less than 1% of published books were available in less developed nations.[7] This could result in the violation of the human rights of print-disabled persons such as the principles of non-discrimination and equality, the right to access to information, read, culture, and enjoy the benefits of scientific progress, education, and employment.

To rectify this problem, the international community has come up with an international instrument called_the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise

[1] Brook Baker, Challenges Facing A Proposed WIPO Treaty for Persons Who Are Blind or Print-Disabled, Paper Presented at Law and Society Association Annual Meeting, (2013), P. 3.
[2] *Id*., P.39.
[3] *Id*., P.38.
[4] The term 'Book famine' is an expression used to describe the low number of books and other copyrighted material that is accessible to print-disabled persons throughout the globe (Lida Ayoubi, The Interface of Copyright and Human Rights: Access to Copyright Works for the Visually Impaired, Ph.D. Thesis, Victoria University, Wellington, (2015), P.3, available at http://restrictedarchive.vuw.ac.nz/handle/123456789/9059 accessed on May 20, 2020.
[5] *Id*., P.3.
[6] United Nations Development Program (UNDP), Our Right to Knowledge: Legal Reviews for the Ratification of the Marrakesh Treaty for Persons with Print Disabilities in Asia and the Pacific, Annual Report, (2015), P.7.
[7] World Blind Union (WBU), Press Release for WIPO Book Treaty, (2013), available at http://www.worldblindunion.org/English/news/Pages/JUne-17-Press-Release-for-WIPO-Book-Treaty.aspx ,accessed on May 20, 20202.

Print-Disabled (hereinafter, Marrakesh Treaty).[8] The primary goal of this Treaty is to facilitate the accessibility of copyrighted works for print-disabled persons by eliminating copyright law barriers, i.e. providing copyright exceptions and limitations for a print-disabled person.[9] Ethiopia has also ratified this Treaty on March 13, 2020, with the view of improving access to copyrighted works of print-disabled persons in the country.[10] Upon ratification of the Treaty, a country is expected to implement the Treaty through its national copyright law. However, it has not been examined whether the national copyright law of Ethiopia suits for the effective implementation of the Treaty in the country. This article, therefore, seeks to assess whether the Ethiopian copyright law fits for implementing the Marrakesh Treaty in the country.

The article contains three sections. The first section, in general, deals with the relationship between the human rights of print-disabled persons and copyright law. It gives a highlight on some of the human rights of print-disabled persons and how they could be affected by copyright law. The second section provides a general overview of the Marrakesh Treaty. It tries to articulate the Treaty's objective, historical development, and definitions of relevant terms provided therein. This section also tries to explore the major obligations imposed on the contracting parties by the Marrakesh Treaty. The last section focuses on the analysis of the Ethiopian policy and legal landscapes concerning print-disabled persons and the adequacy of the existing Ethiopian Copyright Law for implementing the Treaty. It particularly assesses the existing exceptions or limitations whether they are sufficient to enable print-disabled persons to access the accessible format of the copyrighted work in Ethiopia.

1. Human Rights of Print-Disabled Persons and Copyright Law

Human rights are fundamental liberties that human beings are entitled to by the sheer fact of being human.[11] The main features of these rights, as they are acknowledged by the 1993 Vienna Declaration and Program of Action, include

[8] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled, World Intellectual Property Organization, Treaty series, (2013), Vol. 218, (hereinafter, Marrakesh Treaty).

[9] *Id*., Preamble Para. 4.

[10] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled Ratification Proclamation, Proclamation No. 1181/2020, *Federal Negarit Gazetta*, (2020).

[11] Magdalena Sepulveda et al, *Human Rights Hand Book*, 2nd ed., University for Peace, (2004), p.6 available at https://www.worldcat.org/title/human-rights-reference-handbook/oclc/58044058 accessed on May 22, 2020.

universality, indivisibility, interdependence, and interrelatedness.[12] The violation of one right results in the breach of other human rights. Likewise, the realization of one right results in the realization of all other human rights. Human rights are also the inborn rights of every individual based on the innate self-worth and equal dignity of all human beings.[13] These fundamental freedoms cannot be waived or taken away.[14] Although the primary responsibility bearers are states, human rights also levy responsibility on non-state actors.[15] Human rights are also grounded in the protection of personhood, which is seen in terms of the person's autonomy, the conception of a good life and being able to pursue it, and the freedom from the interference of others.[16] Thus, human rights such as civil and political, economic, social, and cultural rights and other rights emanate from this idea of personhood.[17]

For this reason, the rights of print-disabled persons emanate from this general idea of human rights. The rights of print-disabled persons are not a distinct or special set of rights. Rather, they reiterate that people with disabilities, print-disabled persons, are entitled to the respect of their inherent dignity and of all human rights and fundamental freedoms on an equal basis with others.[18] Despite this, many human rights of print-disabled persons are infringed due to legal restraints imposed by copyright law. Copyright law usually prohibits individuals, including print-disabled persons, to reproduce, distribute, and share the copyrighted work unless the copyright holder permits.[19] By doing so, it particularly inhibits print-disabled persons to access the accessible format of the copyrighted works. This, in turn, would lead to the violation of the right to access to information, the right to read, the right to education, the right to participate in cultural life, the right to enjoy the benefits of scientific progress,

[12] Vienna Declaration and Program of Action, United Nations General Assembly, (1993), Art. 5 (hereinafter, Vienna Declaration and Program of Action).

[13] Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions on A Human Rights-Based Approach to Development Cooperation, (2006), P.1, available at https://www.ohchr.org/Documents/Publications/FAQen.pdf , accessed on May 22, 2020.

[14] *Id*., P. 1.

[15] Geneva Academy of International Humanitarian Law and Human Rights, Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council, Academy in-Brief No. 7, (2016), p.21.

[16] Sepulveda *et al*, *supra* note 11, p.6.

[17] *Id*.

[18] Convention on the Rights of Persons with Disabilities (CRPD), UN General Assembly, Treaty Series, Vol. 2515, (2007), Art. 1 (hereinafter, CRPD), same comment on commas available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html , accessed on May 24, 2020.

[19] Rami Olwan, The Ratification and Implementation of the Marrakesh Treaty for Visually Impaired Persons in the Arab Gulf States, *The Journal of World Intellectual Property*, Vol. 20, (2017), pp. 178-205, p. 179.

and the right to employment, among others. This also causes the violation of other human rights and principles as human rights are interrelated, interdependent, and indivisible.[20] Below, an attempt is made to explore the major human rights of print-disabled persons and principles that could be directly affected by copyright law.

1.1. The Principle of Non-discrimination

The principle of non-discrimination is a significant principle recognized by various human rights instruments such as the Universal Declaration of Human Rights (UDHR),[21] International Covenant on Civil and Political Rights (ICCPR)[22] International Covenant on Economic, Social and Cultural Rights (ICESCR),[23] and the African Charter on Human and Peoples' Rights (ACHPR).[24] These instruments state that the rights guaranteed should be enjoyed by every human being irrespective of any status such as "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[25] Thus, the principle of non-discrimination is a vital element of human rights law. The principle of non-discrimination and other human rights are also guaranteed in the Convention that is specific to persons with disabilities, the Convention on the Rights of Persons With Disabilities (CRPD). This Convention explicitly prohibits discrimination on the ground of disability.[26] It defined discrimination as:

> *any distinction, exclusion or restriction based on disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*[27]

[20] Vienna Declaration and Program of Action, Art. 5.
[21] Universal Declaration of Human Rights (UDHR), United Nations General Assembly, (1948), Art. 2 (hereinafter, UDHR).
[22] International Covenant on Civil and Political Rights (ICCPR), United Nations, Treaty Series, (1966), Vol. 999, 171 and Vol. 1057, Art. 2/1. (hereinafter, ICCPR).
[23] International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations, Art. 2/2.
[24] African Charter on Human and Peoples' Rights (ACHPR), Organization of African Unity, (1982), Art. 2 (hereinafter, ACHPR).
[25] UDHR, Art. 2.
[26] CRPD, Art. 5/2.
[27] *Id.*, Art. 2.

Hence, according to the principle of non-discrimination, differential treatment on the ground of disability in the enjoyment of human rights is not allowed. The provision prohibits both direct and indirect discrimination. Direct discrimination is treating a person less favorably who is in a similar situation with another individual based on a prohibited ground.[28] This form of discrimination could also occur if there are "detrimental acts or omissions based on prohibited grounds where there is no comparable similar situation."[29] Conversely, "indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of rights in the covenant as distinguished by prohibited grounds of discrimination."[30] Even if it does not have the purpose of making a distinction between individuals, the final effect of a certain act may be discrimination. This is considered indirect discrimination. If a state adopts a copyright law with the view of limiting the human rights of print-disabled persons, it would be direct discrimination. Whereas, even if there is no intent to discriminate, copyright laws that provide general limitations and exceptions without considering the status of print-disabled persons are indirectly discriminatory for they limit access to the accessible format of copyrighted works for print-disabled persons.

Hence, the lack of access to copyrighted works by print-disabled persons amounts to a violation of the principle of non-discrimination and several other human rights. If a print-disabled person is unable to access copyright-protected material due to his/her disability, it is possible to say that there is unjustified differential treatment.[31] This uneven treatment is not in line with the principle of non-discrimination because it denies print-disabled persons the equal enjoyment of human rights.[32] In this regard, the Marrakesh Treaty stipulates the principle of non-discrimination in its preamble, among others.[33]

1.2. The Right to Access to Information

Access to information is a fundamental human right as well as a prerequisite to realize all other human rights of print-disabled persons. The right to access to

[28] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2 of the ICESCR), (2009), Para. 10/a.
[29] *Id*.
[30] *Id*, para. 10/b.
[31] Lida ayoubi, Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access, *Wisconsin International Law Journal*, Vol. 36, No. 3, (2019), p. 13.
[32] *Id*.
[33] Marrakesh Treaty, Preamble, Para. 1.

information is guaranteed under various human rights instruments, including UDHR[34] and ICCPR[35], CRPD[36], ACHPR[37], and national constitutions including the Constitution of the Federal Democratic Republic of Ethiopia.[38] According to these provisions, everyone has the right to access information which includes the right to seek, receive, and impart information and ideas of all kinds.[39] The right to access information has been given special emphasis in the CRPD due to its significance to persons with disabilities.[40] Article 21 of the CRPD states:

> *states parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:*
>
> *(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities promptly and without additional cost;*
>
> *(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes, and formats of communication of their choice by persons with disabilities in official interactions;*
>
> *(c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;*
>
> *(d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;*

[34] UDHR, Art. 19.
[35] ICCPR, Art. 19/2.
[36] CRPD, Art. 21.
[37] ACHPR, Art. 9.
[38] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, (1995), Art. 29/2 (hereinafter, FDRE Constitution).
[39] ICCPR, Art. 19/2.
[40] Sylvana Lakkis et al, Lebanon: Disability and Access to Information, Country Report, (2015), p. 6.

(e) *Recognizing and promoting the use of sign languages.*[41]

This provision shows that print-disabled persons may need accessible formats to seek, receive, and impart information and ideas and they have a right to receive information inaccessible modes and formats. Despite the recognition of the right to access information of print-disabled persons by various human rights instruments, this right is infringed due to lack of accessible published materials and copyright law prohibitions to reproduce, adapt, distribute, and to make available for the public. This violation of the right to access information of print-disabled persons would also lead to the violation of several other human rights. Print-disabled persons need to have access to copyrighted works to take part, inter alia, in education, participate in cultural life, and enjoy the right to employment.[42]

1.3. The Right to Read

The right to read is not explicitly provided in any human rights instruments. It is a right that can be inferred from other rights guaranteed by international human rights instruments.[43] It is not enlightening to state the importance of reading. Reading is one of the main mechanisms that we know about the past, and understand the present. Moreover, through reading, pleasure is derived; great ideas are expressed; knowledge is transferred and language is learned.[44] Thus, all the above mentioned fundamental human rights cannot be enjoyed without access to written words. It is possible to argue that on the human rights of print-disabled persons such as the right to access to information, the right to education, the right to culture, and the right to employment, there is an implied right to read.[45] In cognizance of this, the CRPD requires state parties to "adopt all appropriate legislative, administrative and other measures to ensure accessible information to persons with disabilities."[46] It also requires contracting parties to adopt necessary steps to guarantee to persons with disabilities access on an equal basis with others to information and communications.[47]

[41] CRPD, Art. 21.
[42] Lakkis et al, *supra* note 40, p. 6.
[43] Abigail Rekas, Tracking the Progress of the Proposed WIPO Treaty on Exceptions and Limitations to Copyright to Benefit Persons with Print Disabilities, *European Yearbook of Disability Law*, Vol. 4, (2013), pp. 45-72, p. 3.
[44] *Id.*, p. 4.
[45] *Id.*
[46] CRPD, Art. 4/a & h.
[47] *Id.*, Art. 9.

1.4. The Right to Culture and Scientific Progress

Cultural rights, like other human rights, are important to realize human dignity and maintaining positive societal relations. UDHR recognizes the right to take part in cultural life and scientific progress. It stipulates that every individual has the right to take part in the cultural life of society and share from the benefit of scientific progress.[48] The right to participate in cultural life and to enjoy the benefit of scientific progress is also guaranteed under ICESCR.[49] Culture in ICESCR includes "ways of life, language, oral and written literature, music and song, non-verbal communication, methods of production or technology, and the arts."[50] According to General Comment 21 of CESCR on the right to culture, one of the preconditions to effectively enjoy the right to culture is accessibility.[51] For this reason, the General Comment urges states to provide and facilitate access to culture to persons with disabilities in particular. Moreover, states are required to recognize the right to have access to cultural materials in an accessible format for persons with disabilities.[52]

The CRPD also provides the right to the cultural life of persons with disabilities and obligates member states to take steps to enable persons with disabilities to access cultural materials in an accessible format.[53] Most importantly, the Convention realizes that copyright laws may prohibit persons with disabilities from accessing cultural materials. Accordingly, it asks states to make sure that their copyright laws "do not constitute an unreasonable or discriminatory barrier to access by a person with disabilities to cultural materials."[54] Hence, access to copyrighted works by print-disabled persons in accessible format has immense importance to enjoy the right to culture fully. In addition, the lack of access to copyright works negatively affects the right to enjoy the benefits of scientific progress of print-disabled persons. Since one of the ways that scientific knowledge is transferred through the publication of books, journals, and other copyright-protected materials, the absence of these materials in accessible

[48] UDHR., Art. 27.
[49] ICESCR., Art. 15.
[50] United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21: the Right to Everyone to Take Part in Cultural Life (Art. 15, para. 1a of the ICESCR), (2009), Para. 13.
[51] *Id.*, para. 16(b).
[52] *Id.*, para. 31.
[53] CRPD, Art. 30/1(a).
[54] *Id.*, Art. 30/3.

format will be a violation of their right to enjoy the benefits of scientific progress.[55]

1.5. The Right to Education

The right to education is a fundamental human right recognized by various human rights instruments such as UDHR,[56] ICESCR,[57] CRC,[58] CRPD,[59] and ACHPR.[60] Especially, CRPD is the main human rights instrument that spells out the implementation of the right to education for persons with disabilities. It provides for inclusive education under article 24.[61] Moreover, the provision states that persons with disabilities should access education in the most appropriate "modes and means of communication."[62] If the modes and means are suitable, print-disabled persons will be able to effectively involve and contribute to the academic and social development of their society.[63] Because the educational content is transferred through copyrighted materials, the most appropriate mode and means of communicating those materials for print-disabled persons is by making available those works in an accessible format.[64]

The right to education also belongs to economic, social, and cultural rights and it is vital for a person's human dignity and enhancing respect for human rights and fundamental freedoms.[65] Education is doubly essential to realize the human rights of persons with disabilities and to help their development. Besides, the right to education of print-disabled persons is crucial for states because when a person with a disability grows personally and professionally as a result of education, it reflects the wellbeing of the state.[66] Nonetheless, the right to education of print-disabled persons would not be realized without accessible published materials. They will not have equal opportunity with others in education without effective access to copyright-protected materials. This barrier to access published materials leads to the infringement of the right to education of print-disabled persons by limiting their access to textbooks and other

[55] Ayoubi, *supra* note 31, (2019), p. 36.
[56] UDHR, Art. 26
[57] ICESCR, Art. 13.
[58] CRC, Art. 28.
[59] CRPD, Art. 24.
[60] ACHPR, Art. 17.
[61] CRPD, Art. 24.
[62] *Id.*, Art. 24/3.
[63] Ayoubi, *supra* note 31, (2019), p. 25.
[64] *Id.*
[65] UDHR, Art. 26/2.
[66] Ayoubi, *supra* note 4, (2015), p. 52.

published educational resources. Therefore, to respect the right to education of print-disabled persons, countries must ensure that their copyright law regime is print-disability-friendly.

1.6. The Right to Employment

The right to employment is expressly recognized under UDHR. It states "[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."[67] The ICESCR guarantees the right of every person to engage in a work he/she freely chooses.[68] It further requires contracting parties to take necessary steps including "technical and vocational guidance and training programmes, policies, and techniques" to protect the right.[69] Thus, both of the instruments recognize the right to work to all individuals including persons with disabilities. The CRPD provides for the right to work and employment of persons with disabilities under article 27. The provision prohibits discrimination in employment based on disability and requires state parties to provide reasonable accommodation in the workplace to persons with disabilities.[70] Access to copyright works in an accessible format is crucial to seek employment or to improve one's working condition. However, it is worth noting that despite the recognition of the right to work of persons with disabilities in the above human rights instruments, without access to copyrighted works, print-disabled persons will not attain the requisite skills and qualifications to access employment in the open labor market. Accordingly, lack of access to copyright works violates print-disabled persons' right to work in an open and inclusive labor market.

2. General Overview of the Marrakesh Treaty

The struggle to eliminate the lack of access to copyrighted material by print-disabled persons has been ongoing for many years.[71] In 1985, the World Intellectual Property Organization (WIPO) conducted a study on copyright problems and came up with a recommendation for the adoption of an international instrument to address the issue of access to copyrighted materials

[67] UDHR, Art. 27.
[68] ICESCR, Art. 6/1.
[69] *Id.*, Art. 6/2.
[70] CRPD, Art. 27.
[71] Olga Bezbozhna, The Marrakesh Treaty for Persons with Visual Impairment: The Intersection between Copy Right and Human Rights, Master Thesis, Lund University Faculty of Law, (2014), p.1.

by print-disabled persons.[72] A representative from Chile demanded the inclusion of exceptions and limitations to copyright and related rights in the agenda of the Standing Committee on Copyright and Related Rights (SCCR) in 2004.[73] The request was accepted and the following sessions were partly dedicated to the discussion of copyright limitations and exceptions for education, libraries, and persons with disabilities.[74]

Besides, in 2007, WIPO conducted another study and considered the situation of copyright limitations and exceptions in many countries.[75] The study affirmed earlier research findings concerning the lack of access to copyright materials to print-disabilities. Afterward, in 2009, Brazil, Ecuador, and Paraguay, along with the World Blind Union, formally introduced a treaty proposal.[76] The proposed treaty was seen as an example of addressing other issues presented at the initial proposal of Chile.[77] Later, in 2013, after extensive dialogues and debates, it resulted in the adoption of the Marrakesh Treaty under the auspices of WIPO.[78] The purpose of the Treaty is to improve access to copyrighted works of print-disabled persons via copyright limitations and exceptions and thereby removing the book famine.[79] As it is clearly stated in the preamble, the Treaty recalls the principles of non-discrimination, equal opportunity, accessibility, and full and effective participation and inclusion in society as proclaimed in UDHR and CRPD.[80] The policy objective of the Treaty is, therefore, to craft a legal system in which print-disabled persons could have equal rights and protection on an equal footing with others.

Moreover, the Treaty attempts to provide the definitions of different terms on its definitional part which have paramount importance to appreciate the scope of the application and beneficiaries of the Treaty. By defining such terms, the Treaty specifically tries to clarify: who intended to enjoy the copyright limitations and exceptions outlined in the Treaty (the beneficiary person); what works are subject to the copyright exceptions and limitations provided in the Treaty (the works); in what formats such works can be adapted (accessible

[72] Ayoubi, *supra* note 4, (2015), p. 146.
[73] *Id*.
[74] *Id*., p. 147.
[75] Judith Sullivan, Study on Copyright Limitations and Exceptions for the Visually Impaired, (2007) available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696 accessed on May 26.
[76] Baker, *supra* note 1, P. 2.
[77] Ayoubi, *supra* note 4, (2015) P. 147.
[78] Lida Ayoubi, Human Rights Principles in the WIPO Marrakesh Treaty: Driving Change in Copyright Law from within, *Queen Mary Journal of Intellectual Property*, (2019), P. 2.
[79] Marrakesh Treaty, Preamble, Para. 12.
[80] *Id*.

formats); and who are allowed to assist a beneficiary person to access the accessible format of a copyrighted work (authorized entity). The Treaty defines the term 'beneficiary person' as:

> *a person who is blind; has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability, and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities.*[81]

The Treaty adopted a broad definition of the 'beneficiary person', taking into account a wider range of difficulties that people may experience when they wish to access information and could be more helpful to people with any disability.[82] This definition helps us to determine the beneficiaries of the accessible format of a copyrighted work. Although the focus of the Treaty is people with print disabilities, it does not prevent the adoption of copyright exceptions for the benefit of people with other disabilities.[83]

The Treaty also defines works covered in it as, "literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media."[84] This form may cover text-based works and notations such as books, e-books, audiobooks, newspapers, journals, and musical scores, as well as related illustrations and images.[85] Although the definition in the Treaty includes textual works embedded in audiovisual works such as educational multimedia DVDs and Audio-visual, works such as films are not covered.[86]

Moreover, the Treaty provides the meaning of the term 'accessible format

[81] *Id.*, Art. 3.
[82] Ti-Li Chen, Copyright Exceptions for Visually Impaired Persons: The WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons, The Master thesis, Centre for Commercial Law Studies (CCLS) Queen Mary, University of London, (2019), p. 35.
[83] Marrakesh Treaty, Art.12 (2).
[84] *Id.*, Art. 2(a).
[85] Jessica Coates et al, Getting Started: Implementing the Marrakesh Treaty for Persons with Print Disabilities: A Practical Guide for Librarian, (2018), p 10.
[86] Carlo Scollo Lavizzari, A WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, A Guide for Publishers and their Trade Association in Membership with the IPA, (2013), p. 13.

copy' as a copy of a work in a form that gives the beneficiary "access as feasibly and comfortably as a person without visual impairment or other print disability."[87] Accordingly, the term 'accessible format copy' means any work reproduced in an alternative manner or form that beneficiaries can acquaint with themselves. For example, "braille code, enlarged print, electronic and aural versions of a book can be cited as an accessible format copy."[88] The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.[89]

Fortunately, the Marrakesh Treaty is aware of the vital role that governmental and non-governmental organizations could play in providing persons with print disabilities with access to accessible format copies. Accordingly, the Treaty allows these organizations, authorized entities, to perform certain acts, otherwise prohibited under copyright law, to assist print-disabled persons. Specifically, the Treaty defines an 'authorized entity' as:

> *an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis and also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.*[90]

According to the definition in the Treaty, 'authorized entities' are supposed to follow some conditions concerning the use of the work. For example, they need to make sure that only those individuals considered as beneficiaries enjoy access to alternative format copies.[91] Furthermore, the Treaty does not entail an organization to satisfy any formalities or undertake specific procedures to achieve recognition as an authorized entity. However, the Treaty does not bar such measures and thus gives member states the leeway to create such procedures at the national level.

[87] Marrakesh Treaty, Art. 2 (b).
[88] Prawnicze Białostockie, The New Provisions on Access to Protected Works for Visually Impaired Persons - One Small Step for Copyright, One Giant Leap for People With Disabilities, (2018), p. 162.
[89] Marrakesh Treaty, Art. 2 (b).
[90] *Id*., Art. 2(c).
[91] *Id*., Art. 2(c).

2.1. Major Obligations of Contracting Parties of the Marrakesh Treaty

2.1.1. Obligation to Provide Copyright Limitations and Exceptions for Print-Disabled Persons in the National Copyright Law

The central obligation of contracting parties in the Marrakesh Treaty is to provide limitations or exceptions[92] for the exclusive economic right of the owner for print-disabled persons in their national copyright law.[93] The Treaty calls for contracting parties to incorporate exceptions or limitations for print-disabled persons in their domestic copyright law so that they can access an accessible format of a copyrighted work even against the will of the owner. Particularly, it obliges ratifying states to include in their copyright law limitations or exceptions to the owner's right of reproduction, distribution, and the right to make available to the public.[94] In principle, the owner obtains an exclusive economic right including reproduction, adaptation, distribution, and public performance right among others.[95] The right of reproduction denotes the right to copy the whole or substantial part of the work in any form or manner including scanning, photocopying, and audio taping.[96] The owner's right of adaptation signifies the right to prepare derivative works from the preexisting copyrighted works.[97] Adaptation right includes "translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted."[98] The right of distribution and public performance refers to the owner's right to spread or distribute the work in the market, and broadcast or communicate to the public at large respectively.[99] Unless the owner authorizes, no one can exercise these rights over the copyrighted work.

[92] The distinction between 'limitations' and 'exceptions' is "somewhat murky and the two terms are often used interchangeably. 'Exceptions' are probably best understood as outright exemptions from copyright liability. 'Limitations' is a term that includes compulsory or statutory licenses creating a liability rule, so that acts are permissible but subject to an obligation to pay for the use." (Samuelson, Justifications for Copyright Limitations and Exceptions, in Ruth L. Okediji (Ed.), *Copyright Law in an Age of Limitations and Exceptions*, (pp. 12-59), 1st ed., Cambridge University Press, (2017), p. 12.

[93] Laurence R. Helfer *et al*, *Facilitating Access to Books for Print-Disabled Individuals*, The World Blind Union Guide to the Marrakesh Treaty, (2016), p. 103.

[94] Marrakesh Treaty, Art. 4/1.

[95] Anjaneya Reddy NM and Lalitha Aswath, Understanding Copyright Laws: Infringement, Protection, and Exceptions, *International Journal of Research in Library Science*, Vol.2, No. 1, (2016), pp. 48-53, p. 49.

[96] Stim Richard, *Copyright Law*, 1st ed., Delmar Health Care Publishing, (2000), P. 42.

[97] *Id*., P. 42.

[98] *Id*., P. 27.

[99] *Id*., P. 42-43.

The Marrakesh Treaty, however, mandatorily requires contracting states to limit the rights of the owner by domestic national copyright law for the benefit of print-disabled persons. It specifically requires contracting parties to:

> *provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitations or exceptions provided in national law should permit changes needed to make the work accessible in an alternative format.*[100]

The Treaty also praises states to adopt voluntary limitations or exceptions for print-disabled persons on the owner's right of public performance. It, however, doesn't stipulate mandatory rules regarding what the exceptions and limitations that a national copyright law incorporates should look like.[101] The Treaty simply recommends two ways of limiting the exclusive economic right of the owner in favor of print-disabled persons. The first way is contracting parties can provide the copyright limitation or exception in their domestic law by empowering authorized entities to:

> *make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to the beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps "…".*[102]

The Treaty reminds contracting states to realize the rights of print-disabled persons by permitting authorized entities that work on the area to reproduce, adapt, and distribute the copyrighted work for the benefit of print-disabled persons without the authorization of the owner. By allowing authorized entities to make necessary modifications of the work to make an accessible format to print-disabled person, to convey or obtain such accessible format to or from other authorized entity in domestic or abroad, and distribute it to the beneficiaries; a country can implement its obligation to incorporate limitations

[100] Marrakesh Treaty, Art. 4/1.
[101] International Publishers Association, *A WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*, IPA Guide to the Marrakesh Treaty, (2013), p. 20.
[102] Marrakesh Treaty, Art. 4/2 (b).

or exceptions in its domestic copyright law. This permission, however, may be awarded only upon the fulfillment of some major conditions stated in the Treaty. These are: the authorized entity must have lawful access to the original work or copy of the work, the change to the work does not modify the work other than the change needed to make the work in an accessible format, the changed accessible format is exclusively distributed to the allowed beneficiaries, and the activities are made on a non-profit basis.[103] The copyright exceptions or limitations can also be made by permitting to:

> *[a] beneficiary person, or someone acting on his or her behalf including a primary caretaker or caregiver, [to] make an accessible format copy of a work for the personal use of the beneficiary person or otherwise [to] assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.*[104]

Once the domestic law entitles the beneficiary or their representatives such as caretakers and caregivers to make the accessible format of the work without the authorization of the right holder, print-disabled persons will have access to the copyrighted works. Nonetheless, to make an accessible copy of the work, the beneficiary person should obtain the work lawfully. By doing so, contracting states can realize the human rights of print-disabled persons, including the right to education, cultural rights, the right to develop, and the right to get knowledge.

Besides, the Treaty allows contracting parties to adopt their ways of copyright limitation or exceptions, so long as it enables print-disabled persons to access published works.[105] Contracting parties are free to apply their methods of copyright limitations or exceptions or those methods specified in the Treaty or a combination of the two.[106] What matters is the effect of the copyright limitation or exception_making copyrighted works accessible to print-disabled persons; the method of copyright limitations or exceptions doesn't matter. They can use judicial, administrative, or regulatory methods of determinations of copyright limitations or exceptions.[107]Contracting parties, nevertheless, may come up with their conditions for a beneficiary to exercise the limitations or exceptions provided in the national law. The Treaty, for example, leaves for the contracting

[103] *Id.*, Art. 4/2(a).
[104] *Id.*, Art. 4/2(b).
[105] *Id.*, Art. 4/3.
[106] *Id.*, Art. 4/3 & 10/3.
[107] *Id.*, Art. 10/3.

states to adopt a commercial availability test in their domestic copyright law.[108] The only duty is to notify other contracting states of the adoption of such a requirement in the domestic copyright law.[109] The commercial availability test means that changing the work into accessible formats and distributing it is allowed only when a beneficiary is unable to get the accessible format with reasonable terms in the market.[110] It is possible only when the work is not available in the market in an accessible format or reasonable price. As of October 30, 2019, only three countries namely Argentina, Japan, and Canada have adopted the commercially available test in their national copyright law.[111] Moreover, the Treaty gives contracting parties discretion to determine in their domestic law whether the beneficiary should get the accessible format for free or upon paying remuneration.[112] It is optional for state parties to require beneficiaries or authorized entities to pay royalty or license fees to the owner to reproduce, adapt, distribute, or make available in an accessible format.[113] This requirement, however, is criticized as complex and challenging for developing and least developed countries.[114]

2.1.2. Obligation to Provide Exception to Anti-Circumvention Laws

To prevent the infringement of their copyright, it is common that the right holders of a copyrighted work to apply technological protective measures (hereinafter TPMs).[115] Right holders or publishers may use TPMs to protect their work from unauthorized access.[116] Mostly, publishers are reluctant to make available copyrighted publications in accessible electronic form fearing that they

[108] *Id.*, Art. 4/4.
[109] Caroline B. Ncube et al, Beyond the Marrakesh VIP Treaty: Typology of Copyright Access-Enabling Provisions for Person with Disabilities, *The Journal of World Intellectual Property*, (2020), pp. 1-17, p. 8.
[110] Jingyi Li and Niloufer Selvadurai, Facilitating Access to Published Works for Persons with a Print Disability: Amending Australian Copyright Laws to Ensure Compliance with the Marrakesh Treat, *Monash University Law Review,* Vol. 43, No. 3, P. 623.
[111] Ncube *et al*, *supra* note 109, p. 8.
[112] Marrakesh Treaty, Art. 4/5.
[113] Helfer *et al*, *supra* note 93, (2016), p.123.
[114] Ncube *et al*, *supra* note 109, p.8.
[115] Urs Gasser, Legal Frameworks and Technological Protection of Digital Content: Moving Forward towards a Best Practice Model, Fordham Intellectual Property, *Media and Entertainment Law Journal*, vol.,17, No.,1, (2006), PP. 40-113, p. 4. Available at https://dash.harvard.edu/bitstream/handle/1/13548615/World%20Anti-Circumvention%20Legislation.pdf;jsessionid=89179CC03B78EA449E96FA4CB21216A3?sequence=1 accessed on July 10/2020.
[116] Jerry Jie Hua, Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese Copyright Law, *China, and WTO Review*, p.9.

may lose their commercial income.[117] The TPMs could be disabling the pdf reader, making the e-books non-downloadable, making digitalized works non-accessible, and inhibiting copying the material even after lawful access.[118] Such means of protecting the copyright are recognized under the domestic and international copyright laws.[119] For example, the WIPO copyright Treaty demands contracting states to provide sufficient protection and to give appropriate remedies against the circumvention of the copyright of right holders.[120] Such TPMs, however, have negative externality on the rights of print-disabled persons. Even if, the primary mission of TPMs is to protect the rights of the owners, incidentally, it may hinder print-disabled persons to access the work.

To avoid such a problem, the Marrakesh Treaty requires the contracting parties to ensure that their anti-circumvention law "does not prevent [print-disabled persons] from enjoying the limitations and exceptions provided for in the Treaty."[121] The anti-circumvention law of contracting states shall not apply to the reproduction, adaptation, distribution, and making available for the benefit of print-disabled persons if conditions for the limitations or exceptions meet. To state it otherwise, circumvention is allowed if it is for the benefit of print-disabled persons. Here, the term circumvention is used to refer to "avoiding, bypassing, removing, deactivating, or impairing a technological measure."[122] This provision can be implemented in two ways. First, it can be enforced by giving authorized entities to circumvent technologically protected works without the authorization of the right holder.[123] Second, it can be enforced by empowering the authorized entities to ask the owner to make his work without TPMs.[124] Authorized entities, however, could adopt anti-circumvention TPMs once they reproduce, distribute, or make available to the beneficiaries.[125] This is to limit the chance of reproduction by other non-print-disabled persons.

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[117] Samuel Macharia et al, *Exploiting the Marrakesh Treaty to Obviate Copyright-Related Challenges on Access to Information by Visually Impaired People in Academic Libraries*, Library Management, Emerad Publishing, (2020), p. 6.

[118] International Publishers Association, *supra* note 101, p.25.

[119] Diplomatic Conference for Visual Impaired Persons, Marrakesh Treaty Implementation Guide South Africa, Briefing Paper Version 2, (2015), p.11.

[120] WIPO Copyright Treaty, World Intellectual Property Organization, Treaty series(1996), Vol. 226, Art.11.

[121] Marrakesh Treaty, Art. 7.

[122] Jingyi Li, Facilitating Access to Digital Content for the Print-Disabled: The Need to Expand Exemptions Copyright Laws, *Intellectual Property Journal*, Vol. 27, (2015), PP. 356-384, P.366.

[123] Chen, *supra* note 82, p. 84.

[124] *Id*.

[125] International Publishers Association, *supra* note 101, p.25.

2.1.3. Obligation to Cooperate to Facilitate Cross-Border Exchange

The mere recognition of the possibility of transforming the copyrighted work, without the authorization of the owner, into an accessible format is not sufficient to realize the rights of print-disabled persons. The process of changing the work into an accessible format is expensive.[126] Print-disabled persons may not afford to cover the cost to be incurred in changing copyrighted works into an accessible format or they may not have access to technologies at all. Even it is very costly and challenging for authorized entities to convert the format let alone for print-disabled persons. Especially, this problem is common in developing countries where most people live under the poverty line. To curtail the problem, the Treaty imposes an obligation on contracting parties to allow and facilitate the exportation and importation of the accessible format for the exclusive benefit of beneficiaries_print-disabled persons.[127] It requires the domestic copyright law exceptions or limitations of contracting states to allow the distribution or making available the accessible format by an "authorized entity to a beneficiary person or an authorized entity in another contracting party."[128] The Treaty, however, allows the exportation of accessible formats of a copyrighted work only by authorized entities; beneficiary persons can't do that.[129]

Contracting parties can use their ways of fulfilling this obligation. The Treaty shows a non-mandatory way of implementing this obligation. It recommends that contracting parties can implement this obligation by permitting authorized entities in their jurisdiction to distribute and make available for the exclusive use of the beneficiary in another contracting country through the authorized entity of another contracting party or directly to the beneficiary.[130] Additionally, the Treaty makes it mandatory for contracting parties to allow beneficiaries, their agents, or authorized entities to import accessible formats, to the extent of exceptions or limitations in the national domestic law, from another jurisdiction without the permission of the right holder.[131] Furthermore, contracting parties are obligated to share information so that authorized entities can be known to each other.[132] By allowing the cross-border exchange of accessible formats, the Treaty endeavors to deal with the following problems. First, it aims to rectify the

[126] Marketa Trimble, The Marrakesh Puzzle, University of Nevada, *Las Vegas -- William S. Boyd School of Law*, Vol. 4, (2014), p.9.
[127] Marrakesh Treaty, Art. 5/1 & 6.
[128] *Id*, Art. 5/1.
[129] Bezbozhna, *supra* note 71, P. 36.
[130] Marrakesh Treaty, Art. 5/2.
[131] *Id.*, Art. 6.
[132] *Id.*, Art. 9.

problems of the inaccessibility of the accessible formats to print-disabled persons in countries of poor technology and finance.[133] If a country ratifies the Treaty, print-disabled persons of that country can easily access relevant copies from foreign countries.[134] Second, the Treaty strives to share its benefits with all countries regardless of socioeconomic development differences.[135] By doing so, the Treaty tries to avoid "inefficiency and duplication of investment in the production of accessible formats."[136] It avoids the problem of replication of changing the work into accessible forms in different countries and authorized entities.

2.1.4. Obligation to Respect the Privacy of Beneficiaries

In addition to the aforementioned obligations, the Treaty imposed on the state parties to respect the privacy of the beneficiary person. It compels state parties to "protect the privacy of beneficiary persons on an equal basis with others" in implementing the exceptions and limitations.[137] While distributing or making available the copyrighted works to print-disabled persons, there may be a record of the identity or other profiles of the beneficiary. This may be performed to ensure that the work is handed out exclusively for beneficiary persons. In such a case, the contracting parties shall endeavor to protect the privacy of beneficiaries.

3. The Legal and Policy Frameworks for Print-Disabled Persons in Ethiopia

In Ethiopia, there is no specific law or policy designed to address the issue of access to copyrighted works for print-disabled persons. Although there are laws and policies, to a limited extent cater to persons with disabilities, they are not designed to address the issue of access to published works to print-disabled persons in a specific manner. Yet, one can argue for the recognition of print-disabled persons' right to access to copyrighted work by interpreting the policy and legal regime that applies to all disabled persons, or persons in general. For example, the FDRE constitution, under its non-discrimination clause, prohibits all forms of discrimination on the enjoyment of human rights on grounds of

[133] Helfer *et al*, *supra* note 93, (2016), p.131.
[134] Bram Van Wiele, The Ratification and Implementation of the Marrakesh Treaty: A Look at the Future of South African Copyright Law, Master's Thesis, University of Cape Town Faculty of Law School for Advanced Legal Studies, (2014), P.26.
[135] Helfer *et al*, *supra* note 93, (2016), p.131.
[136] *Id.*, p.132.
[137] Marrakesh Treaty, Art. 8.

"race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth, or other status."[138] Although the provision failed to prohibit discrimination on the ground of print disability, they can be benefited from this article based on the emerging interpretation of the phrase 'other status' under the international human rights law. Based on this provision, one can argue that it is discriminatory when print-disabled persons are unable to access copyrighted works due to their disability. Besides, the FDRE constitution, as explained before, entitles every individual's right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any media of his choice."[139] Hence, print-disabled persons can exercise this right only when they have access to the accessible format of copyrighted works. Thus, though the constitution lacks a direct stipulation as to print-disabled persons' right to access copyrighted work, still, one can argue by interpreting such provisions.

Looking into other laws of the country, we will find a very important proclamation specifically designed to guarantee the rights of persons with disabilities in the employment sphere. It is the proclamation concerning the rights to employment for persons with disabilities, Proclamation No.568/2008.[140] This Proclamation plays a significant role in shaping the societies' perception of disability. A close reading of the preamble of the Proclamation shows that the law is aimed at changing negative societal attitudes towards disability including print disabilities.[141] Moreover, it makes laws, practices, customs, attitudes, and other discriminatory situations that limit equal opportunities for PWDs null and void[142]. Therefore, though the Proclamation lacks stipulation about the accessibility of copyrighted works for print-disabled persons, it indirectly addresses it by prohibiting discrimination that could limit the equal opportunity of persons with disabilities. This is because access to copyright works is crucial to realize the right to employment of print-disabled persons.

Besides, persons with disabilities are given due emphasis on the Second National Action Plan (2016-2020) on human rights.[143] This plan of action

[138] FDRE Constitution, Art. 25.
[139] *Id.*, Art. 19/2.
[140] Right to Employment of Persons with Disability Proclamation, Proclamation No. 568/2008, *Federal Negarit Gazet*, (2008).
[141] *Id.*, Preamble, Para. 1.
[142] *Id.*, Art. 5/1.
[143] The Federal Democratic Republic of Ethiopia, the Second National Plan of Action on Human Rights 2016-2020, p.165-172.

highlights several undertakings that need to be done to ensure the rights of PWDs including "accessibility, inclusive education, assistive devices, awareness-raising and mainstreaming of disability issues in curriculum of higher education institutions, particularly curriculum of legal education".[144] Since inclusive education would be ineffective without access to copyrighted works tailored to the particular needs of PWDs, it is possible to argue that the action plan indirectly demands the accessibility of copyrighted materials for print-disabled persons. Furthermore, the National Action Plan (2012-2021) for persons with disabilities is adapted to enhance the promotion and protection of the rights of PWDs in Ethiopia. This action plan declares the aspiration of creating conditions that enable PWDs to full inclusion in society.[145] Particularly, it emphasizes that it was prepared to promote, protect, and ensure the full and equal enjoyment of fundamental rights, public services, opportunities for education and work, and the full participation in family, community, and national life by all PWDs in Ethiopia.[146] Generally, the action plan is designed to remove barriers to equality of opportunity and to bring the full participation of PWDs into society.[147] The National Plan of Action outlines thirteen specific priorities for action including education and training, culture, sport and recreation, and research and information. Therefore, we can observe that, in one way or the other, the issue of access to copyrighted works of print-disabled persons is addressed.

Exploring the education policy of the country, although there is education and training policy document adopted in 1994, except section 2.2.3, it does not make an explicit reference to the education needs of PWDs. In the referred section, the policy states that one of the specific objectives is "to enable both the handicapped and the gifted learn in accordance with their potential and needs."[148] Still, this policy is criticized for lack of accuracy and detail.[149] Besides, when we look at the national ICT Policy, one of its guiding principles ensuring unhindered access to ICT for persons with disabilities.[150] The policy also affirms that special training programs shall be developed for PWDs to

[144] *Id.*

[145] The Federal Democratic Republic of Ethiopia Ministry of Labor and Social Affairs (MOLSA), The National Plan of Action of Persons With Disabilities (2012-2021), p.13.

[146] *Id.*, p.11.

[147] *Id.*

[148] The Federal Democratic Republic of Ethiopia, Ministry of Education, Education and Training Policy, 1st ed., (1994), Section 2.1.3.

[149] Sunayna Bahadoer et al, Mainstreaming Disability: Literature Study on the Laws and Policies Regarding the Rights of PWDs in Ethiopia, India, and Kenya, p. 45.

[150] The Federal Democratic Republic of Ethiopia, The National Information and Communication Technology Policy and Strategy, (2009), p.4.

address social inequalities.[151] Thus, it is possible to say that the ICT policy is disability, friendly. More importantly, the tax law of the country attempts to facilitate the accessibility of an accessible format of a published work for print-disabled persons by exempting the "import and supplies of talking books (in cassettes or other forms of recording) specifically designed for the blind or severely handicapped" from VAT payment.[152] By and large, although the issue of access to published works for print-disabled persons is not addressed directly in the Ethiopian legal system, it is possible to conclude that it is guaranteed indirectly under the FDRE Constitution and other relevant national laws and policies.

3.1. Analysis of the Ethiopian Copyright Law in Light of the Marrakesh Treaty

Copyright law, in principle, grants some exclusive economic rights to the owner intending to encourage further innovation.[153] The copyright law of many countries bestows an exclusive right to reproduction, adaptation, distribution, public performance, and display to the owner of the work.[154] Similarly, the Ethiopian Copyright Proclamation gives some exclusive economic rights to owners of a copyrighted work. It confers the owner of a work an exclusive economic rights of reproduction, translation, adaptation, arrangement or other transformation of the work, distribution, importation of original or copies of the work, public display of the original or a copy of the work, the performance of the work, broadcasting of the work and other communication of the work to the public.[155]

Nonetheless, the Proclamation lays down some general exceptions and limitations to the exclusive economic rights of the owner of copyright intending to balance the interests of the public and the right holder.[156] It fails, however, to provide special copyright exceptions and limitations for print-disable persons.

[151] *Id.*, p.16.
[152] Council of Minster, Value Added Tax Regulation, Regulation No. 79/2002, (2002), Art. 33.
[153] The USA Department of Commerce Internet Policy Task Force, Copyright Policy, Creativity, and Innovation in the Digital Economy, (2013), P.5 available at https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf accessed on June 12/2020.
[154] Teklu Hunde, Protection and Enforcement of Public Performance Right Under Ethiopian Law, LL.M Thesis, College of Law and Governance Studies, Addis Ababa University, (2013), p. 4 available at http://etd.aau.edu.et/bitstream/handle/123456789/19210/Teklu%20Hunde.pdf?sequence=1&isAllowed=y accessed on June 12/2020.
[155] Copyright and Neighbouring Rights Protection, Proclamation No. 410/2004, *Federal Negarit Gazetta*, (2004), art. 7 (hereinafter, Proclamation No. 410/2004).
[156] *Id.*, Art. 9-19.

Though the existing copyright law fails to have special provisions for print-disabled persons, they are still beneficiaries of the general exceptions and limitations designed for every individual in general. It is not, however, clear whether these general exceptions and limitations of copyright are adequate to implement the obligations in the Marrakesh Treaty in Ethiopia, and in particular, to attain the interests of print-disabled persons recognized in the Treaty. The aim of this section is, therefore, to entertain these exceptions and limitations whether they are appropriate to realize the rights of print-disabled persons in the Marrakesh Treaty or not.

3.1.1. Copyright Limitations and Exceptions in the Ethiopian Copyright Law

3.1.1.1. Reproduction for Personal Purposes

As indicated above, in principle, the Ethiopian copyright law grants, among others, an exclusive economic right of reproduction to the owner of the work. Despite this, the Proclamation attempts to protect the interests of the public by limiting the exclusive economic right of the owner by providing exceptions and limitations. Among others, it allows a "private reproduction of a published work in a single copy by a physical person exclusively for his own personal purpose."[157] Accordingly, a person can reproduce the published work without the authorization of the owner if it is exclusively for his benefit. Here, reproduction refers to 'the making of one or more copies of a work or sound recording in any manner or form, including any permanent or temporary storage of work or sound recording in electronic form.'[158] Using this exception, readers, researchers, scholars, and any other persons can access information and knowledge by reproducing the published work without the consent of the owner.

This exception doesn't, however, fully address the special needs of print-disabled persons. According to this exception, the reproduction is required to be made by the beneficiary himself. The expression "by a physical person exclusively for his own personal purpose" clearly shows that the reproduction should be made by the beneficiary himself. It does not warrant the reproduction of the published work for personal use by a third party. Nevertheless, in some cases, a print-disabled person may not be able to reproduce the work in his capacity. For example, he may be accompanied by other physical disabilities,

[157] *Id.*, Art. 7/1.
[158] *Id.*, Art. 2/25.

due to which he will not be able to reproduce the work by himself or he may not afford to cover the cost of reproduction. In such cases, a print-disabled person may need another third party who can support him in reproducing the work for his personal use. To avoid such a problem, the Treaty recommends for, though it is not mandatory, contracting parties to implement the rights of the print-disabled persons by allowing, inter alia, the reproduction of the work by their representative including caregivers or caretakers.[159] Hence, to realize a print-disabled person's right to access knowledge and information, the Ethiopian copyright law shall allow a representative of print-disabled persons to reproduce the work for the print-disabled persons.

Moreover, this exception is allowed only for physical persons. Nevertheless, since the reproduction, changing the work into an accessible format, is very expensive, individuals may not afford it. This problem can be alleviated by allowing non-profit organizations that are working on a print-disabled person to reproduce the published work. In addition to reproduction, legal persons shall also be allowed to distribute and make available the work to the beneficiaries. By doing so, print-disabled persons will be able to have access to the accessible format of the copyrighted work. Furthermore, the Proclamation allows only reproduction of the work; it doesn't permit, for example, the adaptation of a work without the authorization of the owner. However, in most cases, to make published works accessible to print-disabled persons, the reproduction may not be sufficient; rather, it requires adaptation of a work.[160] As it is defined earlier, reproduction allows only the making of one or more copies of a work in any manner or form. That is, reproduction will not allow, for example, modifying the copyrighted work to make it accessible to print-disabled persons. In certain cases, however, to change the work into an accessible format, it may become necessary to translate, dramatize, fictionalize, motion picture version, sound recording, abridgment, or condensation. Even the Treaty calls for contracting parties to allow in their copyright law exceptions and limitation the "changes needed to make the work accessible in the alternative format"_the adaptation of the work.[161] Therefore, as the reproduction exception may not be adequate to realize the rights of the print-disabled persons, an adaptation of the work shall also be recognized as an exemption to the exclusive economic right of the owner.

[159] *Id.*, Art. 4/2 (b).
[160] Wiele, *supra* note 134, P.38.
[161] Marrakesh Treaty, Art. 1/a.

3.1.1.2. Reproduction for Teaching Purpose

Intending to encourage education, the Proclamation allows the reproduction of a published work or sound recording by any person for teaching purposes.[162] The owner can't inhibit the reproduction of the work for teaching purposes unless the reproduction surpasses the fair practice and the extent justified by the purpose.[163] This exception is very decisive to facilitate the accessibility of academic copyrighted works for teaching and scientific discourses. It helps to attain the individuals' right to education, right to access to information, right to employment, right to culture and scientific progress, right to read, right to development, freedom of expression, and other related rights. A person can also reproduce the work for the benefit of print-disabled persons, to teach them. This exception is, however, limited only for teaching purposes. Through this exception, one can't reproduce a work for leisure or any purpose other than teaching. A person can't reproduce a work to enable print-disabled persons to read non-academic materials, for example. Moreover, this exception is limited to the reproduction of the work; it doesn't state anything about an adaptation of a work. As mentioned above, adaptation is inevitable to make copyrighted works accessible to print-disabled persons. A teacher, for example, shall be allowed to adapt the copyrighted work so that print-disabled persons can access the accessible format of the work. Therefore, the Proclamation needs to allow, first, the reproduction of any materials, regardless of its purpose, so long as it is made for the exclusive benefit of the print-disabled persons. Second, this exception shall even be extended to the extent of adaptation of the work even for teaching.

3.1.1.3. Reproduction by Libraries, Archives, and Other Similar Institutions

The other pertinent copyright exception recognized in the Ethiopian copyright law is a reproduction by libraries, archives, and other similar institutions. The Proclamation permits "a reproduction of a work by a library, archive, memorial hall, museum, or similar institutions whose activity directly or indirectly is not for gain."[164] This exception is not without prerequisites. A reproduction of a work by a library, archive, memorial hall, museum, or similar institutions is allowed provided that, among others:

[162] Proclamation No. 410/2004, Art. 1.
[163] *Id.*, Art. 11.
[164] *Id.*, Art. 12/1.

> *a) The copy will be used solely for study, scholarship, or private research,*[165] *b) the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion*[166] *and c) there is no available administrative organization which the educational institution is aware of, which can afford a collective license of reproduction.*[167]

This exception is allowed if it is:

> *a) to preserve and, if necessary to replace a copy or a copy which has been lost, destroyed, or rendered unusable in the permanent collection of another similar library or archive, b) where it is impossible to obtain a copy under reasonable conditions, and c) the act of reproduction is an isolated one occurring and if repeated on separate and unrelated occasions.*[168]

When we examine this exception from the perspective of print-disabled persons' interest, it has some shortcomings. Firstly, the exception granted for these institutions is limited to the reproduction of the copyrighted work; it doesn't allow the adaptation and distribution of the copyrighted work. Reproduction may not be adequate to make materials accessible to print-disabled persons. Some print-disabled persons may demand beyond reproduction including adaptation. To make materials accessible to print-disabled persons, these institutions shall be allowed to make 'necessary changes,' adaptation, on the copyrighted work. The exception doesn't also include the distribution of materials to beneficiaries. However, reproduction is meaningless unless the reproduced work is distributed to the beneficiaries, in this case, print-disabled persons. Secondly, this exception is recognized only if it is to study, scholarship, or private research. It seems that these institutions can't reproduce, for example, copyrighted works for leisure purposes through this exception. The restriction of this exception only for study, scholarship, or private research will lessen the print-disabled persons' right to read, right to development, right to access to information, equality, and others.

Thirdly, the exception becomes effective when there is a request only by a physical person.[169] However, to facilitate the accessibility of copyrighted work

[165] *Id.*, Art. 12/2 (a).
[166] *Id.*, Art. 12/2 (b).
[167] *Id.*, Art. 12/2 (c).
[168] *Id.*, Art. 12/3 (a).
[169] *Id.*, Art. 12/2.

to print-disabilities, a legal person that works with persons with disabilities may request these institutions to reproduce provided it doesn't afford to do so. The existing copyright exception doesn't also allow the exchange of materials between or among institutions, what the Treaty calls them authorized entities, working on the print-disabled person. Fourthly, these institutions can reproduce the copyrighted work only when it is impossible to obtain a copy under reasonable conditions. This condition is equivalent to the commercial availability test. Since the Treaty gives the discretion to set the commercial availability test for national copyright laws, national copyright laws of some countries restrict the exceptions and limitations provided in the accessible format of the work available in the market.[170] The problem is, however, print-disabled persons may not afford to buy all copyrighted work, which is available in the market in an accessible format. As a developing country, it is very futile to think that print-disabled persons residing in Ethiopia can afford to buy the accessible formats of copyrighted works that they need to use from the market. Lastly, this exception is applicable only for those institutions working, directly or indirectly, not for gain. Based on this requirement, private universities, schools, and other related institutions can't be beneficiaries of this exception. It means that print-disabled persons who join these institutions can't have access to the accessible format of a published work.

In general, because of the above-mentioned limitations in the existing copyright law of Ethiopia, it can be concluded that Ethiopia lacks preparedness to implement the obligations imposed by the Marrakesh Treaty.

3.1.1.4. Importation and Exportation of the Accessible Format

Concerning cross-border exchange of an accessible format of a copyrighted work, the Ethiopian Copyright law allows the "importation of a copy of a work by a physical person for his own personal purposes."[171] Using this exception, a print-disabled person can import a copy of a copyrighted work, without demanding the green light of the right holder, from abroad so long as he is going to use it exclusively for his personal use. This exception is very important for print-disabled persons to access the accessible format of a copyrighted work from abroad. Since Ethiopia lags behind in economic and technological advancement, print-disabled persons may not be able to convert a copyrighted work into accessible formats. Hence, allowing such persons to import from

[170] Bezbozhna, *supra* note 71, P. 33.
[171] Proclamation No. 410/2004, Art. 15.

abroad without infringement of copyright is very critical to realize the interests of the print-disabled person in the country.

This exception is, however, inadequate to enforce the Marrakesh Treaty. On the one hand, it allows only the importation of a copy by a physical person for his personal use. It doesn't allow the importation and distribution or make available the copy by institutions. The problem is that physical persons may not be able to import a copy of a work from abroad due to financial problems or other inconveniences. As legal persons are more efficient in terms of finance and facilitation of the importation of copyrighted works from abroad, print-disabled persons can easily access copyrighted works in an accessible format if authorized entities are allowed to import, distribute or make available a copyrighted work from abroad. On the other hand, the existing Proclamation doesn't allow the exportation of copyrighted work from Ethiopia. The Treaty, nevertheless, imposes an obligation to allow and facilitate the exportation of the accessible format in addition to importation.[172] According to the existing copyright law of Ethiopia, an Ethiopian print-disabled person who resides in America, for example, can't import a copy of an Amharic fiction from Ethiopia. This contravenes with the contracting party's obligation in the Marrakesh Treaty, i.e. an obligation to allow the importation and exportation of an accessible format of a copyrighted work for the exclusive benefit of a print-disabled person.

3.1.1.5. Circumvention of Technology Protected Works

As asserted earlier, the Treaty requires contracting parties to provide exceptions to their anti- Circumvention law of technology protected works to enable print-disabled persons to access the accessibility format of copyrighted work.[173] When we look at the Ethiopian case, there is no legal framework that prohibits the circumvention of technologically protected works.[174] Even no law prescribes a copyright owner to apply technology protection measures to prevent unauthorized access or copy. However, this doesn't mean that the copyright owner of the copyright can't use technical measures to prevent unauthorized access or copying of his work. Nothing prohibits copyright owners in Ethiopia to adopt technology protection measures to protect their rights. Currently, the

[172] Laurence R. Helfer et al, Copyright Exceptions across Borders: Implementing the Marrakesh Treaty, *European Intellectual Property Review*, Vol. 42, No. 5, 2020, P.334.
[173] Marrakesh Treaty, Art. 7.
[174] Kinfe Micheal Yilma and Halefom Hailu Abraha, The Internet and Ethiopia's IP Law, Internet Governance and Legal Education: An Overview, *Mizan Law Review*, Vol. 9, No.1, (2015), pp. 154-174, p.162.

country is striving to build a digitalized economy, which includes facilitating copyright holders to make their work available digitally. In doing so, it is inevitable that copyright holders to use TPMs to protect their rights over the work. Practically also, innovators start to apply for TPMs to protect their digital copyright.[175]

The problem of such measures is, however, it locks the work not to be retrieved by print-disabled persons. It restricts print-disabled persons to read such works and get knowledge, which, in turn, violates their human rights. Technology protection measures may forbid print-disabled persons to be a beneficiary of limitations or exceptions provided by the national copyright law. For example, they can't reproduce the copyrighted work for their personal use. For the same reason, authorized entities that work to facilitate the accessibility of copyrighted work to print-disabled persons can't reproduce, distribute, or make available the work for the exclusive benefit of print-disabled persons. Eventually, this creates difficulty to implement the obligation imposed in the Marrakesh Treaty and thereby to realize the human rights of print-disabled persons. Hence, to comply with the rules of the Marrakesh Treaty, Ethiopia needs to provide an exception to circumvent the technology protected copyrighted work for the benefit of print-disabled persons. Otherwise, it will be naive to think to realize the rights of print-disabled persons through other exceptions without allowing the circumvention of protected works.

3.1.1.6. Mandatory Licensing

The other copyright limitation that the Ethiopian copyright law recognizes to balance the interests of the right holder and the public is mandatory licensing by the Ethiopian Intellectual Property Office (EIPO). The Proclamation authorizes the EIPO to grant a "license to authorize the reproduction or translation or broadcasting of a published work' regardless of the consent of the owner or his heirs for the sake of public interest.[176] As a rule, the right to grant a license to another person, the licensee, is an exclusive economic right of the copyright owner. However, to safeguard the interests of the public, the law tries to strike a balance by applying mandatory licensing to reproduce, translate, or broadcast a copyrighted work. When we appreciate this limitation from the perspective of print-disabled persons, we can argue that it is an essential means to facilitate the

[175] Samuel Samiai Andrews, Globalization, Sovereignty and Ethiopia in the Age of IP Creative Jurisprudence, *The International Journal of Ethiopian Legal Studies,* Vol. 4, No. 1, (2020), p.130.
[176] Proclamation No. 410/2004, Art. 17/1.

accessibility of copyrighted works to the benefit of print-disabled persons. The EIPO may grant a mandatory license to educational institutions, NGOs, or other entities to reproduce, translate, or broadcast works for print-disabled persons. But it has to be noted that the owner of copyright needs to be paid a fair compensation to be determined by a regulation.[177]

This limitation, however, has some drawbacks when we appreciate it from the perspective of print-disabled persons. Firstly, it lacks precision when to be exercised. The Proclamation empowers the EIPO to grant a mandatory license when it is for a public purpose. But it is not clear what it means by public purpose. Can, for example, reproduction for the benefit of a single print-disabled person be a public purpose? or what are the standards to say it is for the public purpose? Secondly, this limitation is not an outright limitation. Mandatory licensing becomes effective only when EIPO believes there is a need to apply the mandatory licensing on a specific work. This makes the rights of print-disabled persons to be dependent on the will of the office. It is inconvenient to require a mandatory license to reproduce, translate, or broadcast each copyrighted work for the benefit of a print-disabled person. Thirdly, through this limitation, the EIPO can't license any alteration of work.[178] But, in some cases, some modifications or alterations may be needed to make a work accessible to print-disabled persons. Hence, mandatory licensing is not sufficient to facilitate access to copyrighted works for print-disabled persons.

Conclusion

The corpus of human rights law recognizes several fundamental human rights and principles of print-disabled persons including the right to access to information, the right to read, the right to education, the right to participate in cultural life, the right to enjoy the benefits of scientific progress, and the right to employment. Besides, the equal enjoyment of human rights by print-disabled persons is protected through the principle of non-discrimination and equality under human rights law. Despite this fact, these rights are often violated due to copyright law barriers to access the accessible format of a copyrighted work. Copyright law denies them to access the accessible format of a work by giving the owners an exclusive economic right including the right to reproduction, distribution, adaptation, and making available to the public. To avoid such legal barriers, in June 2013, the international community adopted the Marrakesh

[177] *Id.*, Art. 17/2.
[178] *Id*, Art. 17/3.

Treaty aiming to facilitate access to the accessible format of a copyrighted work to print-disabled persons. Ethiopia has ratified this Treaty on March 13, 2020. Though Ethiopia ratified the Treaty, it hasn't made any change in its copyright law so far. Hence, this article has made a critical appraisal of the existing Ethiopian copyright law whether it suits to implement the Marrakesh Treaty.

The article concluded that based on the existing national copyright law, Ethiopia couldn't realize the obligations imposed under the Marrakesh Treaty. That is, though the present copyright law provides exceptions or limitations applicable to all persons, including print-disabled persons, they are inadequate to address the special needs of print-disabled persons and thereby to attain the objective of the Treaty. Specifically, some of the current exceptions or limitations are not per se_they are contingent upon some conditions. For instance, reproduction through mandatory licensing is contingent on the decision of the EIPO. Also, the existing exceptions or limitations do not incorporate all exceptions or limitations that the Treaty requires to be incorporated in the national copyright law. It doesn't, for example, permit the circumvention of technologically protected works, adaptation, and distribution of a published work, the exportation, reproduction, and distribution of a copyrighted work for the benefit of the third person. Moreover, some of the existing exceptions or limitations are restricted to some specified purposes. For example, reproduction by libraries, archives, and other similar institutions is permitted only if it is to study, scholarship, or private research. Because of such limitations in the existing copyright law of Ethiopia, it is hardly possible to facilitate access to published works for persons who are blind, visually impaired, or otherwise print-disabled.

Therefore, to implement the Treaty effectively in the country, Ethiopia needs to amend its copyright law in such a way that accords with the Treaty. The amendment should come up with inclusive copyright law rules that can facilitate the realization of the rights of print-disabled persons. It shall provide exceptions and limitations that can be exercised *per se*, and enable print-disabled persons to have access to the accessible format of copyrighted works.

Adjudication of Tax Disputes within the Tax Authority in Ethiopia: Critical Reflections on the Law and the Practice

Aschalew Ashagre Byness[♦]

Abstract

The experiences of various countries clearly demonstrate that the tax authority is vested with adjudication of tax disputes arising between taxpayers and itself when a taxpayer does not accept the decision of the authority. In Ethiopia, the 2016 Federal Tax Administration Proclamation (hereinafter FTAP) has unequivocally provided that if a taxpayer is aggrieved by a tax decision of the tax authority and if he wants to challenge that decision, he is compelled to take his grievance to the Review Department of the Tax Authority- an authority accountable to the Ministry of Revenues, which itself is the successor of the former Ethiopian Revenues and Customs Authority (ERCA). Before the coming into force of the FTAP, taking a tax case to the Review Committee of ERCA was not mandatory while the FTAP has clearly provided that taking a tax case to the Review Department is mandatory. This shows that the role of the Review Department has become more influential on the taxpayer as compared to its predecessor- the Review Committee. Therefore, it is imperative now to investigate the review power of the Department and the overall process of tax dispute resolution within the tax authority. This piece is, therefore, aimed at critically examining the process of tax dispute resolution at the Review Department of the Tax Authority at federal level. This study has found out that there are certain meaningful improvements made by the FTAP that enhance access to justice to the taxpayer and the fairness of the process. Nevertheless, the study has revealed several shortcomings in the FTAP including lack of clearly defined scope of review power of the Review Department; absence of clear provisions dealing with appointment, composition and removal of members of the Review Department; absence of unequivocally articulated right to be heard before the Review Department; that FTAP does not seem to have

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given sufficient time to taxpayers to lodge an application and that it has not provided exceptional circumstances where the tax authority should bear burden of proof. Therefore, the author recommends that the problems identified needs to be addressed by amending the FTAP.

Key words: *Tax Dispute, Internal Review, Hearing, Burden of Proof, Notice of Appeal, Objection Decision*

Introduction

It is obvious that tax is a compulsory levy which is levied and collected by the government of a given country irrespective of the will of an economic unit (a person) so designated as a taxpayer by a piece of tax legislation or tax code as the case may be.[1] This means that a government of a given country has an inherent power of taxation[2] whether that government is dictatorial, democratic or monarchical as the world history of taxation clearly demonstrates.[3] Nonetheless, the fact that a government enjoys such power does not mean that it is not accountable to its citizens concerning the kind of taxation system it puts in place. Therefore, tax systems have to meet certain standards by embracing critical features of a good tax system pertaining to substantive and administrative matters of taxation.[4] One of the most important components of a fair tax administration is the existence of a fair tax dispute resolution system.[5] That is why many jurisdictions have established both internal (administrative) disputes resolving organ (department) within the tax authority and external dispute resolution bodies such as quasi-judicial tax tribunals (commissions), a special tax court or ordinary courts as the case may be.[6]

[1] See Victor Thuronyi, *Comparative Tax Law,* Kluwer Law International, (2003), p.45.

[2] Odd-Helge Fjeldstad, Taxation, Coercion and Donors: Local Government Tax Enforcement in Tanzania, *Journal of Modern African Studies*, Vol. 39, No. 2, (2001), p.293.

[3] See Hanneke Du Freez, A Construction of Fundamental Principles of Taxation, PhD thesis, University of Pretoria, (2015), pp.46-61.

[4] Clinton Alley and Duncan Bentley, A Remodeling of Adam Smith's Tax Design Principles, *Australian Tax Forum*, Vol. 20, No. 4, (2005),p.586; see also Beverly I. Moran, Adam Smith and the Search for an Ideal Tax System, available at taxprof.typepad.com/taxprof_blog/files/Moran.pdf, accessed on July 15, 2020. See also Richard M. Bird, Improving Tax Administration in Developing Countries, J*ournal of Tax Administration*, Vol.1, No.1, pp.23-38; see also Richard M. Bird, Administrative Dimensions of Tax Reform, *Asia-Pacific Tax Bulletin*, (2004), pp.134-150.

[5] Binh Tran-Nam and Michael Walpole, Independent Tax Dispute Resolution and Social Justice in Australia, *University of New South Wales Law Journal*, Vol. 35, No.2, (2012), PP.470-474.

[6] See generally Simon Whitehead (ed.),*Tax Disputes and Litigation Review*, 8th ed., Law and Business Research LTD,(2019)

In Ethiopia, the Ministry of Revenues-a federal government organ-[7]is empowered to administer federal taxes[8] and resolves tax disputes using its internal review organ called the Review Department. The same arrangement exists in regional states since the tax administration proclamations of regional states are verbatim copies of the FTAP. Consequently, the structures and contents of the regional tax disputes resolution systems are virtually the same as the structure and content of the tax dispute resolution system of the Federal Government.[9] On account of this, the discussions and legal analyses made under this piece, based on the federal tax dispute resolution system, are equally relevant to have a clear picture of the tax dispute resolution system of the regional states. Therefore, the provisions of the regional tax administration proclamations have not been cited under each and every discussion and analysis made under this work as doing so cannot serve any purpose except duplication of same legal provisions, taking unnecessary space and wasting time and energy.

This contribution is principally aimed at critically examining the law dealing with the process of tax dispute resolution within the tax authority in Ethiopia. Consequently, the main research method employed in this piece is doctrinal research method as this method is concerned with a thorough investigation of legal concepts, values, principles and existing legal texts such as statutes and case laws.[10] Therefore, by using this research method, the author has analyzed legal provisions that are germane to this study, special emphasis being had on the provisions of the FTAP. Nonetheless, because doctrinal research method is not capable of addressing how the law is implemented, the author has supplemented this method by a qualitative research method as the latter is

[7] Federal Administrative Procedures Proclamation, Proclamation No. 1183/2020, *Federal Negarit Gazetta,*(2020). Article 2(1) of this proclamation defines an administrative agency as an executive organ of the Federal Democratic Republic of Ethiopia duly established by law and includes the executive organs of city administrations accountable to the Federal Government.

[8] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No.1097/2019, *Federal Negarit Gazetta*,(2019), Article 31.

[9] See for instance, The Amhara Regional State Tax Administration Proclamation, Proclamation No.241/2016, *Zikre-Hig*,(2016), Articles 52-55; Tigray National Regional State Tax Administration Proclamation, Proclamation No.282/2016, Tigray Negarit Gazetta,(2016). It is good to note that the Tigray Region Tax Administration Proclamation simply adopted the FTAP except that there are very few modifications in order to make it compatible to the situations in the region. However, no change at all has been made on the provisions of the FTAP dealing with resolution of tax disputes by the review department. Thirdly, see the Harari Region Tax Administration Proclamation, Proclamation No.136/2016, Articles 52-55; Afar Regional State Tax Administration Proclamation, Pro. No…. /2016, *Afar Dinkara Gezzet* (2016), Articles.52-55. The same is true with the tax administration proclamations of other regions.

[10] See generally Terry Hutchinson and Nigel Duncan, Defining and Describing What We Do: Doctrinal Legal Research, *Deakin Law Review*, Vol.17, No.1, (2012), pp.1-37.

instrumental to capture and categorize social phenomena and their meanings.[11] Therefore, the author has conducted in-depth interviews with fourteen (14) purposely selected individuals (consisting of members of the review department, tax practitioners, lawyers and taxpayers), has analyzed relevant documents and has made use of his personal observations as he is a consultant and attorney at law.

This piece is organized as follows. Section one discusses justifications for resolution of tax disputes by an internal review organ, scope of review power of an internal review organ and reviewable issues, time limit for filing a notice of objection to the internal review organ and time limit for making an objection decision. The second section highlights establishment, accountability, membership and the scope of review power of the Review Department of the tax authority in Ethiopia. Section three is deployed to the analysis of issues in relation to the actual tax cases proceedings before the Review Department by focusing on the time limit to file a notice of objection, the contents of a notice of objection, the hearing and burden of proof while section four analyzes issues pertaining to contents of a recommendation and objection decision. Finally, the work comes to an end with brief concluding remarks.

1. Overview of Resolution of Tax Disputes within the Tax Authority

1.1. Justifications

Needless to say, a tax authority is an administrative agency whose main function is collecting taxes in accordance with tax legislation. However, as any other administrative agency, it engages in internal tax dispute adjudication where a taxpayer is aggrieved by its decision. In many countries, giving the taxpayer an opportunity to get his grievance resolved by an internal review organ has become a common practice since there has been a firm belief that such approach strengthens the integrity of the tax administration, expedites the process of redressing the grievance of taxpayers and lightens the caseloads encountered by tax tribunals and ultimately by the regular courts.[12] An effective internal tax dispute resolution mechanism is not only less expensive than formal tax

[11] Lisa Webley, Qualitative Approaches to Empirical Legal Research, in Peter Cane and Herbert Kritzer(eds.), *The Oxford Handbook of Empirical Legal Research*, (2010), p.2.

[12]World Bank Group, The Administrative Review Process for Tax Disputes: Tax Objections and Appeals in Latin America and the Caribbean: A Toolkit, documents.worldbank.org › curated › pdf › The-Admi...(accessed April 12, 2020),p.18.(hereinafter *The Administrative Review Process for Tax Disputes*)

litigation before quasi-judicial organs and the regular courts, but also it gives the taxpayer a real chance to be heard as speedily as possible.[13]

In addition to affording taxpayers the chance to get wrong tax decisions revised and corrected, a well-organized internal review system is also beneficial to the government as such system helps tax authorities to speedily identify and correct mistakes at minimal administrative cost.[14] Moreover, this mechanism gives both the tax authority and the taxpayer the opportunity to rectify misunderstandings and resolve their disputes before the latter resorts to appellate organs.[15]

According to the World Bank Handbook on Tax Simplification, putting in place an internal review mechanism within the tax authority is aimed at providing credible, independent and timely resolutions of tax disputes thereby boosting public confidence in the tax system and minimizing corruption and abuse of power by tax officers.[16] The Organization for Economic Development and Cooperation (OECD) considers internal tax dispute resolution system as an instrument of protecting the rights of taxpayers and ensuring the integrity of the tax authority. For the OECD Guidelines for tax administration, internal review system is created to realize efficiency, self-control and justice.[17] Regarding efficiency, internal review process should realize resolution of tax disputes in a timely and less costly manner as opposed to courts of law while the self-control becomes a reality since such process offers the tax authority the chance to evaluate its own "systematic accuracy and administrative capacity." The internal review process is also believed to promote justice because "a swift and inexpensive review process by an independent agency within the tax authority can greatly enhance the perceived fairness and credibility of the dispute resolution process."[18]

Although the internal review mechanism is said to be advantageous both to the tax authority and the taxpayers, there are also counter-arguments raised against such mechanism. To begin with, an internal review mechanism is criticized because the system lacks openness, or publicity; it negates the principle of fair

[13]Id.
[14]Id.
[15]See European Commission's Directorate-General of Taxation and Customs Union, Guidelines for a Model for A European Taxpayers' Code, European Union, Brussels, (2016), https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/guidelines-model european-taxpayers-code_en, (accessed March,15, 2020), p.16.
[16]World Bank, Handbook on Tax Simplification, Open Knowledge.worldbank.org › handle, (accessed March 22, 2020), p.131.(Hereinafter Handbook *on Tax Simplification*)
[17]See OECD, Tax Administration, (2013), www.oecd.org › ctp › tax-administration-2013, (accessed April 12, 2020), p.320.(hereinafter Tax *Administration*)
[18] Id.

play; the mechanism may be a victim of political patronage as opposed to merit or competence since the ones who entertain the dispute can be appointed because of their political affiliation and loyalty instead of their professional background and experience.[19] The other criticism is that members of the internal review organ may lack the requisite training and knowledge in which case these members may give a decision on the basis of their notion of justice in disregard of established norms, parameters and forms. Furthermore, it is argued that although resort to internal review is praiseworthy owing to flexibility, flexibility could be a source of uncertainty and unpredictability where aggrieved taxpayers may not be in a position to determine with any reasonable degree of precession what the outcome of the case may be.[20]

Because the above problems can undeniably occur, an internal review system should adhere to critical prerequisites and principles. The major ones are independence, transparency, legally defined rules and harmonized internal review procedures. Independence pertains to "the administrative distance" existing between the tax office that made the original tax decision and the office that is entrusted to review tax decision though complete separation of the two organs is hardly possible.[21] Transparency is instrumental since it helps the taxpayer to get key information regarding the review process. Hence, the organ that reviews the tax dispute is duty-bound to provide clear and easily accessible information regarding the steps involved in the review process from the beginning to the end of the process.[22] Moreover, in order to create a trustworthy internal review system, the law regulating the internal tax dispute review process is expected to be clearly understood to persons who are not specialists. With a view to avoiding taxpayers' confusions and ensuring consistent application of the law, the tax administration law and the tax authority are required to clearly and consistently define key terms germane to the internal tax dispute review process.[23]Equally important is harmonizing the internal review procedures since putting in place multiple objection procedures is "unnecessary and potentially wasteful."[24]

When we come to the reality on the ground, the practice of many countries around the world demonstrates that the internal review process is a widely used

[19]Duru Onyekachi, Administrative Adjudication: An Overview, https://www.academia.edu/6792919/Administrative_Adjudication_An_Overview, (accessed October 21, 2019), pp.3-4.
[20]Id.
[21]The Administrative Review Process for Tax Disputes, supra note 12, p.27.
[22] Id.
[23] Tax Administration, supra note 17, p.223.
[24]The administrative Review Process for Tax Disputes, supra note 12, p.31.

review mechanism. In several countries, taking a case to an internal review organ of the tax authority is mandatory while in several other countries resorting to this kind of dispute resolution mechanism is left to the free choice of the taxpayer. For instance, in Australia, a taxpayer aggrieved by the decision of the Australian Tax Office (ATO) is compelled to lodge an objection to the ATO as provided under the taxation administration Act of the country.[25] The Greek experience is also another example where interval review is mandatory.[26] By the same taken, bringing a complaint against a tax assessment to a tax director is mandatory in Belgium, [27] Denmark,[28] Dominican Republic,[29] and the Netherlands.[30]

On the contrary, there are legal systems where taking a tax grievance to the internal review organ is optional. In this regard, the Nigerian and the UK approaches are mentionable among many other jurisdictions. In Nigeria, the Federal Inland Revenue Act has provided that a taxpayer aggrieved by an assessment, action, decision or demand notice made upon him by the Federal Inland Revenue Service has the liberty to appeal directly to the tax appeal tribunal.[31] By the same token, in UK a taxpayer may file a written protest to Her Majesty Revenue and Custom (HMRC) against decisions involving direct taxes where the protest may be reviewed by an officer who was not involved in the original decision against which the petition is field. However, such taxpayer may opt out this application and may directly lodge an appeal to the tax appeal tribunal.[32] Moreover, in Brazil,[33] Ireland[34] and Norway[35] taking a tax case to an internal review organ is optional.[36]

[25]See Evgeny Guglyuvatyy and Chris Evans, Administrative Approaches to Tax Dispute Resolution: Alternative Perspectives from Australia and Russia, *Journal of Comparative Law*, Vol. 10, No.2, (2018), p.2.

[26]Ioannis Stavropoulos, Greece, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019) , p.118.

[27]Caroline P. Docclo, Belgium, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.20.

[28]Jacob Skaadstrup Andersen, Denmark, in Simon Whitehead (ed.), *Tax Disputes and Litigation Review*, 7th ed. (2019), p.64.

[29]Christoph Sieger and Fabio J Guzman Ariza, Dominican Republic, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.72.

[30]Pual Kraan, The Netherlands, in Simon Whitehead(ed.), Tax Disputes and Litigation Review, 7th ed., (2019), p.208.

[31]See Gospel R. Adams, An Evaluation of the Rules of Practice and Procedure of Tax Appeal Tribunal in Nigeria, LL.M thesis, Ahmadu Bello University, (2012), kubanni.abu.edu.ng › jspui › bitstream › AN EVALUATION OF THE RU...(accessed November 29,2019),p.41.

[32]Melinda Jone, Tax Dispute Systems Design: International Comparisons and the Development of Guidance from a New Zealand Perspective, PhD. thesis, University of Canterbury,2016, p.19, p.139.

[33]Daniella Zagari and Maria Egenia Doin Vieira, Brazil, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.32.

1.2. Scope of Review Power and Reviewable Issues

The scope of review power and reviewable issues by an internal review organ of a tax authority are important concerns of tax administration laws. The experience of various countries demonstrates that these issues have been treated differently in different jurisdictions. As a matter of principle, tax disputes more often than not arise during tax audit or following issuance of a tax assessment or reassessment notice.[37] However, internal reviews are not circumscribed to tax audit or assessment issues only. Rather, there are jurisdictions that allow the taxpayers to raise objections in connection with any aspect of the way their tax responsibility is treated and handled. There are, however, countries which have confined the scope of internal review to an assessment as is the case, for example, in Uganda and Australia.[38] On the contrary, there are other jurisdictions that allow non-tax assessment reasons as valid grounds for objection before the internal review organ. In this regard, the South African approach is a typical example as the country's tax administration act allows a taxpayer to file objection against various non-assessment issues such as decision by the tax authority not to remit penalty, failure to authorize refund, declaration not to extend the period for lodging an objection and so on.[39]

When we come to the scope of reviewable issues, we understand that there are no uniform practices across jurisdictions. In fact, the approaches are divided. While there are approaches which preclude the internal review of system from accepting objections involving interpretation of laws (because it is believed that interpretation of tax law should be left to administrative tribunals or courts), there are also other approaches which allow the internal review organ to make interpretation of laws.[40]

[34]John Gulliver, Maura Dineen and Niamb Keogh, Ireland, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.143.
[35]Thor Leegaard, Norway, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), pp.252-253.
[36]This means that an aggrieved taxpayer has the right to elect either to take a tax case to an internal review organ or to an administrative tribunal (which is separate and independent of the tax authority) or to a regular or an administrative court.
[37]Bewket Abateneh, The Tax Appeal System under the New Tax Administration Proclamation: Improvements and Potential Shortfalls, LL. M, Bahir Dar University, (2017), p.33.
[38]Id.
[39]Johan Kotze, South Africa, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, Law Business Research (2014), p.241.
[40]Bewuket, supra note 37, p.33.

1.3. Time Limit for Filing and Decision Making

In relation to resolution of tax disputes at the internal review stage, filing and decision making time limits are important concerns both to the taxpayers and the tax authority. That is why such issues have received attention in various jurisdictions although the duration of time varies from jurisdiction to jurisdiction. For example in Canada, a taxpayer aggrieved by the decision of the Canadian Revenues Authority (CRA) is required by law to file an objection within 90 days reckoned from the date of issuance of the tax assessment notice.[41] In Kenya, an aggrieved taxpayer has only 30 days to file an objection to the internal review organ as from the date of issuance of the tax assessment notice. [42]In Belgium, a tax complaint against a tax assessment should be made within six months and three working days after the tax bill being sent to the Tax Director.[43] In Portugal, an administrative appeal is to be filed within 120 days as from the date of receipt of an assessment notice by the taxpayer.[44] In Brazil,[45] any taxpayer aggrieved by the decision of the tax authority is entitled to lodge his complaint to the competent organ within 30 days of the receipt of the tax assessment. The same is true in Nigeria,[46] Zambia[47] and India.[48] In Uganda, the Income Tax Act has stipulated that a taxpayer who is dissatisfied with a tax assessment can lodge an objection to the assessment with the commissioner within 45 days after service of the notice of assessment.[49]It is 90 days in the USA[50]and the Republic of Korea[51] while it is 60 days in Pakistan[52] and China.[53]

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[41] Karen Dawn Stilwell, Mediation of Canadian Tax Disputes, LL.M thesis, University of Toronto, (2014), p.19.

[42]See The Republic of Kenya Tax Procedures Act, No. 29 of 2015, Revised Edition 2016(2015), Section 51(2), (7).

[43] Docclo, supra note 27, p.20.

[44]Diago Ortigao Ramos and Pedro Vidal Matos, Portugal, in Simon Whitehead (ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), P.277.

[45]Marcelo Habib Garvalho, Tax Appeal Processes in the Treasury Secretariat of the State of Rio De Jeneiro and the Internal Revenue Service, School of Business and Public Management IBI-The Institute of Brazilian Issues, Minerva Program, (Fall 2013), Washington D.C, www.gwu.edu/~ibi/minerva/Fall2013/Marcelo_Carvalho.pdf,(accessed April 29, 2020),p.7.

[46]Olumide K. Obayemi, An Assessment of the Nigerian Tax Appeal Tribunal and the Need for a Speedier and More Efficient System, *Research Journal of Finance and Accounting,*Vol.6, No.6, (2015),p.26.

[47]Kelvin Mpembamoto, An Evaluation of the Revenue Appeals Tribunal of Zambia, LL.B Thesis, University of Zambia, (2009),p.17.

[48]See Appeal to Commissioner of Income-Tax (Appeals), Income Tax Department, Department of Revenue,' Ministry of Finance, the Government of India, www.incometaxindia.gov.in/Tutorials/34-%20Appeal%20to%20CIT.pdf, accessed *March 16, 2020,* P 3.

[49]See the Ugandan Income Tax Act, 2014, Art. 99(1), omp.go.ug/assets/media/resources//206/INCOME%20TAX%20ACT.pdf, accessed March 10, 2020.

[50] Garvalho, supra note 45, p.24.

[51]See Korean Taxation, Ministry of Strategy and Finance 2012, p. 220, available at https://www.nts.go.kr/eng/data/KOREAN TAXATION2012.pdf, last visited on 30 May 2020.

[52]See the following piece in this regard; Income Tax Appeals, available at download1.fbr.gov.pk/docs/20144171244341203Appeals.pdf, (accessed May 232020)

Generally, a study conducted by the OECD demonstrated that time of appeal in the world mostly varies from 21 days to 90 days.[54]

When it comes to the time-limit within which a decision has to be given, stipulating a time frame has become a common practice in many jurisdictions of the world. Nonetheless, we notice that there are variations of the time limit among different jurisdictions.[55] For instance, in Austria, the tax authority is required by law to give a decision within six months after the filing of the administrative appeal to the same authority. If the tax authority fails to meet this deadline, the aggrieved taxpayer has the liberty to lodge a complaint with the federal tax court invoking the inactivity of the tax authority within the defined time.[56] By the same token, the internal tax dispute decision making body is duty-bound to render its decision within six months in Belgium[57] and Canada.[58] There are, however, other jurisdictions that have provided even shorter periods. For instance, in Greece[59] and the Dominican Republic,[60] internal review decisions should be made within four months and three months respectively. In the Netherlands,[61] the Tax Inspector is required by law to give its decision within six weeks while four months is the time limit in Portugal.[62]

2. Establishment, Accountability, Membership and Scope of Review Power of the Review Department in Ethiopia

2.1. Establishment and Accountability

The FTAP has stated that the Tax Authority is duty-bound to issue a directive that would specify "the procedures for reviewing an objection (including hearings) and the basis for making recommendation to the Authority and the

[53]Fuli Cao, *Corporate Income Tax Law and Practice in the People's Republic of China*, Oxford University Press, (2011), P.396.
[54]David Crawford, Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean, Chapter 11, UASAID's Leadership in Management, (2013)www.usaid.gov/where-we.../latinamerican...caribbean/tax-administration, (accessed 30 March 2020), p. 20.
[55]In general, whitehead (ed.), supra note 6.
[56]See Gerald Schachner, Kornelia Wittmann and Nicolas D.Wolski, Austria, in Simon Whitehead (ed.), *Tax Disputes and Litigation Review*, , Law Business Research,(2019),p.7.
[57] Docclo, supra note 27 ,p.20.
[58]Dominic C Belly(2019),Canada, in Simon Whitehead(ed.), Tax Disputes and Litigation Review, 7th ed., (2019), p.66.
[59] Stavropoulos, supra at note 26, p.118.
[60] Sieger and Ariza, supra note 29, p.72.
[61] Kraan, supra note 50, p.210.
[62] Ramos and Pedro Vidal Matos, supra note 44, p. 277.

decision making procedures."[63] Because of this, the ERCA issued a directive in 2017 which established the Review Department.[64] However, this directive was expressly repealed in February 2020 and replaced by another directive issued by the Ministry of Revenues which has been functional since then.[65] The new directive has contained relevant provisions concerning, *inter alia,* the organization of the Department,[66] accountability,[67] assignment of personnel of the department,[68] powers and responsibilities of the Department in general,[69]powers of the Department located at the Head Office,[70] powers of the branch Review Departments,[71] powers and responsibilities of the secretariat of the Department,[72] procedures of making recommendations and decision making,[73] contents of the recommendation,[74] procedures dealing with filing complaints,[75]and duration of decision making.[76]

Regarding accountability, the Directive has provided that the Review Department established at the head office of the Ministry is accountable to the Minister or to an official delegated by the Minister[77] whereas Review Departments established at branch offices of the Ministry are accountable to the General Manager of the branch concerned.[78] In addition, the Directive has made it clear that Review Departments established at branch offices are required to

[63]Federal Tax Administration Proclamation, Proclamation No.983/2016, Federal Negarit Gazetta,(2016), Article, 55(2)(hereinafter *the FTAP*),

[64]Directive Issued by the Ethiopian Revenues and Customs Authority to Establish the Review Department and Determine Its Working Procedures, Directive No. 127/2017 (Amharic) (July 2017) unpublished, http://www.mor.gov.et/index.php/directives/amharic-format#faqnoanchor, (accessed April 5,2020)

[65]Directive Issued to Define the Working Procedures of the Tax Complaints by Review Department, Directive No.169/2012 E.C (in Amharic), available with the author in soft copy.(hereinafter *Working Procedures of the Tax Complaints by Review Department*)

[66]Id., Article 4.

[67]Id., Article 8.

[68]Id.

[69]Id., Article.9.

[70]Id., Article10. As per this article of the directive, if the applicant taxpayer is a federal large taxpayer, his complaint can be accepted and entertained by the Review Department located at the head office of the Ministry if the disputed amount of tax, including penalty and interest, is above 300,000,000.00(three hundred million Birr); if the complainant taxpayer is a medium federal taxpayer, his grievance can be accepted and entertained if the disputed amount including penalty and interest is above 200,000,000.00(two hundred million Birr) and in the case of small federal taxpayer complainant , his case falls within the power of the Review Department located at the head office if the disputed amount including penalty and interest is above 100,000,000.00(one hundred million Birr).

[71]Id., Article 11.

[72]Id., Article 12

[73]Id., Article 13.

[74]Id., Article 14

[75]Id., Articles 15-18.

[76]Id., Article19.

[77]Id., Article 7(1).

[78] Id., Article 7(2).

make periodic reports to the Review Department established at head office of the Ministry[79] which is located in Addis Ababa.

2.2. Membership to the Review Department

In the 21st century, tax disputes have become more and more complex owing to various reasons[80] even in developing countries such as Ethiopia let alone in advanced economies. Therefore, the resolution of tax disputes nowadays requires understanding wide ranging and complicated factual and legal issues requiring expertise and professionalism making the selection and appointment of members of an internal review organ an important concern. The issue of membership has become one of the most important issues in tax dispute resolution at this stage because creating an internal review department capable of effective and efficient disposition of tax disputes is unthinkable in the absence of appropriate members.

As far as the Ethiopian context is concerned, the FTAP[81] is mute regarding membership issues apart from empowering the tax authority to establish an internal review department. Rather, the FTAP empowered the tax authority to establish the Review Department by issuing a directive.[82] On the basis of this empowerment, the Federal tax Authority issued the afore-mentioned directive,[83] which, *inter alia*, deals with membership to the Review Department. Art. 8(1) of the Directive states that members of the Review Department at head office are to be appointed by the Minister of Revenues while those working in the review departments established at branch offices are appointed by the manager of the branch office concerned. Sub article 2 of the same article has stipulated that the Minister or the manager of a branch office may assign an individual as a member of the Review Department by appointment or by promoting the existing professionals. As per Art.8(4) of the Directive, professionals assigned to work under the Review Department are expected to be those who served in auditing, tax assessment and legal services. However, Directive is mute regarding composition, number and removal of members of the Review Department. Therefore, the silence of the directive with regard to these issues means that

[79] Id., Article 7(3).
[80] Margaret McKerchar, Laura R. Ingraham and Stewart Karlinsky, Tax Complexity and Small Business: A Comparison of the Perceptions of Tax Agents in the United States and Australia, *Journal of Australian Taxation*, Vol.8, (2005) pp.289-327; Samuel A. Donaldson, The Easy Case against Tax Simplification, *Virginia Tax Review*, Vol.22, (2003), pp.646-746.
[81] FTAP, supra note 63.
[82] Id., Article 55.
[83] Working Procedures of the Tax Complaints by Review Department, supra note 65.

composition, numbers and the removal of members are determined by the Minister at head office and by the Manager at branch levels demonstrating that the tax authority enjoys unrestrained discretionary power in these respects.

When we come to the practice, each review department is composed of five members drawn from tax auditors, tax assessors and legal professionals. Members of the Review Department interviewed by the author made it clear that because tax cases have become complicated and more sensitive, the tax authority assigns individuals who have the requisite knowledge and experience in law and accounting particularly at large taxpayers' offices.[84] On the contrary, other interviewees informed this author that the selection and appointment of members is at the pleasure of the appointing official. Instead of relying on merit, political outlook and ethnic composition have been important factors for the selection and appointment of members of the review department.[85] Regarding removal of members, because members are employees of the Tax Authority, it is claimed that they cannot be arbitrarily removed; rather, they are removed in accordance with the relevant provisions of the Ethiopian civil service law and internal rules and regulations issued by the Ministry.[86]

2.3. Scope of the Review Power (of the Review Department) and Reviewable Issues

The several provisions of the FTAP have dealt with the power of the Review Department. Art. 54(1) has made it clear that if a taxpayer is dissatisfied with a *tax decision* and wishes to challenge the decision, he is required to file a notice of objection to the Review Department. Therefore, it is worthwhile to discuss what a tax decision is to get a clear picture of scope of review of the Review Department.

Art. 2(34) of the FTAP has enumerated what tax decisions are. According to this sub-article, a tax decision is a tax assessment (other than a self-assessment), a decision on application under Art.29 (amended tax assessment), a determination made under Art. 40(2) (a tax assessment made against a receiver), a determination of a secondary liability or the amount of tax recovery costs

[84]Interview with Ato Zewude Damtew, Chairperson of the Review Department of Large Taxpayers of Western Addis Ababa Region, Ministry of Revenues, September 29, 2020;interview with Ato Tolu Fite, General Manger of North West Branch. Ministry of Revenues, October 28, 2020.

[85]Interview with Ato Teferra Lemma, General Manager of Steely RMI PLC, September 22,2020; interview with AtoYohannes Woldegabriel, Director of the Arbitration Institute, Addis Ababa Chamber of Commerce and Sectorial Association, September 23, 2020.

[86]Interview with Zewude Damtew, cited above at note 84.

payable, a determination of late payment interest payable, a decision to refuse an application for a refund under Art. 49 or Art. 50, a determination of the amount of an excess credit under Art. 49,[87] the amount of a refund under Art.50[88] or the amount of refund required to be repaid under Art.50[89] and a determination of the amount of unpaid withholding tax under Art. 92(3) of the Federal Income Tax Proclamation (FITP).

It has to be noted that the scope of review power of the Review Department is confined to accepting a complaint from an aggrieved taxpayer involving any one of the above grounds of tax decision. When we closely see the constituent elements of tax decision defined by the FTAP, we can realize that the Ethiopian dispute resolution system by the internal review department of the tax authority is confined only to assessment based determinations made by the tax authority. This means that taxpayers cannot take non-assessment disputes to the Review Department which demonstrates that the FTAP has not made any departure from the previous tax laws of Ethiopia as far as the scope of review power of the internal review organ of the tax authority is concerned. The practice also shows that the scope of review power of the Review Department does not go beyond accepting and entertaining assessment based tax disputes. If taxpayers have non-assessment grievances, they resort to other administrative complaint mechanisms.[90]

Though the scope of review power of the Review Department is confined to disputes arising from tax assessment, the Department has the power to review both legal and factual issues. This can be understood by closely examining the relevant provisions of the FTAP that empowered the Review Department to review tax decisions of the authority which involve both factual and legal issues.[91] The practice on the ground also shows that the Department reviews tax disputes involving both factual and legal issues so long as the case is confined to tax assessment.[92]

[87]Id.
[88]Id.
[89]Id.
[90]Interview with Zewude Damtew, supra note 84; interview with Ato Semaw Nigatu, Consultant and Attorney-at-Law, September 24, 2020; interview with Ato Mesfin Taffese, Principal Attorney at Mesfin Taffese Law Office, September 24, 2020.
[91]FTAP, supra note 64, Article 2(34) cum Article 55.
[92]Interview with Ato Amare Lakew, private tax accountant and consultant, September 18, 2020; interview with Ato Tasew Abitew, General Manager of Tamire and Family PLC, October 22, 2020; interview with Ato Girma Tafesse, Tax Consultant at East Africa Holding Company, September 30, 2020.

3. Proceedings at the Review Department

3.1. Time Limit for Lodging Notice of Objection

As provided under the FTAP, a taxpayer dissatisfied with a tax decision (and who desires to challenge such decision) is required to file what is called a notice of objection with the Review Department within 21 (twenty one days) after he has received the notice of the tax decision.[93] However, the Customs Proclamation[94] has provided that the complaint has to be filed by the taxpayer within 15 working[95]days from the date of the written decision causing the grievance. Apparently, it seems that the FTAP[96] and the Customs Proclamation have set different time limits for lodging a complaint to the Review Department of the Tax Authority and to the Complaints Review Section of the Customs Commission respectively. However, the time limit set under both proclamations is nearly the same since the 21 days provided under the FTAP includes non-working days while the time limit set under Customs Proclamation is confined only to working days.

In the previous tax laws of Ethiopia, a taxpayer aggrieved by the decision of the tax authority would file an application for review to the then Review Committee within 10 (ten) days after receiving the tax assessment notice.[97] This ten days duration was one of the most important sources of discontent to taxpayers since they claimed that it was a very short period of time given that filing a complaint to the then review committee was not an easy task.[98] When the FTAP was at its drafting stage, taxpayers, stakeholders and various professionals vehemently argued that the ten days' time limit should be extended to 30 days. However, the

[93] FTAP, supra note 64, Article 54(1).

[94]Customs Proclamation, Proclamation No.859/2014,(as amended), *Federal Negarit Gazetta*, (2014), Article 153(1).

[95]Note that it is the Amharic version of the provision that states that complaints should be brought to the internal review organ within 15 working days. The English version has simply stipulated 15 days.

[96] Bear in mind that the FTAP is applicable to all federal domestic taxes; see Art.2(36) of the FTAP, supra at note 63.

[97]See Income Tax Proclamation, Proclamation No.286/2002, *Federal Negarit Gazetta*,2002, Article105(2)(now repealed) (Hereinafter *Income Tax Proclamation*).See also Value Added Tax Proclamation, Proclamation No. 285/2002, *Federal Negarit Gazetta*, (2002), Article. 41(3); (Hereinafter *Value Added Tax Proclamation*).Turnover Tax Proclamation, Proclamation No. 308/2002, *Federal Negarit Gazetta*, (2002), Article.19(2); (Hereinafter *Turnover Tax Proclamation*). Excise Tax Proclamation, Proc. No. 307/2002, *Federal Negarit Gazetta*, (2002), Art.16(2).(now repealed). (Hereinafter *Excise Tax Proclamation*).

[98]Aschalew Ashagre, የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ, Mizan Law Review, Vol.8, No.1, (2014), p. 212-214.(hereinafter *የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ*) See also Aschalew Ashagre, Review of the Ethiopian Income Tax Appeal System: Issues of Concern and Recommendations, unpublished, research conducted by the sponsorship of the International Financial Corporation (IFC) so that it would serve as an input during the preparation of the current FTAP, available with the author in soft copy.(Hereinafter *Review of the Ethiopian Income Tax Appeal System*)

Ministry of Finance[99] did not accept this stance and insisted on 21 days. This time limit was finally approved by the HoPR though no justification was given by the HoPR[100] to choose the 21 days' time limit as opposed to the 30 days' time limit suggested by taxpayers, stakeholders and various professionals.

When we see the time limit stipulated under the FTAP in light of international best practices,[101]it is obvious that the FTAP has opted for taking the minimum time limit for lodging of an objection to the Review Department. However, the FTAP has stipulated that if the taxpayer cannot file the notice of objection within the afore-mentioned 21 days, the authority may allow an extension of time for a maximum of 10 days,[102] as stipulated under Art.54(6) of the Proclamation, when the taxpayer is able to show to the satisfaction of the tax authority that the extension of time is sought owing to absence from Ethiopia, sickness or other reasonable cause that prevented the taxpayer from filing the notice of objection within the time prescribed by the law.[103]

But, what if the taxpayer is not able to request extension of time before the expiry of the 21 days limit owing to *force majeure*? The Proclamation does not give a remedy to such taxpayer which means the law lacks procedural fairness to taxpayers in this regard. Equally important is the fact that the law has not contained a provision which allows the taxpayer to lodge an out of time notice of objection (which is an important procedural remedy recognized under the ordinary civil proceedings in Ethiopia[104]), when he was not able to file the notice within this time or was not able to make request for extension of time. The silence of the law in this regard may result in procedural unfairness that jeopardizes the taxpayer's right to access to justice. In other words, the silence of the law in this regard has made taxpayer to be under the mercy of the review department.

[99] Although a foreign expert was hired to draft the FTAP, specific issues such as this were first determined by this Ministry since the Proclamation was drafted and made to take its final shape and content by the Ministry.

[100] The role of the House was so nominal because it did not get enough time to discuss on each and every provision of the Proclamation.

[101] See the discussions made under 1.3 of this piece.

[102] FTAP, supra note 63, Article 54 (7).

[103] Id. See also Working Procedures of the Tax Complaints by Review Department; supra note 65, Article 16.

[104] See Civil Procedure Code of the Empire of Ethiopia, Decree No.52/1965, *Negarit Gazetta*,(1965), Article. 328. Here, it has to be clear to readers that this author is not arguing that provisions of the Civil Procedure Code should be applicable to administrative proceedings. However, allowing a taxpayer to file an out of time appeal is a minimum procedural requirement that has to be applied in any proceeding.

As far as the duration of the filing date is concerned, opinions of tax officers, taxpayers, legal practitioners and other professionals are divided. Officers of the tax authority argue that because taxpayers understand the source of the dispute during the auditing stage, the 21 days' time limit is sufficient.[105] On the other hand, there are individuals who believe that this 21 days' time limit has to be extended to 30 days as preparing a notice of objection to the review department requires adequate time. These individuals justify their argument saying that since audit reports in Ethiopia mostly cover several tax years and there are no exit conferences available to the taxpayer as matter of right, sufficient time is important to examine all these documents and prepare a notice of objection which enhances the right of the taxpayer to get meaningful justice from the Review Department.[106]Despite division of opinions, a member of the Review Department informed this author that there are cases where taxpayers lost their right of filing their notice of objection owing to shortage of time. The same informer underscored that to make the tax dispute system at this stage fair to taxpayers; the 21 days' time limit should be extended to 30 days since such extension does not have any meaningful impact on timely collection of taxes.[107]It is also the belief this author that the time limit for filing a notice of objection needs to extended to 30 days since this time limit has been embraced in several tax systems.

3.2. The Notice of Objection

Because notice of objection is an important document, the FTAP has stipulated certain requirements that have to be satisfied by a notice of objection. According to Art. 54(3) of the FTAP, a valid notice of objection should state precisely the grounds of the taxpayer's objection to the tax decision; the amendments that the taxpayer believes are required to be made to correct the tax decision and the reasons for making the amendments.[108]In addition to the above requirements, Art.17(2) of the directive (Directive No 169/2020) has provided that a notice of objection should contain the name and address of the taxpayer, copy of the tax decision against which objection is filed, the date of the tax decision, name of the branch office which gave the tax decision and other information and

[105] Interview with Tolu Fite, supra note 84.
[106] Interview with Ato Girma Debele, General Manager of Peach Authorized Accounting Firm, September 28, 2020.
[107] Interview with Zewude Damtew, supre note 84.
[108] FTAP, supra note 63, Article 54(3(b&c). Here, it is to be borne mind that the aggrieved taxpayer may pray that a certain tax decision be totally reversed. Therefore, the notice of objection should state the grounds that may justify the total reversal of a tax decision although the Proclamation does not talk about the need for praying for reversal of the decision of the Tax Authority.

evidence which are helpful for making decision on the notice of objection. Besides, as provided under Art.17(3) of the same Directive, a notice of objection should contain the business license, TIN and tax certificate. In addition, if the notice of objection is to be filed by the agent of the taxpayer the document showing the power of attorney should be appended to the application. By the same token, if the taxpayer is registered for VAT, VAT registration certificate has to be produced at the time of filing the application. Moreover, Art.17(4) of the same Directive has made it clear that relevant and authenticated copies of documentary evidence should be appended to the notice of objection. Therefore, if the taxpayer fails to observe these strict requirements at the time of preparation of the notice of objection, the Review Department cannot accept the notice of objection. Where the Review Department believes that the notice of objection has not met the procedural requirements, it should immediately serve written notice on the taxpayer, which contains the reasons why the notice of objection is not validly filed.[109]

In normal civil proceedings, where a statement of claim is filed by a plaintiff, the defendant has the right to submit a statement of defense as a matter of procedural due process of law. Though the rigid provisions of civil procedural rules are not applicable in administrative proceedings, tax administration rules should provide that the tax authority is entitled to file a statement of defense in response to the notice of objection filed by the taxpayer. Nonetheless, the FTAP has not contained a provision that allows the tax authority to file a statement of defense in response to the notice of objection filed by the taxpayer. Even the Directive (Directive No 169/2020) issued by the tax authority to supplement the provisions of the FTAP dealing with the Review Department has not contained any provision that entitles the tax authority to submit a statement of defense to the Review Department. In practice, the tax authority does not produce statement of defense owing to the silence of the law in this regard.[110]Therefore, it is argued that the tax authority should be entitled to produce its statement of defense to ensure procedural equality of the parties. It is also argued that the tax authority should be required to produce a statement of defense so that it would be easy for the Review Department to identify issues.

[109] Id., Art.54(4).

[110] Personal observation of the author as the author appears before the review department representing his clients.

3.3. The Hearing Stage

The right to be heard is one of the most important elements of procedural due process of law recognized in various jurisdictions in civil proceedings in general and in tax proceedings in particular. The opportunity to be heard is a cherished value in dispute settlements since it gives a neutral ground for a resolution of a dispute by an impartial decision-maker and it serves as an instrument of enhancing accurate results by enabling each side to present his case to the decision-maker.[111]According to Schwartz, the right to be heard is a fundamental principle and a foundation of administration of justice which should be available to an aggrieved party even outside the ordinary courts.[112] In a case where an administrative adjudication is involved, observing the basic standards of hearing is a critical matter since the opportunity to be heard in administrative adjudication is one of the most important fundamental elements of a fair play and it is taken to be an irreplaceable instrument to show the legal validity of the adjudication and the maintenance of public confidence in the value and soundness of this administrative adjudicative process.[113] According to Bayles, the opportunity to be heard is one of the most essential requirements of natural justice both in the common law and civil law countries whether or not the case involves an ordinary civil case or an administrative proceeding.[114]

An issue that arises in relation to the right to be heard is whether hearing should be an open or a closed hearing. In normal civil and criminal cases, hearing must be an open hearing since such kind of hearing is considered to be a fundamental element of justice. In addition, open hearing is supported because it creates public awareness which is a useful tool to control arbitrariness and injustice.[115] In this regard, Michael D. Bayles wrote that:

> The point of open application of rules is to let people see that justice is done. Like avoidance of the appearance of impropriety, open hearings help prevent demoralization. If people cannot see that justice is done, they might conclude that it is not. A common (though not always just) charge against secrecy is that people have something to hide. If just

[111] Leonard S. Rubenstein, Procedural Due Process and the Limits of the Adversary System, *Harvard Civil Rights-Civil Liberties Law Review*, Vol.11, (1976), P.48.
[112] Bernard Schwartz, Procedural Due Process in Federal Administrative Law, New York University Law Review, Vol.25, (1950), P.552.
[113] Id., P. 554.
[114] Michael D. Bayles, *Procedural Justice: Allocating to Individuals*, Kluwer Academic Publishers, (1990), P.40.
[115] Davis Kenneth Culp Discretionary Justice: A Preliminary Inquiry, Urbana University of Illinois Press, (1969), PP.111-12.

> rules are unjustly applied, public pressure can often correct the injustice.

When we come to Ethiopia, the right to be heard in the civil cases in general and administrative tax proceedings in particular is not expressly guaranteed under the FDRE Constitution though we can argue that such right does have an implied constitutional basis. This is because as the FDRE Constitution has recognized rule of law under its preamble[116]and because an opportunity to be heard is an important element of procedural rule of law[117] which has to be observed by any government organ, we can safely conclude that the FDRE Constitution has impliedly guaranteed the opportunity to be heard even in administrative tax proceedings. In addition, the FTAP has recognized that an aggrieved taxpayer has the right to be heard by the Review Department as Art. 54(2) of the FTAP states that "the Tax Authority is duty-bound to issue a directive specifying the procedures for reviewing an objection including *hearings* and the basis for making recommendations to the authority and the decision making procedure.*"*[118]*(emphasis supplied)* On the basis of this provision, the Tax Authority issued a directive that has determined the working procedures of the Review Department.[119]

Nonetheless, the Directive has not expressly stated that taxpayers have the right to be heard which means that they cannot enjoy the right to be heard as of right if we stick to the wording of the Directive.[120]Therefore, we can say that the Directive seems to have weakened the position of the Proclamation as the right to be heard of an aggrieved taxpayer seems to have been left to the discretionary power of the Review Department. Therefore, to avoid such a state of confusion, the HoPR should have expressly provided in the Proclamation that taxpayers have the right to be heard at any stage of a proceeding involving tax disputes.[121] However, when we come to the practice on the ground, it is observed that the Review Department hears the parties though the hearing is not an open

[116] The Constitution of the Federal Democratic Republic of Ethiopia, Proc.1/1995, *Federal Negarit Gazetta*,(1995), preamble(hereinafter the FDRE Constitution)

[117] Karina T.Hwang, The Procedural Aspect of the Rule of Law: India as a Case Study for Distinguishing Concept from Conception, CMC Senior Thesis,(2015),http://scholarship.claremont.edu/cmc_theses/1171, (accessed on February 20,2020).

[118] Despite this, it may be contended that because the opportunity to be heard is a very much weighty matter to an aggrieved taxpayer, the law-maker should have expressly provided in the Proclamation that taxpayers have the right to be heard in administrative proceedings.

[119] Directive, cited above at note 93.

[120] In practice, however, the author has observed on several occasions that the Review Department hears the parties although there is no an open hearing.

[121] Undeniably, tax cases are usually complicated owing to various reasons. When the opportunity to be heard is put into practice, the taxpayer can get the chance to clearly explain its objection since written submissions cannot replace the role of oral hearing.

hearing.[122]Therefore, it is argued that the law should expressly provide that the hearing must be an open hearing as it is such hearing that enhances transparency and accountability.[123]

3.4. Burden of Proof

The practice of various countries across the globe generally demonstrates that burden of proof is imposed on the taxpayer. According to Victor Thuronyi, "the burden of proving that an assessment is incorrect tends to be placed fairly squarely on the taxpayer in common law countries."[124] For instance, in Australia, onus of proof is unequivocally imposed on the taxpayer that has made the applicant taxpayer experience a serious hurdle in discharging the duty of proof in cases where the application for internal review or appeal is made against a tax assessment.[125] As provided under the Tax Administration Act of the country, the applicant or the appellant is required to prove that the assessment is excessive on the balance of probabilities. Courts in Australia made it clear that the taxpayer is said to have met the onus of proof where he is able to show that the assessment is wrong and what correction should be made to make the wrong assessment correct.[126] That is why Karen Wheelwright wrote that:

> There was no better example of the powers of the ATO and the inferior standing of taxpayers than the statutory requirement that taxpayers should satisfy the burden of proving their cases. The burden cast upon the taxpayer…. has been characterized as a 'reversal of the onus of proof. This is because the commissioner, by issuing an assessment, proves conclusively thereby that the assessment is correct. He is not required to lead evidence in support of his assertion, but instead it is the defendant taxpayer who must satisfy the tribunal of the fact that the assessment is excessive.[127]

In the USA, the rule remained that burden of proof in tax litigation lies on the taxpayer under all circumstances starting from the early 1920s to the close of the

[122] Interview with Ato Husamudin Seifu, General Manager of My Wish Enterprise PLC, September 28, 2020.
[123] Interview with Ato Wondiye Girma, Consultant and attorney-at-law, September 18, 2020; interview with AtoYohannes Woldegebriel, supra note 85; interview with Mesfin Tafesse, supra note 91.
[124] Thuronyi, supra note 1, P.218.
[125] Karen Wheelwright, Taxpayers' Rights in Australia, *Revenue Law Journal*, Vol.7, Issue No. 1, Article 10, (1997), pp.234-235.
[126] Id.
[127] Id.

20th century.[128] However, in the early 1990s, the onus of proof entrenched under the American tax system was seriously challenged by taxpayers and politicians on account of the abuse of power committed by the IRS and unreasonable tactics used by the same office in enforcing the Tax Code.[129] Hence, in 1998, the Internal Revenue Service Restructuring and Reform Act was issued which shifted the burden of proof from the taxpayer to the IRS where the former satisfies some preconditions of shift of burden of proof. According to this bill, burden of proof shifts to the IRS where the taxpayer produces some measure of credible evidence that is germane to the tax liability in question.[130] In addition, burden of proof is shifted from the taxpayer to the IRS when the latter uses statistical information from unrelated taxpayers to redefine the liability of the taxpayer and when it imposes a penalty on a taxpayer.[131] In Canada, burden of proof lies on the taxpayer since it is presumed that the tax assessment made by Revenue Canada is correct.[132]

In continental Europe, too, burden of proof lies on the taxpayer as a matter of principle although there have been circumstances where national courts and the European Human Rights Court decided that burden of proof should shift to the tax authority where burden imposed on the taxpayer is excessively cumbersome and unbearable.[133] In this regard, Victor Thuronyi wrote that:

> in civil law countries the allocation of the burden tends to be more complex, and to be based on both general principles of civil procedure and specific provisions in the tax laws. In France, the tax

[128] See M. Moran, The Presumption of Correctness: Should the Commissioner be Required to Carry the Initial Burden of Production, *Fordham Law Review*, Vol.55, Issue No.6, (1987), Article 9, pp.1087-1108.

[129] John R. Gardner and Benjamin R. Norman Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases, *Wake Forest Law Review*, Vol.38, (2003), pp.1357-1358.

[130] Id, p.1363. See also John A. Jr. Lynch, Burden of Proof in Tax Litigation under I.R.C. Sec. 7491 – Chicken Little Was Wrong, *Pittsburgh Tax Review*, Vol. 5, No. 1,(2007),pp 1-60.

[131] Janene R. Finley and Allan Karnes, An Empirical Study of the Change in the Burden of Proof in the United States Tax Court, *Pittsburgh Tax Review*, Vol. 6, No. 1, (2008),pp. 61-82. These writers made it clear that the shift of burden of proof from the taxpayer to the IRS, however, entails other obligations that should be discharged by the taxpayer. First, the taxpayer needs to substantiate any item pursuant to the Requirements of the Revenue Code. Secondly, it is the duty of the taxpayer to maintain all records in accordance with the Code. Thirdly, the taxpayer has to be positive to the reasonable requests of the IRS regarding documents, witnesses, meetings interviews or other information.

[132] See William Innes and Hemamalini Moorthy, Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals, *Canadian Tax Journal*, Vol. 46, No. 6, (1998), pp.187-1211.

[133] Aschalew, *የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ*, supra note 98, p.223.

> administration has the burden of proof in certain cases when invoking the doctrine of abuse of law.[134]

In Ethiopia, the issue of burden of proof in relation to taxation figured out for the first time under the Rural Land Use Fee and Agricultural Activities Income Tax Proclamation which was issued in 1976 by the Provisional Military Administration Council (the Dergue).[135] Art. 31 of this Proclamation stipulated that:

> In cases where the tax is assessed by estimation, the appellant should give reasons for his objection to the assessment made by the tax office and the burden of proof shall shift to the tax office which would be expected to explain that no books of account or other documents were not submitted to it or books or accounts were submitted but were rejected on grounds that they were inadequate or incomplete or unreliable in light of the guideline issued by it or the tax so assessed by estimation was made conscientiously and reasonable after the appellant's agricultural activities or conditions and living standard were carefully examined and all appropriate investigations carried out.[136]

The issue of burden of proof in taxation again came into the picture when various tax proclamations were issued at the dawn of this century which expressly provided that burden of proof would lie on the taxpayers without providing any exceptional situation where burden of proof may be shifted to the tax authority.[137]

The FTAP has also retained the stance of the previous tax proclamations as burden of proof lies on the shoulder of the taxpayer under all circumstances.[138] The explanatory note prepared by the drafter of the FTAP justified the imposition of burden of proof on the taxpayer on the ground that the taxpayer has information regarding a tax liability and he has to prove that the decision of the tax authority is not correct.[139] Nonetheless, entrenching a presumption of correctness in Ethiopia with no exception whatsoever is highly questionable as it

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[134] Thuronyi, supra note 1, pp.218-2019.

[135] Rural Land Use Fee and Agricultural Activities Income Tax Proclamation, Proclamation No. 77/1976, *Negarit Gazetta*, (1976).

[136] This provision would be an important safeguard to the taxpayer in preventing arbitrary decisions by the tax office. Probably this important clause was included in that law because the Dergue Regime was pro-farmers and agriculturalists as a regime advocating socialist ideology.

[137] See Income Tax Proclamation, supra note 97, Article.116; Value Added Tax Proclamation, supra note 97, Article 44; Turnover Tax Proclamation, supra note 97, Article 22; Excise Tax Proclamation, supra note 97, Article.19.

[138] FTAP, supra note 63, Article 59.

[139] See Technical Notes on the Federal Tax Administration Proclamation, available with the author in soft copy, P.83.

gives unlimited discretionary power to tax auditors to determine a tax liability which may not have any factual foundation. It also opens the door for the auditors to misuse and abuse their powers since any decision they made by them can be accepted as correct and conclusive unless it is disproved by the taxpayer. However, there are circumstances where the taxpayer cannot prove that the decision of the tax authority is wrong in which case the taxpayer may be a victim of a wrong decision which may be motivated by ignorance, malice or outrageous mistake. In addition, imposing an absolute burden of proof on the taxpayer may be a fertile ground for corruption since tax auditors may impose any arbitrary amount of tax on a taxpayer and negotiate with the taxpayer for the reduction of an arbitrarily imposed tax burden.[140]

Let us cite some provisions from the FTAP and see how burden of proof imposed on the taxpayer under all circumstances can be difficult and at times insurmountable to a taxpayer. Art. 26 of the FTAP has provided that where a taxpayer fails to file a tax declaration, the tax authority automatically resorts to assessment of the tax liability of the taxpayer by estimation (by rendering documents and records kept by the taxpayer useless). In such a case, it is difficult to the taxpayer to prove that the estimated assessment made by the tax authority is not correct. Consequently, the taxpayer may be condemned to pay whatever is decided by the tax authority since the latter is under no obligation to prove that its decision is based on certain facts and findings.

Secondly, Art. 23(4) of the FTAP has provided that where the tax authority has reason to believe that the taxpayer will not file a tax declaration during a certain tax period, it may require the taxpayer to make a tax declaration before the due date. If the taxpayer does not comply with this notice, the tax authority may resort to a jeopardy assessment, which is made by estimation once again, by virtue of Art. 27(1) of the same Proclamation. If the taxpayer does not accept the tax assessment made by the tax authority, the former has to prove that the assessment made by the tax authority is wrong which in effect means that the law requires the taxpayer to prove in the negative.

Thirdly, Art. 48(1) of the same Proclamation has stated that a certified auditor, certified public accountant or public auditor who aided, abetted, counseled or procured a taxpayer to commit fraud resulting in a tax shortfall or to evade tax is assimilated to the taxpayer and is jointly and severally liable with the taxpayer for the amount of the tax shortfall or evaded. Because the FTAP has imposed the

[140] See Aschalew, የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ, supra note 98, p.224.

burden of proof on the taxpayer or a third party assimilated with the taxpayer, such a person is required to prove that he did not commit any one of the acts mentioned above that allegedly resulted in tax shortfall or tax evasion.

In Ethiopia, in addition to the heavy burden of proof imposed on taxpayers under all situations, taxpayers are confused as to what evidence is relevant and admissible that can be adduced to rebut the presumption of correctness enjoyed by the tax authority. This is partly attributable to the fact that the country does not have a compressive evidence law which may be used as a guideline in civil tax cases. The absence of comprehensive evidence rules in general and evidence rules pertinent to tax disputes in particular in Ethiopia has put Ethiopian taxpayers in a state of uncertainty (although legal certainty is an irreplaceable element of rule of law[141]) and are exposed to an uncontrolled powers of tax auditors who can do whatever they want to do with impunity. Moreover, no one can be certain as to the standard of proof to be employed by the decision-maker to say that the taxpayer has or has not met his obligation of burden of proof.

As far as the practice is concerned, the informants made it clear to this author that there are circumstances where taxpayers decline to challenge tax decisions before the Review Department as they cannot produce evidence which would rebut the presumption of correctness.[142] According to the informants, the imposition of burden of proof on the taxpayer with no exception gives an opportunity to corrupt tax auditors to impose unfounded taxes on taxpayers and later on negotiate with the taxpayers for reduction of the burden by taking bribes from the taxpayers.[143] Therefore, informants argue, the FTAP has to provide exceptional circumstances where the tax auditor may be required to prove the correctness of the assessment in order to strike a balance between the interest of the tax authority and the taxpayers.[144]

4. Making Recommendations and Objection Decisions

4.1. The Recommendation

As discussed earlier, the Review Department is empowered only to make a recommendation which may be affirmed, varied, remanded or totally rejected by

[141] See James R. Maxeiner Springer, Some Realism about Legal Certainty in the Globalization of the Rule of Law, in Mortimer Sellers and Tadeusz Tomaszewski(eds.), The Rule of Law in Comparative Perspective, Springer Nature, (2010), pp.41-57.
[142] Interview with Tolu Fite, supra 84.
[143] Interview with Mr. Teka Mehari, Consultant and Attorney at Law, September 22, 2020.
[144] Interview with Dawit Teshome, supra note 111; interview with Tasew Abitew, supra note 92; interview with Semaw Nigatu, supra note 90; interview with Yohannes Woldgebriel, supra note 86.

the concerned official of the tax authority.[145] To make the recommendation, the Review Department is required to follow and observe certain conditions and procedural requirements in the course of entertaining a tax case which results in the recommendation. The first requirement is quorum. The Directive issued to prescribe the working procedures of the Review Department has stated that there shall be quorum where two-thirds of the members of a panel are present and the recommendation supported by the majority becomes the final recommendation which is submitted to the tax official concerned for final action.[146] However, when there is a tie, the recommendation supported by the head of the tax office becomes the final decision[147] while a member of a panel who has a dissenting opinion cause his dissenting opinion minuted.[148] Secondly, the Directive has provided that the recommendation made by the Review Department is required to contain summary of the objections raised by the taxpayer, the arguments of both sides, issues that need decision, the legal provisions and reasons that led the Review Department to make the recommendation and evidence produced by the taxpayer.[149]

4.2. Time Limit for Decision-Making

Any decision, be it administrative or judicial, should be made within a reasonable period of time since "justice delayed is justice denied" as the saying goes.[150] Timely disposition of cases is useful for the parties to the dispute since it saves their time and reduces their cost. Therefore, determining a time limit by law within which a decision is given is an important instrument to achieve these objectives. In Ethiopia, requiring the tax authority to render its objection decision within a certain defined period of time was totally unknown before the coming into force of the FTAP. As a result, the taxpaying community was complaining that there was unreasonable delay within the Review Committee since the Committee was not required by law to make its decisions within a defined period of time.[151] In response to the discontents of the taxpaying community, the FTAP has clearly stipulated that the Tax Authority is required to give its objection decision within 180 days reckoned from the date of filing the

[145] FTAP, cited above at note 63, Article 55(1).
[146] Working Procedures of the Tax Complaints by Review Department, supra note 65, Article 13(1&2).
[147] Id., Article 13(2).
[148] Id., Article 13(3).
[149] Id., Article 14(1).
[150] See Tania Sourdinand Naomi Burstyner, Justice Delayed is Justice Denied, Electronic copy,http://ssrn.com/abstract=2721531, (accessed May 20,2020), pp.46-60.
[151] See Aschalew Ashagre, Review of the Ethiopian Income Tax Appeal System, supra at note 98, p.21.

notice of objection to the Review Department by an aggrieved taxpayer.[152] The stance taken by the FTAP is an important step forward in ensuring speedy disposition of tax disputes within the internal tax dispute resolution system provided that the time limit stipulated by the Proclamation is observed by the Review Department.

In practice, the Review Department generally renders its decision within 180 days.[153] According to the interviewees, when tax cases are not complicated, decisions are rendered even within two or three months.[154] Generally speaking, the Review Department has adhered to the time limit provided by the FTAP because there is a strict supervision by the managers of branches of the Ministry of Revenues and by the concerned high ranking officials of the head office.[155] More importantly, the fact that members of the Review Department are experienced individuals and full time employees of the Review Department has helped the disposition of cases within the time defined by the FTAP. In general, at the federal level, the Review Department cannot decline to render its decision within the 180 days without any acceptable justification. Nonetheless, there are exceptional situations where cases may take even more than one year where legal issues involved are complicated and when legal opinions are sought from the legal Department of the Ministry of Revenues and Ministry of Finance. In addition, cases are sometimes delayed because of the deliberate non-appearance of a taxpayer with a view to delaying the tax decision thereby delaying payment of tax.[156]

The FTAP has made it clear that if the tax authority fails to render its objection decision within the afore-mentioned time limit for whatever reason, the taxpayer may appeal to the Federal Tax Appeal Commission (FTAC) within 30 days after the end of the 180 days period[157]as though an objection decision were made by the Review Department. The question, however, is whether the Review Department should stop entertaining the case once the taxpayer has lodged an appeal to the FTAC owing to the fact that the former failed to meet the time limit provided by law. Though the FTAP is mute as far as this issue is

[152] FTAP, cited above at note 64, Article 55(7). Hence, the Review Department is expected to make its recommendations in less than 180 days so that the tax official can make the tax decision within the 180 days stipulated by the Proclamation.
[153] Interview with Zewude Damtew, supre note 84. The author also witnesses that the Review Department renders its decisions within 180 days though there are exceptional circumstances where the 180 days time limit is not observed owing principally to complexities of cases.
[154] Interview with Tolu Fite, supra note 84.
[155] Id
[156] Id.
[157] FTAP, supra note 63, Art.55(7).

concerned, we can argue that once a taxpayer has lodged an appeal to the Commission, after the expiry of the afore-mentioned 180 days, the proceeding at the Review Department is deemed automatically discontinued as there should not be parallel proceedings at the Review Department and the FTAC for doing so is a meaningless waste of time and resources of both the taxpayer and the tax authority. In practice, however, taxpayers do not take their case to the FTAC even if the Review Department fails to render its decision within the time defined by the FTAP since they are desirous of seeing their cases finally determined by the former without incurring any additional cost and without making any tax payment.[158]

4.3. The Final Objection Decision

Having received a recommendation from the Review Department, the concerned tax official has the power to fully or partly endorse the recommendation, to totally reject it or to remand the case for reconsideration where he believes that there are other factual or legal matters that should be reconsidered by the Review Department.[159] The decision of this tax official, to the exception of remand, is known as *an objection decision* under the FTAP and is a binding decision which is expected to contain a statement of findings on the material facts and the reasons for the decision.[160]

As is the case in other jurisdictions, the FTAP has made it clear that giving reasons in an objection decision is mandatory. Although the duty to give reasons under the American and European tradition of administrative law has been considered somewhat under-theorized, such duty has become a rule in several jurisdictions of the world.[161] For instance, in Belgium a separate statutory law has clearly stipulated that giving reasons is mandatory in all administrative decisions. More importantly, the Belgian Constitutional Court suggested that the law requiring the giving of reasons has obtained a constitutional status.[162] In the Netherlands, the General Administrative Law has stipulated that giving reasons is mandatory.[163] The same is true in France.[164] In addition to individual member

[158] Interview with Tolu Fite, supra note 84; and interview with Zewude Damtew, supra note 84.
[159] FTAP, supra note 63, Article 55(3).
[160] Id., Article 55(6).
[161] Jerry L. Mashaw, Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance, *The George Washington Law Review*, Vol.76, No. 99, (2007), p. 101.
[162] Id.
[163] Ingrid Opdebeek and Stéphanie De Somer, Duty to Give Reasons in the European Legal Area: Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative

states, the duty to give reasons is clearly entrenched under the EU legal order. In this regard, Art. 296 of the Treaty on the Functioning of the European Union (TFEU) states that legal acts are required to state the reasons on which they were based and shall refer to any proposals, initiatives, recommendations, requests, or opinions required by the treaties.[165] In addition, the charter on Fundamental Right of the European Union, which has enshrined the right to good administration, has stipulated that the administration is duty bound to give reasons.[166] Giving reasons in administrative decisions is also a requirement in USA,[167] Canada[168] and the UK.[169]

There are several justifications for the duty to give reasons. To begin with, the duty to give reasons contributes to the development of a relationship of confidence between an administrative body and a person affected by the decision of that body since reasoned decisions are instrumental in enhancing transparency which in turn has become one of the most important pillars of modern democratic administration.[170] Secondly, giving reasons enables legal subjects to have better information which in turn facilitates oversight by administrative authorities and the judiciary. Thirdly, the duty to give reasons ensures thorough decision making because the decision making administrative organ is compelled to think seriously before it makes a certain decision.[171] Moreover, it is argued that giving reasons fosters the rationality of decision-making, compels state bodies to give account for their decisions, facilitates judicial protection and adds consistency to decision making by an administrative organ. Furthermore, it is believed that giving reasons compels the decision-maker to give proper attention to the decisions which in turn increases the acceptability of such decision.[172] According to Buijze, the core justification for giving reasons is that it gives transparency on the level of the motives or justifications underlying the decision since transparency is an important principle of modern administration in general and tax administration in

Law,(2016)file:///C:/Users/user/AppData/Local/Temp/7-RAP-2-1.pdf, (accessed February 5,2020),P.101.

[164] Id.

[165] See The Consolidated Version of The Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT, (accessed March 2, 2020).

[166] Fundamental Right of the European Union, Official Journal of the European Union, at file:///C:/Users/user/AppData/Local/Temp/text_en.pdf,(accessed March 4, 2020).

[167] See Kendrick Lo, When Efficiency Calls: Rethinking the Obligation to Provide Reasons for Administrative Decisions, *Queen's Law Journal*, Vol.43, No.2, (2018), p. 325

[168] See H.L. Kushner,The Right to Reasons in Administrative Law, *Alberta Law Review*, Vol. 24, No. 2, (1986), pp.305-33.

[169] P.P. Craig, *Administrative Law*, Sweet and Maxwell, (2003), pp.436-443.

[170] Ingrid Opdebeek and Stéphanie De Somer, supra note 163, p.103.

[171] Id

[172] Id, p.131.

particular.[173] Although transparency could not to be taken as an end by itself, it is a means to insure accountability of public administration.[174]

When we see the practice at the federal level, we realize that the Review Department tries to give reasons in its decisions.[175] However, it is hardly possible to conclude that the decisions are adequately reasoned with critical legal analysis.[176] This is partly attributable to the fact that members of the review department are required to entertain many cases to be decided within 180 days. Hence, in order to ensure timely disposition of cases, members cannot make thorough analysis and give detailed reasons for their decisions.[177]

Concluding Remarks

Tax authorities around the world have the power to review their own decisions by establishing a department for this purpose which is usually different from the department making the tax decision. However, the practice of various jurisdictions shows that taking a tax complaint to the internal review organ of the tax authority is mandatory while there are several jurisdictions which have made it optional. In Ethiopia, taking a tax complaint to the Review Department is mandatory if a taxpayer wishes to challenge a tax decision made by the tax authority. To this end, the Tax authority has established an internal review organ called the Review Department which is a permanent organ of the tax authority. When a notice of objection is filed against a tax decision by a taxpayer, the Review Department, having entertained the arguments of both an aggrieved taxpayer and the tax authority, makes a recommendation which may be approved, varied, rejected or remanded by the concerned official of the tax authority.

The current FTAP has introduced some useful procedural rules which enhance the adequacy, effectiveness and fairness of the tax dispute resolution system at this stage. To mention the conspicuous ones, the FTAP has tried to define tax disputes that can be entertained by the review Department; it has also extended the hitherto 10 days' time limit to 21 days for filing a notice of objection to the Review Department though the sufficiency of this time limit is still questioned. In Addition, the Proclamation has stated that a taxpayer has the right to request

[173] A. Buijze, *The Principle of Transparency in EU Law*, Uitgeverij Box Press, (2013), p. 36–51.
[174] M. Bovens, Analyzing and Assessing Accountability: Conceptual Framework,*European Law Journal*, No. 13, issue 4, (2007) p. 447.
[175] We can understand this by having a look at decisions of the Review Department.
[176] Interview with Dawit Teshome, consultant and attorney at law, September 17,2020.
[177] Interview with Zewude Damtew, supra note 84.

the extension of the 21 days' time limit where he is not able to make the notice of objection within the 21 days on account of sufficient cause that prevented him from filing the notice of objection within the 21 days' time limit. Moreover, the FTAP has provided that decision must be made within 180 days which was alien to the Ethiopian tax dispute resolution system starting from the early 1940s until the entry into force this proclamation in July 2016. Furthermore, the FTAP has provided, though tangentially, that the taxpayer has the right to be heard. Finally, the FTAP has stated that the Tax Authority is duty-bound to give reasons for its decisions which is supported by the jurisprudence of administrative justice in other jurisdictions of the world as giving reasons is nowadays taken to be a useful element of procedural fairness and procedural due process of law.

Despite the above positive developments made by the FTAP, there are also some critical shortfalls that should have been addressed by the Proclamation. To begin with, even if the FTAP has tried to define the scope of review power of the review department, it has not made it clear whether the listing made under Art.2(34) of the Proclamation is an indicative listing or an exhaustive listing which can be a source of controversy where taxpayers lodge complaints to the Review Department other than the ones enumerated under this sub-article. Secondly, the selection, appointment, composition and removal of members of the Review Department are left to the discretion of the tax officials while the law-maker, which enjoys the highest political authority in the country,[178] should have included at least general legal provisions dealing with these issues in the FTAP. Third, the Proclamation has taken the minimum time limit, as compared to the international practice, for filing an objection decision to the Review Department while the taxpayers earnestly recommended 30 days at the time when the draft proclamation was tabled for discussion.

Fourth, the Proclamation has not expressly and emphatically provided that taxpayers are entitled to hearing when they litigate their cases before the Review Department though hearing is an indispensable element of procedural due process of law. Fifth, the FTAP has imposed burden of proof on taxpayers under all circumstances which makes the tax dispute resolution system at this stage unfair to the taxpayer while the tax authority is allowed to unduly benefit from presumption of correctness no matter how erroneous and unfounded its tax decision might be. Sixth, although the Proclamation has stated that an objection decision has to be made within 180 days reckoned from the time of filing the

[178] The FDRE Constitution, supra note 116, Art.50(3).

notice of objection, the law has not contained any meaningful sanction if the tax authority fails to make the objection decision within this period of time without any justification.

Viability of Private Prison Policy in Ethiopia

Bereket Eshetu ⚉ *& Belayineh Admasu* ♦

Abstract

International bills of rights address the treatment of detainees concerning their dignity. The 2011 criminal justice policy of Ethiopia also calls for decent treatment of detainees and inmates. However, study reports indicate that the existing condition of detainees and inmates in Ethiopia fails to comply with the minimum expected treatment level. They tend to suffer from high levels of overcrowding, lack of separate accommodation (based on sex, age, illness, and nature of the offender), severe occurrences of disease, malnutrition, and unhygienic conditions, absence of organized education and training platforms, and no hearing mechanism. This article attempted to assess the viability of private prisons, in Ethiopia, serving as an alternative public prison system, similar to approaches found in other nations namely, the United States, United Kingdom, and South Africa. A qualitative research approach was employed in collecting and analyzing data. The findings revealed that there could be room for having correctional privatization in Ethiopia in addition to the utilization of alternatives to incarceration.

Keywords: Ethiopia, Overcrowding, Detainees, Inmates, Private Prison, Viability

Introduction

Although the expansion of prison privatization is a recent phenomenon, its factual existence can be traced back to early American history when local governments reimburse private jailers to hold people who face imprisonment.[1] In this period, jailers charged states with high rate price to incarcerate prisoners who owed debts until they were paid in full.[2] Afterward, official public policies

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[1] Meskell A.W, An American Resolution: The History of Prisons in the United States from 1777 to 1877, 51(4), Stanford Law Review, (1999), p.840.

[2] Paul Guerino, Paige M. Harrison, and William J. Sabol, Prisoners in 2010. Washington, DC: Bureau of Justice Statistics, (2011), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf, accessed 27 December 2017.

started to be adopted during the 1970s and 1980s which facilitated an increase in prison privatization, yet with a firm debate.[3] In the year 2010, private prisons detained around 128,195 prisoners of a total of 1.6 million prisoners representing eight percent of the total prison population.[4]

In the beginning, correctional privatization was linked with the problem of overcrowding, which occurred in public prison centers, though other advantages were claimed later. In general, correctional privatization is claimed to have three major advantages by its proponents. It allows the state to avoid large capital expenditures necessary to construct a prison center; correctional privatization also yields reduced operational costs which minimizes the overall budget requirements for supporting the prison system. Besides, it creates quicker availability of prisons in situations where overcrowding is a concern.[5] It is in the latter respect that public officials in the U.S. turned to the private sector where the prison population in state prison centers had risen to its highest levels during the 1980s and 1990s. Then, the private sectors found themselves responsible for more inmates than what was possible to house via existing facilities.[6] Similar problems of overcrowding in public prison centers also triggered the United Kingdom (UK) to opt for privatization.[7]

According to recent facts, there are more than ten million prisoners worldwide and that number is growing incrementally.[8] Yet, the truth is that the growing number of prisoners is leading to often severe overcrowding in prisons. This results in prison conditions that breach UN and other minimum standards that require all prisoners to be treated with the respect due to their inherent dignity and value as human beings. Apart from the US and UK, Australia is currently

[3] This debate still continues today and has generated voluminous literature such as, Douglas C. McDonald, Public Imprisonment by Private Means, Journal of Criminology Volume, 34(1), (1994), p.29; John J. DiIulio, Jr., What's Wrong with Private Prisons, Journal of Public International Law , 92(1), (1988), p.66; Christine Bowditch & Ronald S. Everett Private Prisons: Problems Within the Solution, Journal of Justice Quarterly, V.4 Issue 3, (1987); Charles H. Logan, Private Prisons: Cons and Pros, Oxford University Press, (1990), p.79, available at www.ucc.uconn.edu/soci/proscons.html, accessed on 22 February 2019; Martin P. Sellers, The History and Politics of Private Prisons: A Comparative Analysis, (1993); David Shichor, Punishment For Profit: Private Prisons/Public Concerns (1995).

[4] Guerino P, Harrison, P.M. & Sabol P.M., Prisoners in 2010. Washington, DC: Bureau of Justice Statistics, (2011), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf, accessed 27 December 2018.

[5] U.S. Dep't of Justice, Hindelang Criminal Justice Research Center, Sourcebook of Criminal Justice Statistics, (2002), p.478, available at http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section6.pdf, accessed on 29 December 2019.

[6] *Id.*

[7] Prison Reform Trust, Private Punishment Who Profits, London, (2005), available at www.prisonreformtrust.org.uk, accessed on 15 February 2019.

[8] R. Walmsley, World Prison Population List, published by International Centre of Prison Studies, King's College, London, (2018), p. 2, available at https://prsionstudies.orgpdf , accessed on 3 May 2019.

leading the push towards prison privatization including China, Netherlands, Turkey, and some European countries though it's still much debated on various grounds. Africa has also been identified as a market in which to expand the privatization of prison services. To this end, in response to overcrowding and inefficiency in public prisons, South Africa and Lesotho have opted for the privatization of prison and prison services as policy options.[9]

In Ethiopia, overcrowding in police stations and prisons represents a complicated aspect of bad detention conditions.[10] The existing prison centers throughout the country are usually used to confine both convicted and non-convicted individuals without distinction. As a result, thousands, if not, hundreds are waiting in prison for their pre-trial investigation of the police to be completed and many others have been waiting for months for a court decision. And even those that have been already sentenced can hardly make use of legal possibilities and modalities to quickly rehabilitate and reintegrate into society.[11] This in turn accounts for the failure of the state to protect the human rights of prisoners as promised under international and domestic laws. As a result, the presence of an unprecedented level of overcrowding coupled with its various negative effects across the prison centers in the country motivated this article to examine whether private prison policy is viable for serving as an alternative public prison system.

Thus, the article first presents some general points about private prisons. Next, it makes a brief discussion on major problems in prison centers in Ethiopia. Then, the article endeavors to securitize whether there is room for privatization policy of prison that could serve as an alternative public prison system. Finally, it makes concluding remarks and recommendations.

1. Overview of Private Prison Policy

1.1 History

Privatization of correctional institutions came into the global public sphere in the mid1980 when the new Correction Corporation of America (CCA) in the

[9] Mfanelo Patrick, Privatization of Prisons and Prison Services in South Africa, A research report submitted in partial fulfillment of the requirements for the degree of Masters in Administration in the School of Government Faculty of Economic and Management Sciences University of the Western Cape, November 2005, p. 23.

[10] Center for International Legal Cooperation (CILC), Comprehensive Justice System Reform Program: Base Line Study Report of Federal Democratic Republic of Ethiopia, Ministry of Capacity Building Justice System Reform Program Office February, (2005), p. 192.

[11] *Id.*

U.S. was offered to take over the entire State of Tennessee's troubled prison system with a 99 years lease from the state.[12] While governments are usually assumed to take responsibility for imprisonment and other criminal justice functions (as it's intrinsic or core functions), countries such as the U.S., UK, Australia, and a few others have begun to privatize prisons. Therefore, in the beginning, privatization was confined to juveniles, and the number of privately-operated juvenile facilities began to grow rapidly in the 1960s.[13] Gradually, the adult private prison system began in 1979, when the U.S. Immigration and Naturalization Service (INS) started contracting with private firms to detain illegal immigrants pending hearings or deportation, in secure confinement facilities. These contracts provided the seedbed for the contemporary private imprisonment industry in the U.S., as several of the now-significant players in the industry started with them.[14] Although such developments drew little attention at that time, the situation was changed in 1985 and 1986 when governments began to contract with private firms to operate secure facilities that functioned as county jails and state prisons. These events raised a nationwide debate about the legality, correctness, and desirability of private imprisonment. For instance, a study conducted by the American Bar Association (ABA) concluded that delegating state operational functions to private entities posed '*grave constitutional and policy problems*', though the government continues to use the system. As a result, the years between 1986 and 1996 has resulted in a proliferation of private prison industrial share companies.[15]

In the UK, a prison system was at the forefront of privatization since 1992. Encountered by a rising prison population in the late 1980s, the conservative government turned to the private sector to provide extra prison capacity. Margaret Thatcher had a strong desire to extend the free market in public services. Then, privatization was seen as the most cost-effective solution to the crisis and was part of the government's determination to promote private enterprise and extend the free market into public services. Although the Labor Party has strongly opposed the Conservatives' policy on private prisons earlier, after being elected in 1997, it sustained the system. Today, 14 out of 141 prisons in England and Wales are private or contracted out and there are over seven

[12] Abt Associates Inc. (Abt), Private Prisons in the United States: An Assessment of Current Practice, (1998) p. 4, available at https://www.privateprisonnews.org/Private/Prisons/in/the/pdf, accessed 29 December 2019.

[13] *Id.*

[14] Matthew J. Bronick, The Federal Bureau of Prisons' Experience with Privatization, Washington DC, Federal Bureau of Prisons, (1989), p.4, available at https://www.amazon.co.uk/Federal-Bureau-Prisons-experience-privatization/pdf, accessed on 29 December 2019.

[15] Thomas, Bolinger and Badalamenti, Private Adult Correctional Facility Census, Center for Studies in Criminology and Law, University of Florida, 10th Edition, (1997).

thousand adults and young offenders held in ten private prisons in England and Wales just fewer than ten percent of the prison population, which constitutes the highest proportion of prisoners in privately run jails in Europe.[16] Since then, the UK has developed a private prison system similar to the U.S. concerning the number of privately run prisons.[17]

1.2 The Need

The contemporary private imprisonment industry owes its emergence to several dynamic reasons: *firstly,* the desire of many government correctional agencies to expand their capacity quickly. For example, states faced with the need for more beds to house undocumented residents turned private firms to design, build, and operate detention facilities. Secondly, a large proportion of the global penal facilities were outdated and even obsolete by contemporary standards. For example, in the U.S., during the mid-1980s, several states were even forced to release prisoners ahead of time to bring occupancy levels down to mandated levels.[18] Correctional administrators found themselves in a difficult position, unable to stem the flow of prisoners and constrained in the ability to build more prisons quickly. Thus, turning to the private sector to provide new prison beds was an attractive solution to many governments that were facing debt restrictions. If a private firm financed, constructed, and operated a new prison, payments to the firm by governments for housing the state's prisoners could be charged against operations budgets rather than capital budgets, thereby avoiding any need for increasing debt.[19]

The need for correctional privatization can also be traced back to the conservative government of the UK in the1980s when a concerted attack was launched against the institutional structures and ideology of the welfare state. Private firms were said to be more efficient as they were not mired in the "*red tape*" that encumbers public agencies, especially in procurement and labor relations since public agencies had monopolies on services, and few incentives existed to discover and implement ways of improving efficiency. In contrast, competition in the private market-place and the risk of losing money or going out of business supposedly stimulates the search for increased efficiency.[20] Yet,

[16] R. Walmsley, *supra* note *8.*
[17] Jones T. and Newburn T, Learning from Uncle Sam? Exploring U.S. Influences on British Crime Control Policy Governance, International Journal of Policy, 15 (1) Administration and Institutions (2002), p.101.
[18] Samuel J. Brakel, Privatization and Corrections, No.107, Reason Foundation Policy Insight (1989).
[19] *Id.*
[20] Mfanelo Patrick, *supra* note 9, p. 10.

such a system itself is not without criticism. For instance, it is indicated that there is little room for technological innovation in private prisons because of their labor-intensive nature. The high priority given to maximizing profits creates incentives to minimize costs, which may lead to reductions in service quality. The conditions of these privately-operated facilities were generally terrible, and the death rates in them were considerably higher than in public prisons.[21]

According to the Institute of Security Studies (ISS), which is considered an authority on this matter, there are ten reasons for supporting the privatization of prisons.[22] First, given the devastating bureaucratic *red tape* in public institutions' private companies can construct prisons more quickly and cheaply than the government. They are also more apt to design prisons for efficient operation. Private contractors have greater speed and freedom in matters from personnel to purchasing. This flexibility promotes innovation and experimentation because it allows for risk-taking. It becomes easier to undo mistakes and creates an environment that is ideal for change.

Involving the private sector could also potentially add the expertise, skills, and experience of a multinational company's head office, which will exceed that of smaller jurisdictions. Moreover, contracting-out prisons increase accountability as market mechanisms of control are added to the political process. Private prisons are highly visible while the public ignores state prisons. Even, private prison contracts promote the development and use of objective performance measures. The government spends taxpayers' money without incentives to measure the quality of performance, but contracts usually specify performance indicators, and to the same extent broader goals as well. By creating alternative prison contracts, encourages competitive evaluation, raising standards for the government as well as for private contractors. Furthermore, private prison contracts provide a surgical solution. That is, if reform is needed, public management is entrenched and inert, whereas a contractor is easier to replace than a government agency.

Consequently, the above reasons have facilitated a lot for the privatization of incarceration, an area which is a historically exclusive domain of the state and remains unchallenged like the provision of water, electricity, and education.

[21] See in general, John D. Donahue, The Privatization Decision, Published by Basic Books, New York, (1990).

[22] Institute of Security Studies (ISS), Correction Challenges, Ned bank ISS Crime Index, 2(6) (2001), p. 8, available on https://oldsite.issafrica.org/uploads/Crime/Index/98/.pdf, accessed on 22 February 2019.

1.3 Role of Private Prisons

State and federal prisons in the U.S., whether privately or publicly operated, are responsible for general adult confinement. Ninety-one percent of the prisons provide confinement services for adult prisoners.[23] However, the service rendered by privately operated prisons is somewhat different from state and federal prisons operating throughout the country. Large proportions of privately operating prisons served as drug and alcohol treatment units.[24] In contrast, fewer private prisons contracting with state and federal correctional agencies carry-out the task of diagnosing and classifying newly admitted prisoners and confinement of special inmate populations such as inmates seeking mental health services and those who are sentenced to death or geriatric patients. More treacherous inmates were usually not administered in these institutions.[25]

Usually, when states contract-out prison services, it follows one of the following forms. To start with the general one, the state may pay for the costs of incarceration and the private sector provides various services. The second mechanism is contracting in which a private entity is hired to perform specific services or contracting private entities specifically to provide management services such as staffing, administration, and security.[26] The third private operator might also be hired to design and build prisons or can also be involved in financing the project to build prisons. The last, the predominant form of prison privatization is where the state contracts out the design, construction, finance, and management.[27] Of course, the Trade Union Research Project identified two broad forms of private prisons that are experienced globally: (1) those prisons owned by the government and operated by private companies on short-term subcontracting' concessions and (2) those prisons which are built under government tender by a private company that has a long-term lease of the prison.[28] In general, what is common in all of the above circumstances is that the private sector is in charge of public services intending to make profits while the government covers the costs, directly or indirectly through a long-term arrangement depending on the nature of the contract.

[23] Abt Association, *supra* note 12, p. 4.
[24] 26 percent of the privates, compared to 16 percent of government prisons and regarding facilities for parole violators returned to custody 16 percent compared to 7 percent.
[25] *Id.*
[26] *Id*.
[27] Monograph, Privatizations in South Africa: Issues, Challenges and Opportunities, 64(1), Institute of Security Studies, 11(2001), available at http://www.iss.org.za/Pubs/Monographs/No64/Chap5.html, accessed on 13 may 2019.
[28] Trade Union Research Project (T.U.R.P.), Privatization of Prisons and Prison Services: The International Experiences, Published by Durban University of Natal (2000) p. 21.

1.4 Legality of Delegating Correctional Services

The legality of delegating the prison function to private entities posed controversy in the 1980s. It appeared that an objection to correctional privatization on constitutional grounds has relatively little potency.[29] The constitutional delegation doctrine is rarely invoked as a point of resistance. It has little direct application for delegating the incarceration function to private entities. In this respect, the U.S. Supreme Court has not invalidated a private delegation since the New Deal-era case of *Carter v. Carter Coal.*[30] More generally, privatization is usually viewed merely as a delegation of certain *administrative* functions related to incarceration. Accordingly, only delegated rulemaking and adjudication functions are deemed to require special constitutional due process and to be subject to keen judicial scrutiny.[31] These due process mandates often can be incorporated under a broader idea of '*delegation*' where certain types of rulemaking and adjudication are kept in the hands of public correctional bodies so that private entity's role is subordinated to adequate public oversight and/or approval. In the U.S., for instance, industry officials were allowed to propose non-binding minimum prices in the areas where officials functioned '*subordinately*' to a public commission.[32] In this context, a delegation challenge might be sustained if private correctional authorities had the final say in functions like writing rules on a release or making disciplinary decisions. To this end, numerous states in the U.S. had enacted legislation directed at retaining the ultimate release related to decision-making and rulemaking in the public sector.[33] Other states sought to retain such powers by contracts. In most cases, these statutory or contractual provisions mandated those initial decisions or recommendations, even where formulated by private contractors, must be subject to final approval or ratification by public authorities.[34] Generally, privatization is usually viewed merely as a delegation of certain administrative functions related to incarceration.

[29] Joseph E. Field, Making Prisons Private: An Improper Delegation of a Government Power, *Journal of Hofstra Law Review,* Vol. 15,No. 3, (1987) p.11.
[30] *Carter v. Carter Coal,* U.S. Supreme Court New Deal-era, No. 298, 238, (1936).
[31] DM Lawrence, Private Exercise of Governmental Power*, Indiana Law Journals,* Vol. 61, (1986), p.647& 653.
[32] *Sunshine Anthracite Coal Co. V. Adkins,* U.S Supreme Court 381, 399 (1940).
[33] For instance, Arizona Regional State Law prohibits contractors from taking any disciplinary action against an inmate. Colorado Regional State Law prevents private contractors from making conclusive recommendations about parole of particular inmates.
[34] Abt Association, *supra* note*,* 12*,* p. 58.

1.4.1 Liability for Prison Conditions

The other relevant legal issue for the governments intending correctional privatization is the question of how privatization affects liability for the conditions in private prisons. During the commencement of correctional privatization, excessive claims were made by both advocates and opponents of privatization that the advent of private prisons would shield governments from liability. In the U.S., for instance, it was reported that some politicians believed the government could escape from liability through the use of private prisons.[35] Claims were also raised that privatization would substantially shield private contractors from violation of inmate civil rights.[36] In general, the major issues invoked in this sphere are the constitutional rights of the prisoners, the responsibility of the government correctional authorities in private prison management, and the cost of litigation.

Concerning safeguarding inmate rights in the U.S., it's generally accepted that private prisons will be treated as '*state actors*' for the enforcement of civil rights suits. Hence, all relevant constitutional requirements apply with equal force to private as well as public correctional facilities. And, private prison employees are not covered by the 'qualified immunity' that shields from liability public correctional authorities who reasonably believe that their discretionary actions are lawful.[37] As to liability, a government's exposure will generally be lower if a private contractor is running a private facility. A contractor is a primary defendant in inmate litigation and government authorities generally will not have direct responsibility for the actions of contractor employees. Since public authorities will entrust the day-to-day management of prisons to private contractors, authorities will be less likely to have notice or knowledge of specific harms alleged to have caused injury to inmates.[38] Moreover, it is found that the litigation cost of the government at a particular facility may or may not be lower with prison management being in the hands of a private contractor.[39]

[35] M. Walzer, Hold the Justice' New Republic, (New York, April 1985, p. 12; Washington Post, (March 23, 1986), p. F6, col. 2.
[36] Sullivan, Privatization of Corrections: A Threat to Prisoners' Rights, in G. Bowman, and others (eds), Privatizing Correctional Institutions, (1994), p.139.
[37] *Street v. Corrections Corp. of America,* U.S Supreme Court*,* 102 F. 2d 810, 814 (1996); *Payne v. Monroe County,* U.S. 779 F. Supp. 1330, 1335 (1991).
[38] *Monell v. Dep't of Social Services,* U.S Supreme Court, 436. 658, 694 (1978).
[39] Abt Associates, *supra* note *12,* p. 60.

1.4.2. Contractual Dimensions of Private Prison

Nowadays, it is believed that the success or failure of a private prison arrangement relies on the skills with which contracts are negotiated. Public authorities should give due concern to the purposes served by contracting out prison administration. There should be an adequate statutory or regulatory framework that treats several issues related to prison operation. Also, correctional authorities should be sensitive to create, wherever possible, a level playing ground between public and private prisons to promote fairness, increase competition, and allow meaningful cost comparisons. A good example of this is ensuring that private contractors could not make money unfairly. Interested private entities should prepare and submit a proposal to find different kinds of contractor information and plans which public officials can scrutinize and evaluate for dealing with an effective contract.[40] Moreover, contracts can also ensure better performance and cost-effectiveness through well-drafted provisions which include objective standards, relatively short contractual periods,[41] renewal possibility, termination clauses, and penalty provisions. Contracts may also help to specify cost savings requirements, which can be phrased in terms of a provider delivering correctional services at significantly less cost and better services.

1.4.3 Employment Issues

Legal questions related to employment and labor relations pose several important issues to government correctional authorities as well as private contractors, including concerns about private employees' right to strike. As a preliminary matter, experience shows that it is important for a government correctional agency to ensure that a private prison management company is indeed treated as an independent contractor, with its responsibility for compliance with all legal requirements imposed on private industry, including the Labor Standard Act and relevant federal and state nondiscrimination laws. Furthermore, private contractors are subjected to the Labor Law than the legislation governing public employees or Civil Service Law since persons who will be working in these centers are to be employed by and contracted with private actors.

[40] *Id.*

[41] For example, in U.S, 3-4 period of year is recommended as duration of contract. Abt Associates, *supra* note *12,* p. 68.

While the right to strike visibly will exist at privately operated private prisons, as it's commonly experienced in the U.S., the risk of such work disruptions can be minimized in two important ways. First, a private contractor can seek to have employees agree, individually or collectively, to a no-strike pledge. For instance, the U.S. Bureau of Prisons contract with its privatized Taft, California facility dictates that any collective employment agreement should provide that grievances and disputes involving the interpretation of the agreement are to be settled without resorting to a strike, lockout, or other interruption of normal operations. Contractors can also seek notification requirements that allow contractors to make arrangements for the assumption of certain correctional responsibilities in the event of a work interruption.[42]

1.5 Critique

The notion of private prisons remains one of the most controversial policies in the criminal justice debate. Since its inception, opposition to private sector involvement in the prison service is mainly related to the following key concerns. These are *state responsibility, gaming and accountability.* State responsibility is a contentious point as to the involvement of the private sector in the prison service, which is by its nature the power of the government. Contenders argued that the use of detention and the deprivation of liberty fall in the ambit of state responsibility, and are thus not suitable for private sector management. In 1993, Tony Blair[43] endorsed such a view when he opined that "it is fundamentally wrong in principle that persons sentenced by the state to imprisonment should be deprived of their liberty and kept under lock and key by those not accountable primarily and solely to the state".[44]

In terms of gaming, penal reformers argued that the profit motive encourages inappropriate, unethical, and dangerous practices. These include neglecting difficult or vulnerable prisoners, running institutions with a low cost or failing to train and manage the workforce appropriately, and employing inexperienced or insufficient staff.[45] Finally, contenders also question the accountability of the system. Contracts with private companies for prison management or construction are subject to commercial confidentiality. In turn, the lack of transparency led to concerns that contractors are accountable to their

[42] Abt Association, *supra* note, 12, p. 61.
[43] Tony Blair was the former Prime Minster of United Kingdom from 1997 to 2007.
[44] Will Tanner, The Case for Private Prisons, Reform Ideas No 2, (February 2013), p.4 available at http://www.antoniocasella.eu/nume/Tanner_private_prisons_2013.pdf accessed on March, 2020.
[45] Trade Union Research Project (T.U.R.P.), Privatization of Prisons and Prison Services: The International Experiences, Published by Durban University of Natal, (2000), p. 21.

shareholders at the expense of parliament or the public.[46] In sum, opponents support the above critiques to influence public policy for the government to reclaim the role of sentencing and imprisonment.

2. Major Practical Problems of the Prison System in Ethiopia

The treatment of prisoners, while they are in prison, has accorded international concern since the adoption of the UDHR and subsequent covenants such as the ICCPR (International Covenant on Civil and Political Rights). And, the very objective behind the need for the good treatment of prisoners lies in the UDHR. The point is that persons who are detained or imprisoned do not cease to be human beings, no matter how serious the crime of which they have been accused or convicted. Prisoners are human beings and as such, they retain their rights even when they are in prison. Accommodation is one of the basic needs for human survival.

The ICCPR under article 10 expressly affirmed that detained persons should be treated concerning their dignity, good detention conditions without torture, cruel, inhuman, and degrading treatment or punishment contrary to the respective international conventions. Subsequently, a series of minimum standards for the treatment of detained persons are adopted both internationally and regionally that are serving as thresholds to show violations of human dignity. Ethiopia, part of the Covenant, has designed policy and attempted to implement legislation for the protection and reformation of prisoners.

Among others, the 1995 Constitution guarantees that detained persons shall be treated with due respect to their dignity. Article 21 of the Constitution states "*all persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity"*. Regulations No. 138/2007 on Treatment of Federal Prisoners is also the reflection of UN Standard Minimum Rules for Treatment of Prisoners. The criminal justice policy adopted in 2011 contains sections about the prison policy. Accordingly, the first *line* of subsection 5.3 notes the main objective of the prison system:

> *To adopt a just, clear, and reasonable procedure of effecting punishment for prisoners that can reform and make them productive citizens thereby reintegrating them with the community so that, peace and security of society as well as the government would be protected.*

[46] *Id.*

Moreover, to achieve this objective, the policy devised some specific measures. That is, the prison administration giving due concern to the human rights of prisoners has to develop strategies and plans that can reintegrate reform and make productive citizens. Though such policy has a plethora of unregulated areas as it is designed in broader and vague terms, its existence has many implications for the betterment of the countries' criminal justice system. Nevertheless, looking at the real prison conditions in Ethiopia, almost all centers are exacerbated by diversified and complicated situations.

2.1 Overcrowding

Ethiopia faces a serious problem of overcrowding in prison centers. According to Allen,[47] the problem of overcrowding exists in a prison center when there is a lack of enough room for prisoners to stay and sleep insufficient staff, food and health care services, and absence of separate accommodations for different types of prisoners namely, women, men, untried, convicted, juveniles, adults. Lack of any capacity to receive more numbers of inmates also exhibits the situation of overcrowding. Hence, the issue encompasses and results in various intricate problems.

In Ethiopia, overcrowding is conceded in the prison system. In its footprint, during the reign of Emperor Haile Selassie was one of the serious problems. And even today it poses a great danger across the prison centers of the country as underscored by a myriad reports and studies. Each discussion on the condition of accommodation of prisoners is characterized by the problem of overcrowding. In this specific regard, the situation across all prison centers in the country is congested by many residences of prisoners per class, accounting for 20/25 in number, which is astonishingly far from the UN Standard Minimum Rule for Treatment of Prisoners that requires allocating a detained person with *"minimum floor space*".[48] According, to the 2004 report of the Special Rapporteur to Prisons to African Mission to Ethiopia, all the detention facilities visited, including the police stations are overcrowded and this is mainly

[47] Charles Robert Allen, Handbook on Strategies to Reduce Overcrowding in Prisons, (2016), available at https://www.unodc.org/documents/prison/Overcrowding/in/prisons/Ebook.pdf, accessed on 3 February 2019.

[48] For instance, the International Committee of the Red Cross (ICRC) has recommended minimum space per prisoner of no less than 3.4 sq. and area within the security perimeter of 20-30sq m per person. Whereas the United States, Federal Supreme Court adopted 18.18 square meters' floor space for a prisoner, which is most exaggerated one.

attributed to a large number of sentenced prisoners, constituting about 68% of the total inmate population.

The Ethiopian Human Rights Commission[49] admitted that many of the prisons' rooms were getting overcrowded by the increasing the number of prisoners. Prisoners slept over the floors and at night they were crowded to the extent that prisoners who wanted to excrete had to move over the inmates. During the nighttime, they had to urinate in buckets. New prisoners who could not find unoccupied beds either shared others' beds or slept on the floor in the congested area between the beds where others had to move over them. Moreover, it was observed that out of 114 prisons visited, 41 were highly congested while the remaining detentions are insufficient to accommodate their detainees. Most of the shelters were made of mud the walls were falling apart devoid of sufficient air and light and had no tiled floors.[50] Generally, most shelters had several problems in terms of construction, size, a number of detainees accommodated, types of detainees in each room, and internal conditions. In the police detention centers, where all other things remain constant, there was no medical service at all.

Besides, according to a specific visit at Arada detention center in Addis Ababa, three rooms were inhabited by 107 male inmates with 35 male detainees were allocated in each room, though the actual capacity of each room was for 18 inmates.[51] Due to the absence of wide windows, congestion of inmates created suffocation and the problem of lice and fleas. Consequently, overcrowding as a phenomenon could lead to an accommodation condition that failed to meet the international and national minimum standards violating UN Standard Minimum Rules for the Treatment of Prisoners (articles 9-14); ICCPR, (article 10); ICESCR, (article 11) and Article 21 of the EPDRF Constitution, Regulation on the treatment of federal prisoners (Reg. No. 138/2007).

2.2. Lack of Separate Accommodation

Based on the data prisoners in Ethiopian were not segregated by age, nature of criminal as recommended by the UN Standard Minimum Rules for Treatment of Prisoners (under Article 8), the Federal Prisons Establishment Proclamation No. 365/2003 (Article 25), and the Federal Prisoners Treatment Regulation

[49] Ethiopian Human Right Commission (EHRC), 2015, 2016 & 2017 state of prison report in Ethiopia.
[50] *Id.*
[51] Addisu Gulilat, The Human Rights of Detained Persons in Ethiopia; Case Study in Addis Ababa, Master Thesis, Addis Abeba University, (2012), p.35.

No.138/2007 (article 5). They provide for separating accommodation of prisoners based on their sex, age, criminal record, the legal reason for their detention, and the necessities of their treatment. Men and women, untried and convicted, persons imprisoned for debt, and the young (juveniles) and adults, shall all be kept separate. This is a major area whereby the prison system of the country has received blatant criticisms from different stakeholders. The 2003 criminal justice policy has also failed to give appropriate consideration for differential treatment. By contrast, the Indian prison reform policy of 2016, has taken the following position on separation of female prisoners, juvenile offenders, politically differentiates, and terrorists.[52] So, the point is that separate accommodation of prisoners should be indicated at least at a policy level in Ethiopia.

In Ethiopia, it's true that in all police detention and prison centers, female detainees are kept in separate cells, though there are no further set up in the respective institutions under the study based on age, illness, and behavior. A brief look at the report of EHRC (2012) and African Special Rapporteur (2004), in the Federal detention centers and some detention centers in Amhara and those in Mekele, Sodo and outside Jimma did not provide separate accommodation to detainees classified by types of punishment or other criteria. That is, there was no differentiation between awaiting trials, convicted prisoners, and death row prisoners in Ethiopian Prisons. They were all mixed and treated the same way.

Similarly, in relation to juveniles while a single-center exists in Addis Ababa, they were put together with adults in all prison centers. However, according to EHRC (2016) prison report in some prisons, juvenile detainees between 15 and 18 years of age were completely separated from those other detainees, and in some others, juvenile detainees spent the night in separate rooms but were allowed to mix with others in the day time. Yet in all other prisons including all prisons in Addis Ababa, juvenile detainees shared the same premises and rooms with adults. A study conducted in Addis Ababa (2004) found that there were no separate rooms for juveniles or separate accommodations for inmates with communicable diseases in most police detention and prison centers in the city.[53]

The United Nations Human Rights Committee (UNHRC) affirms the violation of the right of prisoners under art. 10(1) of ICCPR if there are overcrowding, absence of natural light and ventilation, inadequate or inappropriate food, shortage of mattresses, no integral sanitation or proper unhygienic setting,

[52] See the 1960 Indian Model Prison Manual, Ministry of Home Affairs, and Government of India.
[53] Jones T. and Newburn T., *supra* note *17,* p. 81.

inadequate medical services (including psychiatric treatment), and absence of recreation or educational facilities.[54] According to the Committee, such ill-treatment of prisoners would amount to a violation of the prohibition on torture, cruel, inhuman, or degrading treatment or punishment. All these facts could trigger the government of Ethiopia to devise alternative policy solutions that could potentially ease the ill-treatment of prisoners across the country so to promote their rights and basic needs, thereby carrying-out its international and national legal obligations.

2.3. The Search for an Alternative Policy Solution

The main objectives of the 2003 criminal justice policy of Ethiopia are to reduce the number of prisoners, empower the federal and regional prison administration councils, and to design alternative measures other than imprisonment via conducting relevant studies in collaboration with the responsible organs. Yet, the policy does not mention what constitutes alternative mechanism is, other than amnesty and parole.

There are various forms of alternative mechanisms of imprisonment such as recognition of a restorative approach, use of traditional justice, decriminalization, reduction of the number of sentenced prisoners via cooperation with police, recognition of last resort principle, the imposition of imprisonment for most serious crimes, and implementation of conditional release. The 2005 FDRE Criminal Code recognized alternative mechanisms of imprisonment as those generally applicable to all criminals, and specific to offenders with special conditions. These are fines, conditional suspensions of penalty, warning, reprimand and exemption, compulsory labor/community service, admission to curative institutions, supervised education, censure, and school or home arrest.[55]

While studies[56] show that there is insignificant use of alternatives to incarceration in Ethiopia, still there is a contestation that the release of prisoners

[54] See for instance, the UNHRC Communication No.763/1997, 26 March 2002; *Madafferi v Australia*, UNHRC Communication No. 1011/2001, 26 July 2004.

[55] See generally, Arts. 90-99, 190-197, 103-104, 158, 160, 161 and 162 of the Criminal Code of the Federal Republic of Ethiopia, Proc. No. 414/2004, *Federal Negarit Gazeta*, (2004).

[56] Belayineh Berhanu, Community Service as Alternative to Imprisonment in Ethiopia; A Comparative Study, A Senior LL.M Thesis Bahir Dar University, School of Law, (2017), (unpublished); Haile Asenake, Community Service and Compulsory Labor Punishment in Ethiopia, A Senior LL.M Thesis Bahir Dar University School of Law, (2016), (unpublished); በላይነህ አድማሱ እና ዓለሙ ዳኛው, የወንጀል ቅጣትን መገደብ፡- በኢትዮጵያ ያለው የሕግ ማዕቀፍና አፈጻጸሙ በአማራ ክልል, የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት, ቅጽ ፫ ቁጥር ፩.

via *probation* is motivated with the due concern of reduction of prisoners given the ongoing problem of overcrowding with no objective change of behavior. It is indicated that the determinant factor for allowing probation i.e. positive change in the behavior of prisoners is not properly considered by most prison administration centers, since it's easily permitted for an inmate who claimed it.[57]

It seems obvious that overcrowding is a serious problem throughout the correction centers in Ethiopia; hence prisoners are usually released via conditional release upon satisfying least behavioral changes than what is legally required. In contrast, there is an argument that no inmate is released on pardon or probation without showing a considerable behavioral change for reduction of prisoners.[58] Nevertheless, the enduring problem of overcrowding in most prison centers is not denied.

Penal Reform International suggests a ten-point plan to reduce overcrowding. These are conducting an informed public debate, using prison as a last resort throughout all stages of the criminal justice system, increasing prison capacity, diverting minor cases, reducing pre-trial detention, developing alternatives, reducing sentence lengths and ensuring consistent sentencing, developing solutions to keep youth out of prison, treating rather than punishing drug addicts, mentally disordered and terminally ill offenders, and ensuring fairness for all.[59] Most were recommended under the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa.[60] However, it is found that overcrowding in prison centers becomes a common problem in Africa, Asian, and some Latin American countries.[61]

Consequently, it is generally noted that there was little attention to the substantial behavioral change of prisoners while permitting prohibition or conditional release. This little attention to probation on the part of the government was exacerbated by the problem of overcrowding, which is the common problem across several public prisons in Ethiopia.

[57] Interview with Worku Yaze (Asst. Professor), Ph.D. Student at Addis Ababa University, on June 12, 2017.

[58] Interview with Firdie Cheru, Head of Amhara National Regional State Justice Bureau, June 13, 2017.

[59] Penal Reform International, Ten-Point Plan to Reduce Overcrowding, (2012), available at https://cdn.penalreform.org/wp-content/uploads/2013/10-pt-plan-overcrowding.pdf, accessed on February, 2019.

[60] Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, September 2002, available at www.achpr.org/instruments/ouagadougou-planofaction/pdf, accessed on February, 2019.

[61] Thomas Bolinger, *supra* note *16*, p. 4.

3. Viability of Private Prison Policy in Ethiopia

3.1 Legal Perspectives

Article 19 and 21 of the FDRE Constitution deals with the right of arrested persons and persons held in custody and convicted prisoners. It's in this latter provision that all those persons held in custody and imprisoned upon conviction are guaranteed the right to treatments respecting their human dignity.[62] Apart from this explicit provision, this chapter of the constitution contains several articles that have special significance for prison administration particularly the treatment of prisoners.[63]

Article 51(6) and 52(2-g) of the constitution respectively confer both the federal and state governments the power to maintain a prison system as a means to sustain public peace and order. From these provisions, it is possible to understand that regional and federal states do have the autonomous power to organize and administer the prison system in its way provided that it is compatible with the provisions in the Constitution. At the federal level, police, prison, and public prosecutor entities have established the responsibility of administrating justice including the prison service, and the same holds at the state level. This structure is designed in the spirit of the FDRE Constitution. Accordingly, the Constitution seems comparable with the traditional view that the state is the only responsible organ, which has vested power and responsibility to administer the penitentiary system. It's not clear whether private bodies can be part of such activity as the Constitution does not prohibit them from carrying out such activity. Hence, it is sound for one to argue that except for policy decisions, there is no constitutional restriction for the privatization of correction centers in Ethiopia.

The ramification is that the presence of comprehensive and detailed legislation may help us create a firmer basis for delegation of correctional services (particularly, the management and operation) to private bodies with a proper legislative mandate that clearly defines what can and cannot be undertaken by such bodies. If not, the allocation of public and private responsibilities may become confused and public trust will be eroded as a result. Accordingly,

[62] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 21(a).

[63] Articles 14-16 guarantee the inviolable and inalienable right to life and to personal security of prisoners. Exception is made in respect of death penalty because of a serious criminal offence. Article 17(2) stresses the need for strict control by the prison administration of the legality of imprisonment. Most importantly, article 18 prohibits cruel treatment and inhuman or degrading treatment.

private prisons in the U.S., UK, and South Africa operate according to statutes and/or contracts that retain rule and decision making in the hands of government correctional authorities.

3.2 Overall Views about the Introduction of Private Prison Policy in Ethiopia

In considering the situation of prison administration in Ethiopia, overcrowding is the real problem and has an impact on various public prison centers. It necessitates the adoption of a private prison policy. However, the FDRE criminal justice policy and criminal laws don't recognize the notion of a private prison. Rather, they give recognition only to the public prison.[64] This study also reveals that the issue of private prisons has not been given any place in the Criminal Justice System of Ethiopia, and some professionals in the Amhara Region do have little insight about the privatization of prisons.[65] In contrast, others suggest that introducing this policy may have a significant contribution to alleviating over-crowding in the public prison even if it might face several administrative difficulties.[66] It's indicated that lack of budget, abuse of power, corruption, and lack of trust might encounter if the administrative power of prison is delegated to the private bodies.[67] Besides, the attitude and practice of the criminal justice system is an obstacle in the process of privatizing the prison system. To introduce private prisons in Ethiopia*, a* huge effort should be exerted to bring an attitudinal change of the professionals and officials in the justice organs of the role and responsibility of private prisons in the criminal justice administration. First, attitudinal change has to be made. Prosecutors, police, and others believe that being a prisoner is not solely a matter of limitation on liberty, also perceive as evils that have to be punished rigorously. In effect, such belief is taken even as organizational culture. The conception as to deprivation of liberty, which is the assumption in other jurisdictions with all proper conditions of imprisonment, does not exist in Ethiopia. Hence, prison experts and officials should change their attitude to imprisonment and get worried about the proper implementation of the prisoners' rights.

[64] FDRE Constitution, *supra* note 62, Art.21, Criminal Justice Policy of Ethiopia 2016 and see the Criminal Code in general.

[65] Interview with Ato Yaze Mekonen, Head of Correction and Internalization Process of ANRS Prison Administration Commission, on October 23, 2020 and interview with Tekeba Belayineh, Legal Advisor of ANRS Supreme Court (Former vice president of the court), on October 13, 2020.

[66] Interview with Abebe Kassie, Research Department Head of ANRS Justice Organs' Professional Training and Research Institute, held on October 23, 2020; Interview with Tekaba, *supra* note *65*.

[67] *Id*.

There is a belief that the government lacks proper attention to the criminal justice enforcement system when relatively seen from other sectors such as educational, health, and other policy of the country. Respecting prisoner's rights should also get proper concern and be provided with a sufficient budget to fulfill minimum human rights conditions of imprisonment. Hence, the policy of correctional privatization is not the right choice in Ethiopia today.[68] The point is that proper attention to the treatment of prisoners by the government results in better protection. In doing so, if overcrowding and related problems are still an issue, it is inappropriate to resort to the implementation of alternatives to imprisonment which are not effectively utilized in Ethiopia.[69]

Nonetheless, the above argument can be challenged when it is viewed in light of two important concerns today. These are the governmental stance on a *policy of prison reduction* (which limits the expansion of additional prisons),[70] and lack of financial capacity to appropriately fulfill conditions of detentions. Another respondent also reaffirmed such points. He asserted that lack of finance on the part of the government was a key factor for substandard detention conditions in Ethiopia. Even if one is to challenge the prison reduction policy of the government via expansion, the prevailing financial deficiency of the country leaves the other enduring problem of overcrowding unanswered.[71]

Considering the disposition of alternatives to imprisonment in Ethiopia, research works have shown the non-utilization of alternatives to the reduction of overcrowding such as compulsory work and community service.[72] These measures are provided under the FDRE Criminal Code or Criminal Justice Policy. This necessitates the maximum implementation of alternatives to incarceration. And, the quest for another alternative policy solution, i.e. correctional privatization should come to the scene where there is still inefficiency in alleviating the problem of overcrowding. Hence, the existing alternatives to imprisonment should properly be utilized first.

[68] Interview with Worku Yaze, *supra* note *57*.
[69] *Id*.
[70] The policy stands of state in this regard not only on the face of the 2011 criminal justice policy, yet also prior to such is reduction of prisons thereby limiting and reducing the construction of additional prisons, even to the extent that appears to follow abolishing theory. Most importantly, as indicated elsewhere in this paper, a recent statement made by Prime Minster Dr. Abbiy Ahmed to the House of People Representatives on 22/03/2011 EC has also affirmed this.
[71] Tsegaye Workayehu, Prisiding judge of ANRS Supreme Court Cassation Division, June 16, 2017; Dessie Seyume, Head of Research and Training Process of ANRS Attorney General, June 6, 2017 and Interview with Firdie Cheru, *supra* note *58*.
[72] Belayineh Berhanu and Haile Asenake, *supra* note *56*.

Indeed, imprisonment should not be taken as a natural form of punishment. It may be alien to local cultural traditions that for millennia have relied on alternative ways of dealing with crime. Further imprisonment is counterproductive in the rehabilitation and reintegration of those charged with minor crimes and certain vulnerable populations. There are several other important reasons for alternatives to imprisonment though the primary focus is to reduce the number of people in prison and for imprisonment to be used as a last resort. Because of various human rights concerns and the expensiveness of imprisonment, alternatives to incarceration might be more effective.[73] Generally, the existing alternatives to incarceration could have a primary effect of reducing the prison population.

Nevertheless, it's hardly possible to be certain as to whether overcrowding could be alleviated in the future while there is the maximum implementation of alternatives to imprisonment. Such uncertainty might in turn inform policymakers to look for other means- to adopt the policy of correctional privatization in Ethiopia. Given the large prison population in Ethiopia, it is difficult to argue that the maximum use of alternatives to incarceration could solely alleviate the problem of overcrowding.[74] Alternatives to incarceration can be an interim measure that will be applied for a significant number of criminals in private prisons too were such a policy in place. On top of this, alternatives to incarceration are not simple choices that could be applied to every situation. They are limited by criminal law provisions only for less serious crimes.[75] Accordingly, alternative punishments to imprisonment will be appropriate or possible for only a small share of future convicted criminals. Therefore, the need for additional prison centers will not vanish merely, and policymakers must look for new mechanisms for correction policy**.** Likewise, this has led federal, state, and local officials to consider how the private sector can become involved in correction affairs.[76]

[73] Matti Joutsen and Uglješa Zvekic, Noncustodial sanctions: Comparative Overview*,* in Uglješa Zvekic (ed.), Alternatives to Imprisonment in Comparative Perspective, Chicago, (1994), p. 44.

[74] The prison conditions (including pretrial detention centers) in most part of the country remained harsh and in some cases life threatening. And, one of the main problems is gross overcrowding that occurs especially in prison sleeping quarters. For instance, as it is reported by the Ethiopian Human Rights Commission in 2012 & 2016, more than 35 inmates were allocated in a single room with an actual capacity of 18 persons. See also Country Reports on Human Rights Practices for 2019 United States Department of State, Bureau of Democracy, Human Rights and Labor, 2019, p.5.

[75] For instance, community service applies for lesser offences as per the FDRE Criminal Code.

[76] Adrian T. Moore, Private Prisons: Quality Corrections at a Lower Cost, Policy Study No. 240, (1999), p.3 available at http://www.reason.org, accessed on February, 2020.

Because of all the above facts, since it is difficult to alleviate the problem of overcrowding by implementing the various alternatives to imprisonment, the room should be open to considering privatization of correction centers.

3.3 Practicability of Private Prison Policy in Ethiopia

Given that we open the room for the privatization of corrections in Ethiopia, there are various issues that need to be considered. These are the type of prisoners to be confined in such prisons, contractual arrangement/operation of private prisons, manner of control and monitoring activities, and other related concerns.

Confinement of inmates is the usual function of the government prison centers. While looking into the global trend of the type of prisoners confined in private correction centers, in the US, it appears that the governments largely use private corrections firms to satisfy particular needs in the correctional system. Even though private prisons are supposed to serve as general confinement centers for adult inmates, a large proportion of the prisons are serving as drug and alcohol treatment centers. Still, there are also handful of private prisons contracting with the state to provide reception center functions of diagnosing and classifying newly admitted prisoners or confinement of special inmate populations such as those needing mental health services, those sentenced to death, or geriatric patients.[77] However, unlike public prisons, the private sector has very limited experience in managing high-security prisoners.[78] Similarly, in the UK, private prisons are mostly legalized to confine pretrial detainees and juvenile offenders.[79] Likewise, this article argues for the use of private correction in Ethiopia to confine juvenile and non-grave criminal offenders. It is suggested that, where private correction centers have to be in place, it should first start with juvenile offenders, who are improperly confined in almost all adult correction centers across the country.[80]

Concerning the contractual arrangement on the system of private management of prisons, there are two common approaches. One is standard contract operation, where a private management firm is hired to run a government prison. The other

[77] Abt Associates, *supra* note *12,* p.23.
[78] *Id.*, p.29.
[79] James Austin & Garry Coventry, U.S. Department of Justice Office of Justice Programs, Emerging issues on privatized prisons, a document was prepared by the National Council on Crime and Delinquency, U.S. Department of Justice Office of Justice Programs, (2001), p.12, available on, https://www.ncjrs.gov/pdffiles1/bja/181249.pdf, accessed on 20 June, 2020.
[80] Interview with Tekeba Belayineh, *supra* note *65* and Interview with Abebe Kassie, *supra* note *66*.

is contracting to house prisoners, where private firms own their prisons or lease excess space in local jails and house prisoners from many different jurisdictions in return for per-diem payments.[81] Whereas, in South Africa, there is an arrangement that the private sector would, at its costs, design, build, and operate prisons. Here, the state pays the prison company fee per inmate (according to their agreement) for the term of the contract.[82] The state would repay the private entity that built the prison throughout contractual time (be it 50/25 years). Once the state has settled the cost of the building, the prisons would become the property of the state.[83] From this, if private prison is introduced it is difficult to suggest the use of one of the contractual arrangements in Ethiopia without a specific study is independently conducted. However, considering financial constraint on the part of the state to build further prison centers, one can argue against the practice followed in South Africa, since it requires extra cost other than per-diem payments. However, what is commonly experienced in the U.S and other countries such as UK and Australia could be recommended. Specifically, to overcome the rampant problem of overcrowding in Ethiopia, it's better to prefer an arrangement of contracting to house prisoners in private corrections upon the payment of a fee per inmate. Partly, relevant points about the system of contractual management of prisons by private entities are also raised and discussed in the next section that deals with the presence of indigenous investors who will involve in correction service.

For supervision and control, the legislative framework that would govern private prisons should establish a responsible body that monitors the activities and performance of private prisons. It should enumerate the general duties of the body. For instance, the South African Correctional Services Act of 1998 states some duties such as keeping prisoners in custody, maintaining order, control, discipline, and safe environment, providing decent conditions and meeting prisoner needs, setting a structured day program, preparing prisoners for their return to the community, ensuring delivery of prison services, and community involvement.[84] Hence, the performance of these and related activities should be monitored by the controlling body and how the enforcement is carried out. An important aspect of prison management is the extent and quality of programs designed to prepare inmates for their lawful release and reintegration into society. Although better treatment of prisoners is not the principal goal of

[81] Adrian T. Moore, Private Prisons: Quality Corrections at a Lower Cost, Policy Study No. 240, p.9.
[82] Schonteich, M., Unshackling the Crime Fighters: Increasing Private Sector Involvement in South Africa's Criminal Justice System, Johannesburg: South African Institute of Race Relations, (1999).
[83] *Id.*
[84] Correctional Services Act of South Africa, Schedule D., (1998).

privatization as advocates mainly focus on reduction of inmate congestion and cost-effectiveness arguments, a study shows that the quality of prison life, including staff-prisoner relations, is much higher in private prisons.[85] Hence, this reflects the point that the alternative at hand could have an important implication in achieving the purpose of punishments.

The investigation made by the authors of this article envisages two perspectives about the effective achievement of purposes of punishment in a private prison if such policy is to be adopted in Ethiopia. The first doubts effective attainment of purposes of punishment in private correction centers such as reformation, rehabilitation, and reintegration predestined under both criminal code and criminal justice policy as it's very difficult to trust the private sector given the possibility of corrupt practices and abuses.[86] In contrast, others opines for the better accomplishment of such purpose of punishments in private prisons than state prisons indicating the possible presence of improved quality facilities and services namely, academic educations and vocational training in private centers as relevant measures for the behavioral reform and integration of prisoners.[87] When these issues are seen from the experience of other countries it is found that the latter indication is attained in reality.[88]

Although it could be superfluous to generally conclude that private prisons triumph-over the state prisons in effectively achieving purposes of punishment and issue of inmate programming, experiences show the advancements of private prisons in some respects. Hence, it's possible to assert that the consolidation of private prisons will have positive implications for achieving the purposes of punishment and inmate programming due to the comparable veneration of important facilities namely, educational and vocational training.

3.3 Challenges of Correctional Privatization in Ethiopia

Assessing the visibility of private prisons in Ethiopia needs a critical look at the potential challenges and prospects of this policy, *inter-alia*, whether there are

[85] G and A Liebling., Prison Privatization: In Search of a Business- like Atmosphere, Journal of Criminology and Criminal Justice, 8(3), (2008), p. 261 & 278.

[86] Interview with Worku Yaze, *supra* note *57*.

[87] Interview with Ato Firdie Cheru, *supra* note *58*; Interview with Tsegaye & Dessie, *supra* note *71.*

[88] For instance, in UK during the year 2011 investigation, Don Caster private correction became the first prison with no re-conviction whose service contract also includes PbR (Payment by Results) element. Adding, the so-called Serco, Catch 22 and Turning Point private prisons were also successful in reducing re-conviction rates by 5%. See, Public Service, G4S to take-over Birmingham prison, News Release, April 2011, available on http://www.publicservice.co.uk/news/story, accessed on 17 June, 2019.

indigenous private institutions that can run the service, profitability, and the issue of accountability and corruption. Accordingly, this section discusses the main challenges that will hinder the privatization of prisons in Ethiopia.

3.3.1 The Presence of Indigenous Private Institutions and Issue of Profitability

The engagement of investors in correction service depends on the attainable profit found from undertaking such business (for investors) and service (for the state). Today, investors in Ethiopia have been undertaking business in many investment areas such as education, banking, mining, manufacturing, tourism, forestry and agriculture, livestock, fishery, and horticulture.[89] Concerning this, investors who are also interested in investing on corrections will indeed be available provided that privatization policy is introduced in Ethiopia. This is also affirmed by the participants of this study.[90] Yet, the difficulty lies in the profitability of the service to run it as any kind of business stated above. Most of the responses from the respondents were about this issue. As one has firmly noted, given the current average cost of budget allotted for public prisons in Ethiopia, which is 20 birr per day for one inmate,[91] it could be very grim for the coming investors to bid with a lesser price and unsure profit. The profitability or otherwise of such a business service further involves considering wage employers (such as prison guards, teachers, technicians, health professionals, etc.) and other depreciable goods (like a bed, consumption goods, and many other things). Thus, it could be inferred that the state could not afford to pay more than what it spends today because of financial constraints. Although the assessment of the proper threshold level of profitability for private prisoners needs independent expert investigation, the profitability of the current per-dim cost for one inmate puts into question. Unless, the cost per inmate is raised in a way it ensures profitability of the private organizations, the alternative, private prisons, seems to be not practical.

Nevertheless, still, there is another policy way out. The government has failed to settle the problem of overcrowding mainly because of a lack of willingness to construct additional prison centers. Harsh conditions of confinement existed

[89] Ethiopian Investment Agency, Overview of Ethiopian Investment Opportunities and Policies, (2018), available at http://www.flandersinvestmntandtrade, accessed on 15 June 2019.
[90] Interview with Worku, *supra* note *57;* Interview with Dessie, *supra* note *71.*
[91] Interview with Inspector Shumet Molla, Chief Inspector, Head of Bahir Dar City Prison Center, on April, 2019.

across most prison centers in Ethiopia and this resulted in the violation of the human right of prisoners.[92] Hence, an alternative room has to be designed for the involvement of private bodies through a system that inmates can afford to pay the required cost to be held and confined through private correction centers.[93]

Accordingly, it's hoped that the introduction of alternative private correction centers would provide a better imprisonment condition for inmates since the state has failed to comply with its obligation subject to various factors including financial problems. To some extent, this can extensively resemble the privatization policy of the education sector despite those significant contextual dissimilarities among the two policies. Doing this way, it's inevitable to find partners who are willing and able to afford the cost of confinement in private prisons. Specific types of inmates who should be held in these prisons can in turn be addressed via separate and extensive policy investigations and justifications.

The above line of policy indication might erode the principle of equality, when those who can afford the required money are treated in detention conditions, while others remain in harsh conditions under public prisons. In reality, however, those who were not able to afford the required amount of money will still benefit since it can reduce at least the problem of overcrowding and its resultant effect, namely, limitations with a bed, spacing, and other similar needs. Furthermore, the system known as 'cost-sharing' which operates for higher education students in the country can be similarly premeditated for those inmates who are not able to afford the required amount of cost in private prisons at the time of their detention but can pay in long return either before or after completing their imprisonment. Accordingly, the government can first pay the general contractual amount to the private prison institution, and in turn receive from the private institution's prison capacity per the contractual agreement.

Moreover, religious and charity organizations involved in rendering free educational services (*probono*) through constructing elementary and high schools may perhaps also establish correction centers to house prisoners in better conditions. A similar indication can still be made to private organizations that engage in construction and manufacturing activities to send specifically identified and willing prisoners to undertake labor activities in such places in an organized manner.[94] Independent policy investigation still needs to be made

[92] Interview with Dessie, *supra* note *71.*
[93] *Id.*
[94] Interview with, Tsegaye and Dessie, *supra* note *71.*

concerning the type and conditions of prisoners that should be sent to the correctional institutions.

3.3.2 Risk of Transparency, Accountability, and Corruption

Several scholars address the presence of apparent threats associated with loss of transparency, accountability, and room for corruption as well as a fraud within privatized relationships.[95] There is a fear that private agencies that are providing public goods tend to utilize confidentiality clauses as an attempt to hide information that should be shared with the government and public, which in turn reduces transparency and accountability. Even when problems arise maybe because of lack of adherence to the terms of a contract, these confidentiality matters and issues related to trade secrets allow private agencies to limit the amount of public examination accessibility, which further hinders accountability and opens the door for corruption. This article also showed that malpractices and corruption would occur if private prisons are in place in Ethiopia.[96] The point is that potential actors working in the area will easily manipulate corrupt acts unless there are strong anti-corruption plans and measures.

It is stressed that, while corruption can and does happen in regular public agencies, it occurs more frequently in private agencies providing public services mainly due to the number of transactions taking place within the contractual relationships.[97] Private prisons may also open the door to maladministration, which can include corruption, manipulation, and maltreatment. Nevertheless, scholars like Rose-Ackerman, argued that privatization can decrease corruption through increased competition.[98] However, it's still very hard to assume that there will be a competition among several investors to involve in the correction business in Ethiopia. And, this is also confirmed by Neill & Gable, in their

[95] See for example, Bloomfield, P., The challenging business of long-term public private partnerships: reflections on local experience, Public Administration Review, 66(3) p.411; Fombad, M., Accountability challenges in public-private partnerships from a South African perspective. African Journal of Business Ethics, 7(1), (2013) p.25; Gilmour, R. S., & Jensen, L. S., Reinventing government accountability: Public functions, privatization, and the meaning of state action, Public Administration Review, 58(3), (1998) p.47; Watson, D. The Rise and Rise of Public Private Partnerships: Challenges for Public Accountability, Australian Accounting Review, 13(31), (2003), 14.

[96] Interview with Worku Yaze, *supra* note *53*; Interview with Tekeba Belayineh, *supra* note *65,* and Interview with Abebe Kassie, *supra* note *66.*

[97] *Id.*

[98] Rose-Ackerman, S., Redesigning the State to Fight Corruption: Transparency, Competition, and Privatization, View Point, 1, Note No.75, (1996), p.4.

study, that there was no competition in the prison industry.[99] As a result, this article argues that there might have several measures that can be taken as anti-corruption measures to prevent corruption in private centers. As only certain administrative functions related to incarceration are delegated to private prisons and they were subordinated to public oversight and monitoring, the responsible government body should actively acknowledge if there is a problem of corruption in prison settings and commit to taking action in the short, mid, and long-term. In particular, the controlling body should fully be aware of how corrupt conduct manifest itself in the private prison setting. Efforts to prevent and combat corruption need to be understood as ongoing tasks and should be firmly embedded in all core areas of prison management. Risk assessment should be made on areas exposed to corruption while developing an anti-corruption program. Moreover, a dedicated anti-corruption unit might be established within the public prison administration including the designation of corresponding focal points in each private prison facility with the necessary mandates, power, and resources to carry out their tasks.

3.4 Potential Public Benefits of Private Prison Policy

Private prison potentially improves the entire penitentiary system. It helps the system to alleviate its problem by introducing market competitiveness technology and other facilities in public prisons. Sturgess suggests that private prison policy provides an opportunity for the involvement of private financial institutions in the public prison and they contribute to the competitiveness of the prison system.[100] The institutions which are selected competitively based on the bidding charge could take the responsibility to generate income and create innovation in the activities done by the inmates. Inmates who are involved in vocational training and business activities develop their skills and ability in different professional fields. Consequently, both the prison and the prisoners benefit from the private institutions engaged in the business activities designed by the public prisons. It increased the competitiveness of the Prisons Service by reducing the price of its bids through more flexible staffing arrangements. The private sector will also play a vital role in introducing information technology in managing inmates.

[99] Neill, K. & Gable J, The corrections-commercial complex: A high-stakes, low-risk business. In B. Price & J. Morris (Eds.), Prison privatization: The many facets of a controversial industry, Vol. 2, (2012), p. 116.

[100] Sturgess G., The Sources of Benefit in Prison Contracting' in Cardwell, V. (ed). In, Delivering Justice: The Role of the Public, Private and Voluntary Sectors in Prisons and Probation', London, Criminal Justice Alliance 33 (2012).

This can also be true in Ethiopia if the private prison policy is introduced in the criminal justice policy. The interviewees buttressed this opinion. According to them better means of income generation activities would be created in a more sufficient and modernized way in private prison centers than state prisons since private holders might emphasize certain private interests.[101] This will in turn benefit the public as a whole as it yields various products either handmade or manufactured ones depending on the availability of income generation activities.

One might appreciate the current situation in most prison centers in Ethiopia where there are one or two types of inmates participating in income-generational activities. Even from the analysis made on the 2011 E.C policy, it failed to see prisons as places for education and income-generation for development though practically such has been done in many prisons of the country. It has been some time now since prisoners began to appreciate that prison centers are no longer the hell but are in fact centers of change where they endeavor to engage in development. This issue again needs policy consideration as it is a major area of focus in dealing with the prison system via a reformative and rehabilitative goal. As a result, it's believed that the policy of correctional privatization will complement such snags when state prisons fail to rectify them; thereby culminating with transformed and integrated inmates into society.

Conclusions

The issue of overcrowding in prison is a tenacious problem in Ethiopia. Several reports such as EHRC, UN Human Rights Committee, Committee against Torture, African Commission on Human and Peoples Rights, Human Rights Watch, U.S. Department of State's Reports on Human Rights Practices, and Amnesty International have extensively revealed a lack of room for prisoners to sleep, insufficient food and health care service, insufficient staff, lack of accommodation to hold separately different types of prisoners such as women from men, juveniles from adults or untried from convicted. Independent studies have also learned such. And, this triggers the government to devise a policy solution that can properly alleviate the ill-treatment of prisoners all over the country, protecting their dignity and basic instincts thereby to carry out its obligation under art.10 of ICCPR and national laws.

Accordingly, this article looked into the implementation of various alternatives to imprisonment stated under the 2005 FDRE Criminal Code as well as the 2011

[101] Interview with Tekeba Belayineh, *supra* note *65;* Interview with Abebe Kassie, *supra* note *66*.

Criminal Justice System Policy of the country. Yet, studies showed the non-utilization of those particular significant alternatives to the reduction of overcrowding such as compulsory work and community services. And, it seems difficult to be certain about the proper implementation of the existing alternatives to incarceration that would alleviate the problem of overcrowding, at least, in the long run. Particularly, the prison policy of the state that bars the establishment of prisons and the existing insufficient number of prisons appear unrealistic that alternatives to incarceration independently alleviate the problem of overcrowding. Consequently, this leads the policymakers and officials to look for viable options for the state prison. This has been witnessed in different countries and introducing a private prison policy contributed a lot to alleviating several problems namely, overcrowding and subsequent human rights abuses. Hence, in this article, it has been recommended that Ethiopia should consider the private prison policy as an alternative to alleviate the existing problem in its penitentiary system.

Agricultural Investment Land Acquisition in Times of Emergency in Ethiopia: The Case of Land Delivery to Respond to COVID-19 in Amhara Region

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Abstract

The outbreak of the COVID-19 crisis has been affecting the food and agricultural production sector. As part of responding this challenge, the Amhara region has issued a new Directive on the acquisition of land for agricultural investment. However, this measure is criticized for its incompatibility with the regular rural land and investment laws, and its inadequacy to deal with the land use rights of the local people. The purpose of this article was, thus, to examine the content of pandemic induced Directive on agricultural investment land acquisition modality in line with the regular rural land and investment laws, and impacts of the deviation made by the Directive from the regular laws on local land use rights. A doctrinal legal research method is employed to examine the stated purpose. The FDRE Constitution, rural land laws, investment laws, and other relevant legislations are used as primary data sources. A key informant interview has also been conducted with rural land investment experts working at BoLAU of the Amhara Region. Additionally, the existing body of literature in the form of policies, manuals, books, and articles in the area is scrutinized as secondary data sources. The paper argues that the Directive liberalizes existing land acquisition requirements and procedures through promoting irregularity, and recognizes easy and speedy processes of land acquisition for agricultural investment, which contributes to the trouble of local land use rights. Therefore, it is better to develop the agricultural investment land acquisition framework that keeps local land use rights in balance during emergency times. In so doing, the regional government has to provide a rule that empowers local land users and obliges investors to conduct EIA of the project to mitigate the future risk of the investment in agriculture.

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Keywords: Land acquisition, Agricultural investment, COVID-19, Directive, Amhara region

Introduction

The long-term transfer of large-scale agricultural land by states and non-state actors has received significant attention since the 2007-2008 global financial crisis.[1] The global drivers for acquisitions of land were "the sharp increase in food price, the crisis in western financial markets, fluctuation in fuel prices and carbon trade related to climate change."[2] However, these were not determining factors for the expansion of large-scale land acquisitions in Ethiopia. Rather, the expansion was primarily driven by the development policy of the government.[3] Under the guise of development, the government was using investment in agriculture for an effective political control mechanism.[4] Among others, this politically maneuvered investment involved forcing the resettlement of rural communities.

In rural communities of Ethiopia, land is a valuable natural resource endowment in attaining socio-economic development and poverty reduction.[5] Land use right is a source to sustain livelihood. It is a factor of production, a source of water resources, settled agriculture, grazing pasture, collecting wood, beekeeping, and construction of identities of rural communities.[6] Property rights over land are not only the sources of economic production but also the basis of social relationships, the foundation of political power as well as environmental, cultural, and spiritual values.[7] Thus, access to secured land use right is an essential prerequisite for the realization of the right to an adequate standard of

[1] Olivier De Schutter, The Green Rush: The Global Race for Farmland and the Rights of Land Users, *Harvard International Law Journal*, Vol. 52, (2011), p. 504.

[2] Muradu Abdo, State Policy and Law in Relation to Land Alienation in Ethiopia, PhD Dissertation, University of Warwick, School of Law, (2014), p. 220.

[3] Kirstian Toft, Are land deals unethical? The Ethics of large-scale land acquisitions in developing countries. *Journal of Agricultural and Environmental Ethics*, Springer, (2013), p. 15. Kerstin Nolte, Large–Scale Land Acquisitions in Sub–Saharan Africa: Determinants, Processes and Actors, PhD Dissertation, Universität Göttingen, (2014), p.7.

[4] Tsegaye Moreda, Large-scale land acquisitions, state authority and indigenous local communities: insights from Ethiopia, *Third World Quarterly*, Vol. 38(3), (2017), p. 699.

[5] Daniel Behailu and Getiso Detamo, Res Nullius vs. Res Communis in Matters of Communal Lands of Smallholder Farmers in Ethiopia, *MIZAN LAW REVIEW*, Vol. 12, No. 1, (2018), p.100.

[6] Francis Kariuki and Rapheal Ngetich, Land Grabbing, Tenure Security and Livelihoods in Kenya, *African Journal of Legal Studies,* Vol. 9, (2016), pp. 85-86.

[7] FAO, Land and livelihoods: Making land rights real for India's rural poor. Livelihood Support Programme (LSP), an inter-departmental Programme for improving support for enhancing livelihoods of the rural poor, (2004), Pp. 1-2.

living[8] and a long-term path to prosperity.[9] While land rights are the sources of sustainable livelihood at individual and household level, investment in agricultural land can also support sustainable societal development and helps to meet growing food security needs at domestic, regional, and global levels.[10] As a result of the rise in global demand for food, different actors have started investment in agricultural land.[11] Evidencing this, investors in different localities approach the Ethiopian government to get agricultural land with an ever increased interest. Yet the government make agricultural land available for investors in the face of resistance and mounting grievances from local communities who contend to use this same land resource for their own investment in their own ways.[12]

Under such conditions, a significant amount of agricultural investment land was transferred to investors. However, after the Ethiopian government made an in-depth study on the acquisition of land in 2016, it has made a fundamental policy change towards large-scale agricultural investments. A study commissioned by the former Prime Minister of Ethiopia, Hailemariam Dessalegn, regarding Gambella commercial farming investment found out that among 623 investors who applied for bank loan to finance agricultural investment, 200 took the loan from the Ethiopian Development Bank.[13] Yet while the report shows all these investors took the loan, it was impossible to identify two of the investors whose name is missing from the list provided by the bank.

The report further indicates that a 4.96 Billion-Birr loan was provided to 200 investors, and the investors claimed to have started the investment activities. Yet their land development activities were grossly incompatible with the terms of the loan contract. Upon discovering these acts of the investors, in 2020, the Environment, Land Administration and Investment Bureau of the Benishangul Gumuz Region reported the cancellation of agricultural investment contracts of 54 investors. Currently, the government of Ethiopia is engaged in reclaiming agricultural investment land from investors because of their failure from attaining the intended promises.

[8] Demelash Shiferaw, A Human Rights Approach to Access to Land and Land Dispossession: An Examination of Ethiopian Laws and Practices, *African Journal of Legal Studies*, Vol. 9, (2016), p.104.
[9] AGRA, Africa Agriculture Status Report: The Business of Smallholder Agriculture in Sub-Saharan Africa (Issue 5). Nairobi, Kenya: Alliance for a Green Revolution in Africa (AGRA). Issue No. 5, (2017), p.vi.
[10] Columbia Center on Sustainable Investment (CCSI), Annual Report, (2018), p.7.
[11] New alliance for food security and nutrition, Analytical Framework for Land-based investments in African Agriculture: Due diligence and risk management for land-based investments in agriculture, GrowAfrica, (2015), p.4.
[12] United Nations, Report of the Special Rapporteur on the right to food, (2010), p.6.
[13] Study report, Large-scale Agricultural investment, Gambella Region, May, 2016

Aimed these government moves, the global pandemic, COVID-19 came into the picture and a state of emergency has been in place across the country. Looking into the rural land laws of Ethiopia, one can observe that there are no established rules for the acquisition of investment land under emergency situations. Yet, currently, the government is interested and rationalizing the acquisition of investment land to improve agricultural food production as a way to easily recover from the pandemic crisis. As a result, the government of the Amhara region has issued a Directive to allocate agricultural investment land as a tool of combating food shortage expected to occur during and in post-pandemic period.[14] Nonetheless, the contents of the agricultural investment land acquisition Directive regarding the local land use rights are not closely examined yet. Thus, the major goal of this article is to examine the content of the pandemic-induced Directive on agricultural investment land acquisition in line with the regular rural land and investment laws, and impacts of the deviation made by the Directive from the regular laws on local land use rights.

Accordingly, doctrinal legal research method is employed to examine the Directive on land acquisition according to the regular rural land and investment laws. Both primary and secondary data sources are used to attain the objective of the investigation. As a primary data, the FDRE Constitution, rural land laws, investment laws, and other relevant legislations are critically examined. The authors have also interviewed key informant experts on rural land investment working at the Rural Land Administration and Use Bureau (hereafter, BoLAU) of the Amhara region. Besides, different policy documents, reports, relevant literature, newspapers, online sources, and journal articles are generated as secondary data. To address the stated issue, doctrinal analysis of rural land and investment laws is employed along with existing literature.

The article is structured as follows: the first section provides agricultural investment objectives and land use claims. The second section deals with experiences relating to the impacts and measures of the pandemic on agricultural investment land governance. The third section is devoted to examining the content and deviations of pandemic-induced Directive on agricultural investment land acquisition modality and its impact on local land use right in line with the regular rural land and investment laws. The last section provides a conclusion.

[14] Amhara Region Acquisition of Agricultural Investment Land Law, Directive, 2020

1. Agricultural Investment Objectives and Land Use Claims

The federal investment law in Ethiopia recognizes investments in different sectors and agricultural investment takes a special place in the legislation. The recognition is evident in the inclusion of the Ministry of Agriculture as a member of the investment board.[15] In this legislative document, the term "commercial agricultural investment" is defined as a capital investment of an investor to establish new large agricultural investment farms, ranches, and commercial plantation forests or for expansion or improvement of existing agricultural investment farms.[16] As such, the objective of agricultural investment is to improve the living standard of people by realizing rapid, inclusive, and sustainable economic and social development.[17] Further, it is meant to promote the national economy, employment opportunity, transfer of knowledge and skills, and increase foreign exchange earnings.[18]

The land needed for investment in agriculture holds a unique position at the heart of the economic, social, environmental, cultural, spiritual, and political life of communities with far-reaching meaning[19] and implication on local livelihood.[20] Particularly, the livelihood of the local people in rural Ethiopia depends on land through subsistence farming, small-scale mining, habitation, crop-growing, forest products, pastorals, and other social and political aspects.

Peoples rights over land resources in this country are found mainly within the context of property rights.[21] Property rights over land are not only the sources of economic production but also the basis of social relationships, the foundation of political power as well as environmental, cultural, and spiritual values or identities.[22] Secure land rights play a multi-dimensional role in the overall wellbeing of society,[23] and the realization of a range of human rights[24].

[15] Federal Investment Law, Proclamation No. 1180/2020, *Federal Negarit Gazetta*, (2020), Article 33(1) & Article 51(1)

[16] Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Minsters Law, Regulation No. 396/2017, *Federal Negarit Gazetta*, (2017), Article 2(3)

[17] Proclamation No. 1180/2020, *supra* note 14, preamble, Article.5

[18] Id.

[19] Achamyeleh Gashu and Tadesse Amsalu, Decentralised Rural Land Administration in Ethiopia: The Case of Amhara Region. Centre for Rural Studies, LBSNAA SAGE Publications, *Journal of Land and Rural Studies*, Vol. 6(1), (2017), p. 34.

[20] Marcello De Maria, Understanding Land in the Context of Large-Scale Land Acquisitions: A Brief History of Land in Economics, *Land Review*, Vol 8, (2019), p. 1.

[21] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/ 1995, *Federal Negarit Gazetta*, (1995), Article, 40.

[22] United Nations Economic and Social Council, Report of the United Nations High Commissioner for Human Rights of Land Issues, (2014), p.4. FAO, Land and livelihoods: Making land rights real for

Yet, looking into the FDRE Constitution and subordinate rural land laws, one could see that they do not clearly provide comprehensive dimensions of land resources. Rather, they dictate its ownership aspect, administration and acquisition modalities, and the scope of peasants, pastoralists, and investors' rights over land. Particularly, the Regional State laws of Ethiopia restrict the role of land to farming, grazing, cultivation, and forestry.[25] The remaining land-based livelihood activities do not receive due emphasis under the Constitution and subordinate rural land laws. For example, the rural land law of the Amhara region emphasizes the role of land in accommodating the living standards of farmers and semi-pastoralists concerning economic, social, and political development.[26] However, the law fails from recognizing the spiritual and cultural values of land for the local people.

Turning to the global picture, we could clearly see that agricultural investment policies prioritizes the economic benefits over the social and spiritual dimensions of land resources.[27] To this end, the UN Special Rapporteur on the right to food provides that land-based investment policies increased the pressure on land use right.[28] The competition among various uses of land has recently been increased by policies favoring the acquisition of lands for agricultural producers better connected to markets, which have been posing the risk for local land users to lose access to land on which they depend.[29] The local people had to compete with economically far stronger investors to use land which is a critical source of their livelihood.[30]

The situation in Ethiopia is not free of such risk and threats. Looking into the problems experienced by the communities in this country, one can trace the risk to the government's approach to regulate the rights of investors and local land users. As a preliminary step to initiate agricultural investment, the government is planning projects which require local land uses to be converted to investment in

India's rural poor. Livelihood Support Programme (LSP), an inter-departmental Programme for improving support for enhancing livelihoods of the rural poor, (2004), pp.1-2.

[23] Brightman Gebremichael, Access to Rural Land Rights in the Post-1991 Ethiopia: Unconstitutional Policy Shift. *Journal of Land and Rural Studies*, Vol. 7, No. 1, (2019), p.11.

[24] Demelash Shiferaw, *supra* note 8.

[25] Proclamation No.1/ 1995, *supra* note 20, Article 40(4) & Article 40(5). The Revised Rural Land Administration and Use Determination law of Amhara National Regional State, Proclamation No. 252/2017, *Zikre hige*, (2017), preamble, Article 2(22) & Article 2(5). Federal Democratic Republic of Ethiopia Rural land administration and use Law, Proclamation No. 456/ 2005, *Federal Negarit Gazetta*, (2005), Article 2(12), Article 2(13), & Article 5(1).

[26] Proclamation No. 252/2017, Preamble.

[27] United Nations, *supra* note 12, p. 5.

[28] Id.

[29] Id.

[30] Id., P.6

agriculture,[31] and investors in agricultural projects compete with local and users for the production of food.[32] This leads to a competition of land use claims on the part of local land users.[33]

BoLAU has reported more than 216, 000 hectares of potential land for investment,[34] among which 154, 967 hectares are transferred to investors. The report also shows that 1366 investors are involving in agricultural investments. Yet to expand the volume of investment, the regional government has planned to allocate land for agricultural investment from different parts of the region.[35] More than Sixty-three thousand (63, 000) hectares of uncultivated free land are planned to be allocated in the time of the COVID-19 crisis for agricultural investment.[36] The data from BoLAU shows that more than forty-four thousand (44, 000) hectares of land are transferred to investors. Specifically, details of land planned to be allocated and allocated for agricultural investment is presented in the table below.

Zone	Identified land in hectare	Allocated land in hectare	Duration/year
West Gondar	23, 200.87	11,887.519	3
		1, 678	30
Central Gondar	7,090.87	2, 624	3
North Shewa	8, 426.989	3, 333.2278	3
		3, 790	30
Awi	23, 556	23,000	30
North Wollo	665.771	665.77	3
		80	30
South Wollo	-	299.16	30
East Gojjam	319	315.5	3
West Gojam	-	140.0461	30
Total	***63, 259.5***	***44, 813.2229***	

Source: Data from BoLAU (Complied by the Authors)

Looking into the actions of the government, one could see some level of inconsistency with the stipulations in the Directive. Though the Directive provides the duration of the lease contract as three consecutive production period, the data found and a key informant interview reveals that the regional

[31] FAO, Guidelines for Sustainable Large-Scale Land Deals in Africa, (2017), p. 14
[32] David Palmer, Szilard Fricska, Babette Wehrmann., Towards improved land governance, FAO, Land Tenure Working Paper 11, (2009), p.10.
[33] Id.
[34] Amhara Region, Rural Land Administration and Use Bureau, Office of Head, *agricultural investment land acquisition*, May 10, 2020
[35] BoLAU, Notice and list of identified land for Agricultural investment
[36] Amhara Region, Rural Land Administration and Use Bureau, Notice for public competition in tender, May, 2020.

government has transferred 28, 987.2061 hectares of land for thirty (30) years.[37] Under the cover of the pandemic crisis, the regional government has transferred huge tracts of land for the period referred to under regular rural land laws. The rural land law of the Amhara region sets the maximum lease period for agricultural investment land and provides the effect of the lease contract if concluded for more than the specified year. The law in the relevant section provides: "*the maximum lease year of rural land which will be used for agricultural investment shall be for 30 years and if more than 30 years, it is presumed as for 30 years.*"[38] This maximum period for the duration of an agricultural investment contract is also provided in Directive No.8/2019 of Provision and use of agricultural investment land.[39]

Therefore, we can observe that the government mixed up the rules in the Directive and the regular law and failed to respect the hierarchical relationship between the two. In principle, the regular law prevails over the Directive. Yet once the Directive contravening the regular law issued by the executive, the regional government tuned to the regular law rules to justify its action in allocating land to investors. This measure of the government complicates the rural land governance practices in the region. The deviation should have been fixed, the authors argue, by getting the pertinent regular law amended through the regional council, avoiding the Directive altogether. Finally, while enacting of rules for allocating land for emergency situations, the law making body should sufficiently reason out and justify the need for such laws beyond the regular law. The next section presents the global experience and insights on this issue.

2. Agricultural Investment Land Governance Experiences in Times of Emergency

Though there is no single definition of what constitutes an emergency, it's possible to understand that the term refers an event of national implication, posing an actual or imminent and a serious threat to public safety or threatening the destruction of, or damage to property such as an outbreak of a quarantinable disease.[40] Emergency governance marks out institutional structures and

[37] Interview with Nibret Abebe, Rural Land Investment Expert, Investors Monitoring and Support Directorate, Rural Land Administration and Use Buearu of Amhara Region, (4 November 2020)

[38] Proclamation No. 252/2017, *supra* note 24, Article 22/6/

[39] Amhara Region Provision and Use of Agricultural Investment Land Law, Directive No. 8/2019, (2019), Article 27/1/

[40] _____, Emergency powers, available at https://www.parliament.nz/media/4058/43-ch-43-emergency-powers.pdf, accessed on October 4 2020

processes that guide and restrain collective activities to influence or direct the course of events when dealing with risk issues.[41]

In an emergency situation, there is a danger that the government and other well-connected entities capitalize on the weakness in public supervision to strengthen their claims and engage in the unconventional embezzling of public interest including acquisition of land. This is the major challenge for agricultural investment land governance in a time of emergency.

The experience of different countries shows that re-writing, deregulation, or stopping the implementation of regular rural land and investment laws as well as avoiding the authorization requirements of land acquisition are the measures taken by governments in the time of the pandemic. This directly affects the land use rights of the local people. Particularly, local land-use rights pressure is coming from governments, posing a worrying future on economic drivers once the crisis subsides. Investment companies are also seeking to press ahead with investments to take advantage of the pandemic to avoid the usual authorization requirements.[42] As Cotula observes, governments and investors are using the era of the pandemic as an opportunity to seize lands and rewrite regulations. The governments are deregulating regular rural land and investment laws by using the pandemic as an opportunity to seize the land. As measures, some governments and companies are demanding local consultations with the local people to secure approval for land-based projects during the crisis, though, difficult to meaningfully engage them.

The report of the International Land Coalition (ILC) indicates that the COVID-19 pandemic crisis has stopped the implementation of regular rural land and investment laws, and processes.[43] Food security justification of governments paved the way to acquire agricultural investment land. As a result, governments and investors failed to observe the implementation of regular land and investment laws. ILC also states that the pandemic has shown the failure of governments to establish and implement robust legal frameworks and institutions for protecting local land use rights. Weak agricultural investment

[41] Andreas Klinke and Ortwin Renn, The Coming of Age of Risk Governance, Risk Analysis, (2019), p, 2.

[42] Lorenzo Cotula, Stopping land and policy grabs in the shadow of COVID-19, International Institute for Environment and Development, 2020, available at https://www.iied.org/stopping-land-policy-grabs-shadow-covid-19 accessed on 1 October 2020

[43] International Land Coalition, How COVID-19 is affecting land rights in Africa, Platforms struggle to support communities to secure their land rights and develop agriculture, 2020, available at https://africa.landcoalition.org/en/newsroom/how-covid-19-affecting-land-rights-africa/ accessed on 8 September 2020

land governance system has paved the way for the action of the government in the time of the pandemic crisis. Instead of focusing on an inclusive farmland governance system, governments have prioritized the food sector and are seeking to increase agrarian production on land,[44] and pushing the pressures on land for their food security program through increasing agrarian production.[45] The ILC members and platform reported that the outbreak has disrupted land rights, which are vital in achieving inclusive economic growth, sustainable development, and local food security. The pandemic has ceased the implementation of land laws and regulations, and stopped processes that provide tenure security and protection of the local people in their quest for land use rights.[46]

Land use rights have a direct relationship with food security and the livelihood of the local people. Re-writing the regular land and investment laws, stopping their implementation as well as avoiding the regular land acquisition approval requirements in the time of the pandemic affects the land use rights of the local people, which directly affects food security and livelihood of the local people. In Nepal, for example, the local people depend on the country's agriculture sector to lead livelihood and food supply. As Jagat Deuji reports the experience of Nepal, the pandemic is putting the local people under tension.[47] In his findings, this researcher particularly predicts that a huge number of people will lose their livelihoods because of the impact of the pandemic and the country could slip into deep food insecurity. As a way to curb such impact, Jagat further suggested such measures as locating and distributing relief packages for the vulnerable people and empowering producers of commercial agriculture.

Yet another manifestation of the impact is its profound effect on agriculture and food market. According to various institutions such as FAO, the pandemic may cause reduced access to high-value foods, such as fruits and vegetables; higher food prices, especially for nutritious (perishable) foods; reduced food affordability, and accessibility. As the FAO policy brief indicates, "the COVID-19 pandemic is impacting not only food trade, food supply chains, and markets

[44] Mark Paterson, African Land rights in the time of coronavirus, PLAAS, (2020), p, 5.
[45] Id., p, 8
[46] Isreal Bionyi, How Covid-19 is affecting land rights in Africa, (21 Apr 2020), avaliable at https://africa.landcoalition.org/en/newsroom/how-covid-19-affecting-land-rights-africa/, 2020) accessed on 6 October 2020
[47] Jagat Deuja, Curbing the impacts of COVID-19 on Nepal's small-scale farmers and seizing opportunities for food system reform, International Institute for Environment and Development, 2020, avliable at https://www.iied.org/curbing-impacts-covid-19-nepals-small-scale-farmers-seizing-opportunities-for-food-system-reform accessed on 10 October 2020

but also the economy, livelihoods, and nutrition."[48] Since the pandemic has put the local food system at risk of disturbance, FAO suggests transforming towards a sustainable food system as a solution to prevent hunger. Though the recommendation of FAO does not directly mention land, the sustainability of the food system depends on the protection and security of local land tenure rights.

In Sierra Leone, civil society organizations are assisting considerable number of local people in their negotiations with large-scale land investors in the time of crisis.[49] In Uganda, the worst impacts of rising contestation over land is mitigated by an established mechanism for supporting customary tenure.[50] In Namibia, investors are grabbing the land and the local people are abandoning their land because of the pandemic.[51]

According to agricultural investment land governance reports surveyed by Cotula in the time of the pandemic crisis, national elites in several countries are using the reduced space for oversight and accountability as an opportunity to seize and allocate lands.[52] Pandemic related States of emergency are further marginalizing the local communities and militarizing their territories not to oppose the acquisition of land for investment projects. Governments and companies are forcing rural communities through agribusiness projects on their lands.[53]

Furthermore, the pandemic makes activists not to mobilize the community to defend rights in the face of commercial pressures as a result of restricting campaigners and journalists on travel and gathering.[54] However, protesters in some countries such as Thailand succeeded in getting a public hearing of the creation of a special economic zone postponed because of community concerns about its impact on the environment and local livelihoods.[55] Also, in Brazil, environmentalists and parliamentarians delayed voting on a land bill that would make it possible for commercial farmers who encroached into Amazon forestlands to get title deeds.[56]

[48] FAO policy brief, available at http://www.fao.org/2019-ncov/resources/policy-briefs/en/
[49] Mark Paterson, *supra* note 44, p, 6
[50] Id.
[51] Id.
[52]Lorenzo Cotula, *supra* note 42.
[53] Id.
[54] Id.
[55] LANDac, Netherlands Land Academy, Land Governance and the COVID-19 Crisis: Agenda for Knowledge and Action, (2020), avaliable at https://www.landgovernance.org/ accessed on 20 October 2020
[56] Lorenzo Cotula, *supra* note 42.

Still other sources such as LANDac, Netherlands Land Academy, in its report titled "Land Governance and the COVID-19 Crisis: Agenda for Knowledge and Action" revealed that the crises put land rights under pressure.[57] The report in its detailed account of the pandemic, indicated that loss of livelihood options, suspension of democratic controls, use of violence against environmental and human rights defenders, and closing of land administration services are the most worrying immediate effects from a land rights perspective. The manifestations of the pandemic in the Global South are increasing risks of resource grabbing and loss of assets and land access for the poor people.[58] The report confirms having pressures on land and impacts as a lack of due diligence in land-based investments, reduced quality of agricultural investment land governance. The report shows that governments of the Global South are exercising an increase in destructive capitalism and tempting to attract investments to finance the recovery from the crisis without observing the necessary due diligence. Since the pandemic is contributing to regular agricultural investment governance defects, the gains of two decades of investing in the governance of farmland acquisition for sustainable and equitable development are undone.[59]

In Ethiopia too, the pandemic damages the overall economy of the nation, employment, livelihoods, and future productivity.[60] It has been affecting the ability of the local people to produce food. To support the livelihood of the people in the time of the crisis, pressure on land as an agricultural resource have been grown.[61] The pandemic has an impact on rural communities that depend on land-based livelihoods.[62] It may raise the vulnerability of communities who have limited access to and insecure tenure of land because of the failure of observing the procedures and requirements of rural land and investment laws.

[57] LANDac, *supra* note 55.
[58] Id.
[59] Id.
[60] Ethiopian Lawyers Association, policy brief on the Ethiopian Public Health System and Possible Policy Responses, 2020.
[61] Mark Paterson, *supra* note 44.
[62] PLAAS Webinar: Covid-19 and African food security, (2020), available at https://www.plaas.org.za/plaas-webinar-covid-19-and-african-food-security/. The State of Food Security and Nutrition in the World Report, Transforming Food Systems for Affordable Healthy Diets, (2020), available at http://www.ipsnews.net/2020/07/understanding-covid-19s-impact-on-food-security-and-nutrition/

3. Land Acquisition Directive of Agricultural Investment in Amhara Region and Local Land Use Rights

3.1. Land Transfer as an Emergency Power

As already mentioned above, there are no established principles or rules of land acquisition in cases of emergency in Ethiopia. In this regard, the FDRE Prime Minister in his meeting with heads of regional governments, pointed out the need to cultivate free land as a measure to ensure food security and agricultural production during and after the pandemic period.[63] In one of the relevant remarks in this meeting, the Prime Minister also noted that "uncultivated free land shall not be there" thereby giving a direction to heads of regional states to develop the land. It seems following this direction, the government of the Amhara region has issued a Directive to allocate uncultivated free land to agricultural investment in the time of crisis.[64]

With this backdrop on the initiation of the Directive, now let us examine its content through a constitutional lens. The FDRE Constitution empowers the Council of Ministers of the federal government to decree a State of emergency in case of "external invasion [occurrence of] natural disaster and an epidemic, a breakdown of law and order which endangers the constitutional order [and] cannot be controlled by the regular law enforcement agencies and personnel."[65]

From the reading of the constitutional provision, one could clearly see that the occurrence of the natural disaster or epidemic can be a ground for States to declare a statewide state of emergency.[66] When the State of emergency is declared, the Constitution empowers the government to maintain public security.[67] The Concept of public security can be construed to include economic security in case of emergencies. Accordingly, the Federal government has declared a 5-month State of emergency and passed the law[68] to take measures of countering and mitigating the humanitarian, social, economic, and political damage being caused by the pandemic.[69]

[63] As the Prime Minster disclosed the issue through social media.
[64] Directive, 2020, *infra* note 80
[65] Proclamation No.1/ 1995, *supra* note 21, Article 93/1/a
[66] Id., Article 93(1)(b)
[67] Id., Article 93/4/a
[68] State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, Proclamation 3/2020, *Federal Negarit Gazetta*, (2020)
[69] Id., Preamble

Further, the Constitution recognizes nomenclature of the state, equality, freedom from slavery, protection against inhuman treatment and human trafficking, and the right to self-determination as non-derogable rights during a State of emergency.[70] Also, the State of Emergency Proclamation Implementation Regulation[71] issued by the Council of Ministers stipulates details of the suspension of rights and measures to counter and mitigate the humanitarian, social, economic, and political damage that could be caused by the pandemic.[72] As such, the State of Emergency Proclamation defines suspension of rights as a partial or full temporary derogation of rights stipulated under the FDRE Constitution.[73] The State of Emergency Proclamation implementation Regulation of Ethiopia permits taking possession of property in the course of the State of emergency to counter or control the spread of COVID-19 and mitigate its impact.[74]

Similarly, the COVID-19 regulation of Botswana allows taking of possession or control of the property on behalf of the republic as emergency power.[75] However, according to Botswana's regulation, the acquisition of land is not provided under the emergency power of the president and cannot be allowed during a State of emergency. The president authorizes the acquisition of any property other than land. In the case of Ethiopia, the COVID-19 State of emergency law is silent regarding whether the government has the power to authorize the acquisition of land.

As outlined earlier in this section, the FDRE Constitution recognizes the right to equality as a non-derogable right during a State of emergency. Equality before the law and equal protection of the law are the two essential elements of the right to equality under the Constitution. Equality before the law defines the absence of any privilege in favor of any individual and equal subjection of all citizens to the ordinary law. This implies that the Constitution of Ethiopia does not allow allocation of land by favoring investors and discriminating against the local people even in a time of State of emergency. Equal protection of the law also implies equality of treatment in similar circumstances both in privileges conferred and liabilities imposed. It also implies the claims of society itself and

[70] Id., Article 4(2) c cum Proclamation No.1/ 1995, *supra* note 21, Article 93(4) c).
[71] State of Emergency Proclamation No. 3/2020 implementation Regulation, 2020,
[72] Proclamation 3/2020, *supra* note 67, Article 4/1 cum Artcile 4 of the Regulation
[73] Id., Article 2/5
[74] Emergency regulation, *supra* note 71, Article 4/15
[75] COVID-19 regulation of Botswana, Article 4

public interest to have absolute equality among all classes.[76] The equal protection clause prohibits discrimination by substantive and procedural laws, and the government is not allowed to enact land acquisition laws that violate the non-derogable right of equality during a State of emergency. However, the new Directive on the acquisition of agricultural investment land goes against the right to equality recognized in the Constitution as non-derogable right during a State of Emergency.

3.2. Rationalizing the Directive

The governing laws with respect to agricultural investment and the rural land administration and use in Amhara National Regional State are Proclamation[77], Regulation[78] , and Directive[79]. These laws provide, among others, why and how land can be transferred to farmers and investors. In the year 2020, the BoLAU has announced the existence of uncultivated free land subject to be allocated for agricultural investment[80] and issued a Directive on the acquisition of land for agricultural investment on May 11, 2020, as a measure of ensuring food security through agricultural production. The Directive aims to allocate uncultivated free land for crop production to interested investors for three consecutive production periods.[81] An interview with Nibret Abebe, a rural land investment expert in BoLAU also shows that the regional government has allocated more than 28,000 hectares of land for thirty (30) years. In its notice for tenders, the BoLAU stated:

> *የእርሻ ወቅት እየደረሰ በመሆኑ በተያዘው የምርት ዘመን ከኮቪድ 19 ጋር በተያያዘ ምርትና ምርታማነት እንዲቀንስ፣ ማምረት የሚችል የነጠር ኢንቨስትመንት መሬት ጾም እንዲያድር በክልሉ ውስጥ በተለያዩ ዞኖችና ወረዳዎች 195 ነጻ መሬት በድምሩ 60, 161 ሄክታር የኢንቨስትመንት መሬት ለማስተላለፍ ዝግጅት ጨርሰናል።።*

Its translation reads:

> Since the farming period is approaching and to prevent the reduction of productivity to COVID-19, more than 60, 161 hectares of uncultivated free land is identified and planned to be allocated for agricultural investment from different parts of the region (Translation mine).

[76] Sarath Mathilal , The Concept of Equality: Its Scope, Developments and International Legal Regime, *Journal of the Royal Asiatic Society of Sri Lanka*, New Series, Vol. 61, No.2, pp, 37-38, (2016)
[77] Proclamation. No 252/2017, *supra* note 25.
[78] The Revised Rural Land Administration and Use Law, Regulation No. 159/2018, *Zikre. Hig*, (2018).
[79] Amhara Region Rural land provision and use for investment, Directive No. 8/2019, 2019
[80] Amhara Region Acqusition of Agricultural Investment Land Law, Directive, 2020
[81] Id., preamble, Article 11

Thus, the major rationale for the identification and allocation of land for agricultural investment is to prevent the reduction of productivity to occur in the time of COVID-19. Hence, COVID-19 is the major triggering factor for the decision of the regional government to issue the land acquisition Directive. Furthermore, the difficulty of transferring all agricultural investment lands to investors following the regular rules of land allocation, prevention of the reduction of productivity, and production as a result of the failure of cultivating free lands, and enhancement of agricultural products are the purposes of the Directive.[82] To mitigate future periods of economic decline, the regional government seeks to avoid interruptions to investment approvals and likely hope to secure investment-related revenues.

However, the Directive does not mention COVID-19 as a factor that necessitates the issuance of the law. The authors nonetheless argue that the COVID crisis is the major triggering factor for the issuance of the land acquisition Directive. Firstly, an interview conducted with the Director of investors monitoring and support Directorate and rural land investment expert shows that COVID-19 as a triggering factor for the issuance of the Directive.[83] Clearly evidencing this, the Director remarked "*the Directive is issued because of COVID and issuing such kinds of Directive is not allowed in the normal situation*". The rural land investment expert also added that "*COVID is the primary factor for the issuance of the Directive*".

As outlined earlier in this section, the land acquisition requirements and procedures for agricultural investment recognized in the Directive were not expected under the normal course of things. In the normal course of things, the existing regular land acquisition laws, with details of requirements and procedures on the acquisition of land, are applicable for agricultural investment in the region. Therefore, issuing such Directives before the pandemic or during emergencies is against the requirements and procedures of regular laws on land acquisition for agricultural investment. Secondly, as stated in its notice for tender, the regional government has clearly stated COVID-19 as the major cause for the plan of allocating investment land through competition in the tender or lease system.

[82] Id.

[83] Interview with Tigabu Belay, Investors Monitoring and Support Directorate Director, Rural Land Administration and Use Bureau of Amhara Region, (4 November 2020). Interview with Nibret Abebe, Rural Land Investment Expert, Investors Monitoring and Support Directorate, Rural Land Administration and Use Bureau of Amhara Region, (4 November 2020)

In addition, the press release of the BoLAU points out that some of the land identified for acquisition is available through evaluating the performance of investment and terminating the lease contract of investors who failed to develop land as per the terms of their contract.[84] It is important to note at this point that even though investments on farmland deals failed and the land is retaken, it did not go back to the previous local communities or new users of land, rather the government wants to replace the initial company with another without the knowledge of the local land users. As a result, failed investment projects have devastating impacts on the rights and interests of the local land users. As BoLAU reported in a press release, because of less development performance of 74 investors in the investment period of 2018/2019, 1802.5 hectares of land are entered into the land bank. Though the magnitude of the damage from this project is not made clear, one can imagine similar adverse effects on the rights of local communities and the economy of the country at large.

3.3. Competition Requirements for Investors

The regular rural land and investment laws provide the competition requirements to acquire agricultural investment land. They include providing investment permits, project proposals, and environmental impact assessment. Specifically, the competition requirements of investors are provided under section 3.4. (competition process in tender) of the document. The Directive also sets out competition requirements for investors who want to participate in the process of land acquisition for agricultural investment. However, the requirements and procedures provided in the new Directive unduly liberalize and facilitates the acquisition of land for investment in agriculture.

As the Directives states, the requirements vary depending on investors (who are displaced and investing upon lease; who does not have land before; who have land before and investing in it; and who have not acquired land before).[85] The competition requirements for displaced investors and developing upon lease are the provision of bank statements and having farm equipment such as tractor and relevant farm types of machinery.[86] Apart from providing bank statements, having a higher amount of money is also taken into account for the investors.[87]

[84] Amhara Region, Rural Land Administration and Use Bureau, Office of Head, Press release on agricultural investment land acquisition, May 19, 2020.
[85] Directive, 2020, *supra* note 80, Articles 1-11
[86] Id., Article 1. Regarding the competition result, provision of bank statement is given 40%, providing higher amount of money will be given 40%, for those who provide more than 2 tractors 60% will be given, 2 tractors 50% will be given, 1 tractor 40% will be given.
[87] Id.

For investors who do not have land before, the requirements are the capacity to invest with farming tractors, other machinery, and sufficient capital.[88]

Investors who have land before and investing in it shall have relevant types of machinery and in cases where there is more than one competitor, the one who has less amount of land and with more than 50% of development performance prevails.[89] For investors who have not acquired land before, the requirement is providing bank statements that show the capacity to invest through renting of farming types of machinery.[90] The Directive also provides the competition of capable investors only in two lands,[91] a lot system as a way of identifying investors who have equal results,[92] and free service charge for investors.[93] The competition process of the Directive narrows the opportunity of the local people. The local people (farmers or youth) have given last chance only if investors could not fulfill the stated requirements.[94]

Finally, the Directive states that the winners of the competition are not obliged to provide investment permits, project proposals, and environmental impact assessment documents. They are required to provide only a renewed identity card and conclude a contract within 7 consecutive working days after the winner is announced by BoLAU.[95] If the first product period is not entered into development as per the contract, the BoLAU will terminate the contract without providing a warning before the end of the contract period.[96] As this juncture comes the ambiguity and contentious link between the acts of the authorities and the law. The evidence from the participants interviewed shows that the regional government has transferred huge tracts of land for thirty (30). Yet, the duration of the lease contract in the Directive is three consecutive product periods. Furthermore, a Directive makes a departure from the regular laws,[97] applicable for the provision and use of rural land for agricultural investment in terms of details of the requirements expected to be provided by investors. For example, as per the Directive, the land acquisition was applicable for contracts concluded

[88] Id., Article 2
[89] Id., Article 3
[90] Id., Article 4
[91] Id., Article 5
[92] Id., Article. 6
[93] Id., Article 8
[94] Id., Article. 7
[95] Id., Article 10
[96] Id., Article 11
[97] Directive No. 8/2019, *supra* note 39.

up to July 7, 2020, and the public competition for investment land stayed on air for seven consecutive working days in April 2020.[98]

The requirements for competition in the acquisition of land for agricultural investment minimizes the burden of the government and favors investors to get land easily. Yet liberalizing the competition requirements and procedures of acquisition of land for agricultural investment have devastating impacts on the land use rights of the local people. Particularly, excluding investment permits, project proposals, and environmental impact assessment from the requirements and procedures negatively impacts the local land users. Also, through these, processes of land acquisition, largely favoring economically strong investors, the local people cannot play a significant role in agricultural investment. Finally, these host of deviations of the Directive and its effect on local communities requires further explorations. The next sections further characterizes the deviations in the Directive and the way the deviation affects the land use rights of communities.

3.4. Competition Process in Tender

Land use rights of investors are transferred through lease contracts, a mechanism to acquire land for agricultural investment.[99] The law states that private investors have the right to acquire land in line with the land use plan from the regional government through a lease contract.[100] The acquisition of land commonly occurs between the government and the investor.[101] As such the pre-conditions provided in regular laws to conclude agricultural investment contracts are ascertaining whether the investor is the winner of the competition in the tender; confirming the provision of investment permit; safeguarding the provision of the acceptable project proposal document, and preparation of map with land size and location.[102] Rural land for agricultural investment is acquired through competition in the tender.[103] In other words, public competition in a tender is a means for private investors to acquire agricultural investment land.[104] An application presented by private investors for land acquisition is responded

[98] Notice for public competition in tender, ANRS rural land administration and use bureau, May, 2020.
[99] Proclamation. No. 252/2017, *supra* note 25, Article. 22
[100] Id., Article 10(5)
[101] Kaitlin Cordes and Anna Bulman, Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes, *20 UCLA J. INT'L L. & FOR. AFF*, Vol. 87, (2016), p.92.
[102] Directive No. 8/2019, *supra* note 39, Article 25/1-6/
[103] Proclamation. No. 252/2017, *supra* note 25, Article 22/1,2/
[104] Id., Article. 22/1/ and Regulation. No. 159/2018, *supra* note 78, Article 12/1/

by making a public competition between and among applicants.[105] Also, land to be used for investment is provided by conducting competition among statements of the project proposal as per the criteria laid down in the law and entered into a contract with the winner.[106]

The Rural Land Administration and Use Laws of the region sets out the preconditions for such competition in the tender for investors.[107] The preconditions, among others, require the investor to have the ability to process the product into the second-level output and generate additional assets there-from. The promised significance and contribution of the project proposal submitted in benefiting the local community and favoring natural resource development and environmental protection are also requirements to compete in the tender. Further, the law considers the content of the project proposal in defining the investor's development capacity, readiness, experience, and interest to recruit trained professionals as a ground to recruit investors for the required purpose. Besides, the financial capacity of the investor to be supported by a bank statement and the number of job opportunities likely to be generated as the result of the project and the favorable working environment to be created for the employees thereof are into account in the evaluation of the application for competition in a tender.

As clearly outlined in this section, the contents of the project proposal including its significance to local people, its potential to support natural resource development and environmental protection, and investor's capacity are taken as the requirements to enter into competition in a tender for land acquisition. However, by disregarding the conditions, the new land acquisition Directive takes financial capacity supported by a bank statement as the only condition for competition in a tender to acquire agricultural investment land. As the head of BoLAU pointed out in a press release, potential investors are not required to provide the stated requirements of the competition in the tender. This lenient, unduly generous and capital favoring approach to land governance risks overriding of social responsibilities by the government and investors alike.

The occurrence of the COVID-19 crisis, the authors hold, has opened an opportunity for the BoLAU to allocate land for agricultural investment by rewriting the requirements and procedures of regular rural land and investment laws. Finally, it is important to note that, unless the BoLAU stops irregular

[105] Id., Article 22/2/
[106] Regulation. No. 159/2018, *supra* note 78, Article 33/1/
[107] Id., Article. 12/2/ a-f cum Directive No. 8/2019, *supra* note 39, Article. 19(1-6)

reform of agricultural land and approval process, the investment companies may face resistance from the local people.

Turning to another important point in this connection, the regular law, in direct contrast to the Directive, gives weight to strict evaluation of the agricultural investment project submitted for competition and determines the mechanism to notify results of the competition in tender and grievance thereof.[108] Further, this law provides for how investors obtain information and submit investment project proposals.[109] Also, it has qualification requirements for investors,[110] clear rules for allocating agricultural investment land through competition,[111] and ways of announcing competition result and grievance hearing.[112]

Particularly, the relevant provision on investors right over such information obliges the institution to publicly notify potential investors with the necessary information regarding undeveloped free lands found in land banks. The public notice should include the area of land in a hectare, the purpose of the land with its exact location, the distance between the main road, and existing infrastructures in the land.[113] However, under the Directive, all these hosts of the rules, including the notification of obligation, are not regulating the rights and obligations of investors, suggesting that the Directive largely contravenes the regional law and the federal Constitution. The FDRE Constitution obliges governments at all levels to hold land resources, on behalf of the people, and to deploy them for their common benefit and development,[114] yet the government, in enacting and enforcing this Directive, is showing monopoly over land administration and seeking to allocate it without following the constitutionally enacted acquisition procedures.

3.5. Payment of Lease Price

The FDRE Constitution, under article 40(6) provides for the right to access land for investors with payment arrangements. This constitutional provision obliges the government to ensure the land use rights of private investors based on payment without violating local land use rights. Based on this constitutional ground, lease of land through competition in tender is provided as a way of

[108] Regulation. No. 159/2018, *supra* note 78, Article 12/5/
[109] Directive No. 8/2019, *supra* note 39, Article 4
[110] Id., Article 5
[111] Regulation. No. 159/2018, *supra* note 78 cum Directive No. 8/2019, *supra* note 40.
[112] Directive No. 8/2019, *supra* note 40, Article 22
[113] Id., Article 4 (1-4)
[114] Proclamation No.1/ 1995, *supra* note 21, Article 89/5,

acquiring land for investment in agriculture.[115] Lease as a modality of land acquisition is defined, under article 2(30) of Proc. No. 252/2017, as the operation in which any private investor takes rural land for a limited time to legally permitted service from the regional government. The lease contract, among others, grant the investor the right to mortgage the land for creditor institutions until the effective date of the contract to use.

Another important element in a lease contract is the payment arrangement. Since the investor cannot take the land free of charge unlike peasant and pastoralists, the lease payment is implemented through a lease contract concluded with the lessor. Lease payment is a source of revenue to realize the common interest and local development of the people through financing infrastructure, and creating job opportunities. However, the new Directive, under article 8, empowers the investors to acquire the land without paying its lease price.[116] Expressly exempting them from this payment, the Directive under the relevant section reads "…investors can acquire the land free of charge". This is against the constitutional provision that allows investors to use land with the lease payment. The Constitution imposes an obligation upon the government to ensure the land rights of the investors based on a payment arrangement. The recognition of investors' land use right without payment of lease price indirectly and unfavorably affects the land use rights of the local people. As emphasized throughout this paper, under the cover of the pandemic, the regional government has transferred more than 28, 000 hectares of land for thirty (30) years and the investors are not expected to pay the lease price for the contract period.

3.6. Securing an Investment Permit

An investment permit is a condition to acquire land, to enter into an agricultural investment contract, and to invest in this country. The federal investment law set out this rule as a principle. Consistent with the federal legislation, the regulation of rural land administration and use of the Amhara region also provides an investment permit or license as a requirement to be recognized as an investor. Evidencing this, the regulation defines investor as "*any person who has obtained an investment license…*".[117] Therefore, securing an investment permit is a pre-requisite to conclude an agricultural investment contract at the regional level too.[118] One exception to this rule, particularly at the federal level, is the

[115] Directive, 2020, *supra* note 80, preamble
[116] Id., Article 8 *"…. investors can acquire the land free of charge."*
[117] Regulation No. 159/2018, *supra* note 78, Article 2(1) B
[118] Directive No. 8/2019, *supra* note 39, Article 25(1)

preferential treatment given to foreign nationals of Ethiopian origin treated as a domestic investor. These investors are exceptionally allowed to invest without acquiring an investment permit in areas not eligible for incentives, or, in areas eligible for incentives, by waiving their right to claim incentives.[119]

The investment permit is required to be issued by a competent, federal and regional investment organ,[120] and shall only be suspended or revoked by this same organ.[121] The federal investment law sets eligibility requirements as a pre-condition to obtain an investment permit.[122] An investment permit is only valid until the investor becomes operational and is issued with a business license to market its products. The permit is required to be renewed until the investor commences marketing his products and services. However, there shall be no need for renewal of investment permit after issuance of a business license. Finally, the law cautions that wrongful acts such as failure to submit accurate and timely information or project implementation report, presenting incorrect report, securing the permit fraudulently, submitting false information, using incompatible permit with the objective it issued, failure to renew the permit, failure to complete the project, and violation of investment laws would entail suspension of investment permit.[123]

Another important element related to this subject is the grounds for the revocation of an investment permit of the investor. The investment permit shall be revoked if the investor fails to commence investment project implementation of the project within two years of from the date of the issuance, and delayed the completion of the project by two years from the time that will be agreed with the competent investment organ. Moreover, the investment permit would be revoked if the investor fails to rectify the issue that caused the suspension of the investment permit within the time given voluntarily forsakes his investment activity, or misuses or illegally transfers to third-party investment incentives granted according to the pertinent laws.[124] However, the appropriate investment organ may renew the investment permit if it is convinced of the existence of sufficient cause prompting a delay in the commencement or completion of the project.[125]

[119] Proclamation No. 1180/2020, *supra* note 15, Article 10(2)
[120] Id., Article 2(16)
[121] Id., Article 13(6)
[122] Id., Article 10(1) a-e.
[123] Id., Article 13 (1)
[124] Id., Article 13 (3)
[125] Id., Article 11(1-4)

Finally, the investment organ with competent authority shall notify the revocation measure it takes to all concerned bodies. Upon revocation of the investment permit, the investor shall immediately lose entitlement to all benefits.[126] An investor whose investment permit is revoked shall return all investment incentives he received to the Ministry of Revenues, the Ethiopian Customs Commission, the Ministry of Finance, and other pertinent organs within one month of the revocation.[127] The investors are also obliged to submit a quarterly progress report on the implementation of the investment projects to the appropriate investment organ; provide information concerning investment whenever requested by the appropriate investment organ.[128]

Looking into the Directive against the rules of the license set out in the federal law, one can see the substantial incongruity between the two. For example, even though, having an investment license is a condition to acquire investment land and to conclude the lease contract under the federal proclamation, the new Directive of land acquisition states that investors are not obliged to provide investment permits or licenses in the period. As a result, the regional government passed the conditional procedure that dictates investment permits as a requirement to obtain land. Therefore, investors can get land and enter into lease contracts without securing investment permits.

The rules surrounding the investment permit would inherently oblige and encourage investors to comply with reasonable claims of local people to protect the value of investment, to cover investment project damages by the insurer, to obtain loan and disclose any improvements, and to protect the investment from its removal. Yet, because of the exclusion of investment permits as a requirement to acquire land, the investment project may affect the interests of the local communities in varying forms.

3.7. Provision of Investment Project Proposal

The investment project proposal is an expression of interest submitted by the investor. In this document, the investor is expected to detail the project site, crop, business model, and profile of the company including its historical performance, financial backing, growth potential, and promised future local contributions.[129] The government screens the project document to accept or to

[126] Id., Article 13 (4)
[127] Id., Article 13 (5)
[128] Id., Artcile 14(2)
[129] World Bank, Screening prospective actors: Responsible agricultural investment, (2019), p.3.

reject it in the end. A positively rated investment project largely demonstrates those elements the government expects to see in the complete business plan and ultimately in the investment contract.[130]

Such screening in fact requires a rigorous examination of myriads of issues related to the link between the proposed project and the national development plan, site suitability, and investor credibility.[131] As such the screening body examines the impact of the project proposal on sustainable development (such as job creation, tax revenue, human capital development, socio-economic spillovers, environmental protection), financial and operational sustainability, its alignment with the strategic national, regional, and local development plan and goals, the suitability of the site for the project, company past credit record, environmental management practice, capacity and expertise of the project.[132] The screening requires investors, apart from practically meeting these requirements, to incorporate clear descriptions of each in the document.[133]

Turning to the investment and rural land laws once again, one can observe that producing and submitting a project proposal is prerequisite to key moves along the route to acquire land and engage in investment activities. The project proposal is a primary condition to be recognized as an investor under rural land regulation of the Amhara region. Evidencing this, the regulation defines investor as "*any person who, having obtained an investment license, is capable of promoting the sector into the higher level by formulating a project plan….*"[134] Presenting this same document is a major requirement for competition in a tender.[135] Yet, ensuring the provision of an acceptable project proposal document is also provided as a pre-requisite to conclude the final contract.[136] The submitted project proposal is accepted through the evaluation of the technical committee established by the law.[137] This committees, operated by law at regional, zonal and woreda levels are responsible to ensure that investors have produced an investment project proposal before they move to the other steps of the investment processes.[138]

[130] Id.
[131] Id.
[132] Id., P.4.
[133] Id.
[134] Regulation No. 159/2018, *supra* note 78, Article 2/1/B
[135] Id., Articles 12(2) a-f
[136] Directive No. 8/2019, *supra* note 39, Article 25/3/
[137] Id., Article. 15
[138] Id., Article. 16

While this stringent laws and administrative structures are in place to enforce the constitutionally founded land governance rules, the new Directive exempts investors from providing project proposal in the process of land acquisition, thereby preventing the constitutionally established committees from protecting the public interest. Having a project proposal would be important for communities to know the details of a specific investment project and its promises for transforming the local livelihood and economy. The investor, under the regular law, is expected to provide details on the sustainability of the investment, willingness of the local community on the project, and promised future local contributions including local employment opportunities. The promises of the investment project are also required to be provided in the proposal so that the concerned government organ can monitor the performance of the specific project as per the proposal. Further, the project proposal supports the local people to know the future benefits of the investment to them. All this would mean an important mechanism to contain the adverse effect of investment on local communities. Yet, the Directive closes this window of opportunity by disregarding the provision of the investment project proposal as a requirement for the acquisition of land. It is also difficult for the government to evaluate and monitor the performance of the investment project without having the project proposal.

3.8. Conducting Environmental Impact Assessment

Environmental Impact Assessment (EIA) is one of the fundamental preconditions for an investment activity. The need for each activity is emphasized both in the policy and pertinent laws of the country. The Federal Environmental Impact Assessment Proclamation No. 299/2002, one of such laws, defines it as "*a method of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project*."[139]

A close reading of this provision shows the government's commitment to ensure that the positive or negative impacts of a project development need to be identified and evaluated prior to any investment activity. If the project has a negative impact after its assessment, alternative mitigation and management measures would be required. The law also provides the standards to evaluate the impact of the project. As such "the impact of a certain development project

[139] Federal Environmental Impact Assessment Law, Proclamation No. 299/2002, *Federal Negarit Gazetta*, (2002), Article 2(3)

needs to be assessed based on the size, location, nature, cumulative effect with other concurrent impacts or phenomena, trans-regional effect, duration, reversibility or irreversibility, or other related effects of the project."[140] The EIA Directive No. 1/2017 of the Amhara region under article 4/4/ also defines it as the process of identification or mitigation of positive or negative environmental impacts of any project during its start, expansion, or termination.[141]

The global standard (for example, the European Investment Bank, EIA-code) requires "a proposed project to disclose the possible, probable, or certain effects of that project on the environment and the affected communities."[142] The assessment is required to be inclusive, neutral, and adequately specific for the decision-makers to examine the potential environmental and social effects of the proposal.[143] Further, it should explore possible alternatives to the project that might maximize the benefits while minimizing the adverse impacts.[144] Finally, since EIA provides a structured opportunity for local communities to have their voice heard,[145] it need to be consulted with the local people.[146]

To hold investors accountable, the contents of the EIA need to be also transparent for the local people.[147] To this end, the federal environmental policy provides public consultation as an integral part of EIA.[148] International norms and principles, to which this country is a party, oblige the government to agree to the conduct of environmental and social impacts by investors.[149] The government should also consider how to ensure that impact assessments be integrated into contracts between investors and governments.[150] Investors are responsible to raise local awareness of specific environmental and social impacts on local people.[151] Failure to conduct EIA should amount to a material breach of contract and be a ground for termination.[152]

[140] Id., Article 4(1)
[141] Amhara region Environmental Impact Assessment Law, Directive No. 1/ 2017, *Zikre. Hig*, (2017), Article 4/4/
[142] European Investment Bank, Environmental and Social Standards, (2018), p.2.
[143] Id.
[144] Id.
[145] World Bank, Environmental impact assessment: Responsible agricultural investment, (2019), p.2.
[146] Id.
[147] Id.
[148] Environmental Policy of Ethiopia, (1997), p.24. The Environmental Policy of Ethiopia is approved by the Council of Ministers in 1997.
[149] World Bank, *supra* note 145, P.4
[150] Id.
[151] Id., P.2.
[152] Id., P.4

The right of the Ethiopian people to a clean and healthy environment is among the overriding principles enshrined in the FDRE Constitution.[153] This principle applies to all legislative frameworks of the country. Improved living standards, sustainable development, participation, and consultation to projects affecting the local community are issues identified under the right to development in the FDRE Constitution.[154] As provided under the Environmental Policy of Ethiopia, any development project should conduct EIA.[155] The assessment is required to include physical, biological, social, ecological, economic, political, and cultural impacts and conditions on communities.[156]

Encouraging socially and environmentally responsible investment is one of the objectives of federal investment law.[157] The law imposes duty on the investor to observe social and environmental sustainability values. It states that all investors shall give due regard to social and environmental sustainability values including environmental protection standards and social inclusion objectives in carrying out their investment activities.[158] The federal EIA Proclamation No. 299/2002 was also issued to predict and manage the environmental effects of the proposed development activity and to achieve intended development, assessing future environmental impacts before the approval of the development project, and involving the public in the process of development decision making.[159] Consistent with the mission of the federal laws, the EIA Directive No. 1/2017 of the Amhara region provides ensuring environmental protection as one of the factors to bring sustainable development.[160] The law added that the environmental and social aspects of any development projects need to be assessed before its start.

The BoLAU of the region has no unlimited power to decide on issues relating to the environment, forest, wildlife protection, and development authority of the region. The latter is vested with the power of *regulating environmental issues including impact assessment of investment projects.* However, this institution excludes EIA from the mandatory preconditions of investment by enacting the new Directive on the acquisition of agricultural investment. Hence, the

[153] Federal Democratic Republic of Ethiopia Environmental and Social Management Framework (ESMF), For Africa CDC Regional Investment Financing Program (ACRIFP) report. p. 45. Proclamation No. 1/1995, *supra* note 25, Articles. 44 and 92.
[154] Proclamation.No.1/1995, *supra* note 25, Article 43
[155] Environmental Policy of Ethiopia, *supra* note 148, P.24.
[156] Id.
[157] Proclamation. No.1180/2020, *supra* note 15, Article 5(8)
[158] Id., Article 54(2)
[159] Proclamation. No. 299/2002, *supra* note 139, Preamble
[160] Directive No. 1/2017, *supra* note 141, Preamble

constitutionally protected interest of local land users outlined earlier would be affected.

Starting a certain investment project may have negative impact including loss of land, degradation of groundwater, the effect on land-use change, and a decrease in productivity of the land. These impacts of the investment project are identified by conducting EIA in advance to provide mechanisms to minimize the negative effects of the project. In the EIA, the investor is required to agree on the prevention and mitigation of environmental impacts caused by investment project inputs, activities, and products. If the investment project is not able to prevent and reduce the impacts, the EIA declaration obliges the investor to pay all compensation costs. Since the new Directive of land acquisition does not consider EIA, identifying the potential negative impacts of agricultural investment and providing its mitigation measures is not expected.

Conclusion

With the aim of preventing the reduction of productivity in relation to the pandemic crisis, the regional government has issued an investment land acquisition Directive that prioritizes agricultural production. However, the Directive liberalizes existing land acquisition procedures and requirements to promote irregularity and recognizes easy processes. Regarding the process of a public competition in tender, payment of lease price, project proposal, investment permit, and impact assessment of the project, the Directive diverges and goes against with the land acquisition requirements and procedures of regular rural land and investments laws. The Directive seems to adversely affect the land use rights of the local people since it skips key requirements and procedures.

The acquisition of land for agricultural investment without following recognized conditions and procedures in the regular laws affects the local people who depend on land-based livelihood activities. Moreover, since the Directive does not oblige investors to provide project proposals and, environmental impact assessment, it is difficult to evaluate whether the investment project is contributing to boost productivity and local contributions. It is also problematic for the regional government to evaluate the success of the projects at the end of the investment period without having the stated requirements. As a response to emergencies and protecting local land-use rights, a sustainable land use policy need to be established. It is also better to put an effective and responsible regulatory mechanism of agricultural investment that provides a rule upon

investors to conduct an impact assessment and require them to share fruits of investment with the local people.

Book Review

Jola Gjuzi, Stabilization Clauses in International Investment Law: A Sustainable Development Approach (Springer Publishing, Switzerland, April 2018), E-document, ISBN 978-3-319-97232-9, 545 PP, Price 117.69 £

Mulugeta Akalu ●

This book which narrates the inherent contradiction between stabilization clauses and the regulatory power of the host states tries to reconcile the conflict using the principle of sustainable development.[1] The book is of typical significance for students, academics, practitioners of law and policy makers engaged in the field of international investment arbitration. The book explores the rationale why stabilization clause emerged in international investment contracts, why multinational companies prefer them and why host states adhered to insert them. It then analyzes how stabilization clauses began to defeat the regulatory rights of the host states and how their right to regulate in the public interest particularly in the areas of environmental protection and human rights are at stake. The book then suggests the reconceptualization of sustainable clauses and application of the "Principle of constructive Sustainable Development", whose international legal status is controversial and whose meaning is yet to be clear, as a reconciliatory concept to mitigate the effects of stabilization clause on the regulatory space of the host states and to iron out the stabilization/ regulation controversy.[2]

The book is divided in to three parts. The first part which contains three chapters attempts to analyze the antinomy between stabilization clause and host states regulatory right in the public interest in the context of sustainable development. Under chapter I of part I, the author tries to examine the repercussions of stabilization clauses on the international duties of host states such as environmental standards and human rights and eventually its potential impact on the right to sustainable development of host states and the role that the concept of sustainable development itself can play to challenge the might of stabilization clause. In Chapter II, the author had thoroughly and exhaustively elaborated the concept of stabilization clause by discussing the meaning, origin, rational, sources, and categories of the

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[1] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach,* Springer Publisher, (2018),p. 6, 383.

[2] Ibid, pp. 162- 173 and 451-483

concept. In this chapter, attempt is made to enlighten why stabilization clauses emerge in international investment contracts, why multinational investors heavily rely on them and why developing countries adhere to them voluntarily, and how they progressively and gradually migrated from strict "freezing clauses" to a more moderate "economic equilibrium clauses". Chapter three of her book narrates the implications of broad stabilization clauses on the host states rights to regulate in the public interest and the role of sustainable development in addressing the problem. The author discussed three possible impacts on host states' right to regulate and concluded that broad stabilization clauses might affect the right to regulate in the public interest of host states. Then the author went on to discuss the meaning, relevance, contents, legal significance, and the controversial nature of the concept of sustainable development. Furthermore, the book addressed how essential integrating and balancing the three pillars of sustainable development that is (economic, social and environmental development) could be the goal of every host state. The author explains that applying the concept of sustainable development might intensify the stabilization and regulation contradiction further. Here, the author also explained the interactions between sustainable development and stabilization and regulation paradox and the constraints of the former in solving the antinomy.

Under chapter IV, the author assessed the legal status of stabilization clauses *vis-a-vis* national laws. Here, the author discussed how investment contracts including the stabilization clause could be subjected to national law using the choice of law clause contained in the contract. The author then analyzed the legal validity and effectiveness of stabilization clauses in light of constitutional principles and doctrines such as separation of powers, *ultra virus*, rule of law, etc.

Chapter V of the book explored the discourse on legal status of stabilization clauses under international law focusing on the traditional perspective and the debates in favor and against the validity and effect of stabilization clauses under international law. It discusses how the supporters of internationalization theory employ various interpretative techniques to make stabilization clauses valid and effective in the eyes of international law and how the opponents of the internationalization theory argue to render the clause invalid and ineffective. Then she went on to explain how the substantive principles of international law such as *pacta sunt servanda* is used by the proponents of internationalization theory and the principle of permanent sovereignty is used by the opponents of the same to make it invalid. Her analysis reveals that there was a continued controversy over the internationalization of investment contracts with "a confident strand of doctrine rejecting the notion of the contract subject to international law, while an equally confident strand continuing to affirm and embrace it".

In chapter VI, the writer scrutinized the current practice on the legal status, validity and effect of stabilization clauses under international law. She reckons that the traditional debates on the validity or invalidity of stabilization clauses under international law using internationalization theory are gradually abandoned and replaced by other international investment treaty clauses. In this chapter she shaded light on how stabilization clauses of investment contracts are easily transformed into internationally valid and effective provisions having the force of law using clauses in the bilateral investment treaties such as provisions on expropriation, fair and equitable treatment, most favor nation treatment, full protection and security, and umbrella clauses. Because of the concept of legitimate expectations, the violation of stabilization clauses amounts to an international investment treaty violation. She vividly put it that the legal value and effect of stabilization clauses is enhanced by the presence of the aforesaid investment treaty provisions. Besides she had brought to light the contemporary arbitral practice on the validity and extent of application of stabilization clauses and the fears associated with them in relation to the right to regulation of host states.

Chapter VII focused on the role of sustainable development approach in reconciling the conflict between stabilization clauses and host states regulatory power. Jola concedes that the concept of sustainable development is highly vague and blurred with no agreed meaning among the international community. Besides, she had made it clear that there is no general consensus on the legal normative nature of the concept in the international law system.

Nevertheless, the author had analyzed and searched for ways to find some degree of applicability of sustainable development approach to reconcile the conflict between stabilization clause and regulatory power at international law, contractual law and domestic law levels. She had also analyzed the four possibilities of manifestations of sustainable development in the international law level. She argues that sustainable development can play a reconciliatory role if it is indirectly invoked by applying the rules of systemic integration or through conceptualization of sustainable development either as being inherent in judicial reasoning or as being a logical necessity.

Chapter VIII suggested for the reconceptualization of stabilization clauses in the light of constructive sustainable development approach. The author admitted that the sustainable and sustainable development related provisions in international investment agreements are too weak to overcome the predominant perception that makes stabilization clauses the exception to the host states regulatory power in the public interest. The author zoomed in on the idea of reconceptualizing stabilization clauses. She suggested that it should be in a way that these clauses do not impinge on the “legitimate” regulatory practices of host states in relation to environmental,

human rights and social welfare issues[3]. Her assertion is that the principle of integration of constructive sustainable development approach can be applied to reconcile the competing economic, social and environmental norms and values regulated by different international regimes by taking the analogy from article 31(3) (c) the Vienna Convention on the Law of Treaties (VCLT) which aims at "finding an appropriate accommodation between conflicting values and interests in international society". As an alternative, she urged the use of sustainable development as a meta-principle that must be inherent in judicial reasoning so as to strike the balance between the competing objectives.

In short the Its overall organization, scholarly depth, the quality and quantity of table of cases used, the books and articles she referred to, the detailed nature of her analyses on the topics she raised and, the coherence and logicality of her arguments are all worth appreciating. The author dealt with every specific issue relating to the topic in a commendable way. In this effort of substantiating arguments, she had used all the available evidences and sources both primary and secondary. In addition to the diverse literature cited, the book has referred a handful of cases (including of the PCIJ, ICJ, and ICSID etc.), Reports of GATT and WTO Panels, Treaties, International Instruments, National Legislation, and Investment Contracts, Model BITs and IIAs. The other strength of the book is that the author had stated arguments of both sides when she analyzes arguable issues.

Coming to the weaknesses, I hereby set out the following observations. Firstly I think the book is not successful in meeting its desired objective as stated in the book's introduction. The author's aim in writing the book was to reconcile the stabilization clause and host states regulatory power antinomy using sustainable development principle.[4] Nevertheless, finishing the book, I realized that her logic, theories, principles and evidences she used are not sufficient to solve the inconsistency the way she aspired. Her arguments could not convince me to reach a conclusion similar to her. Firstly, she couldn't unequivocally prove the existence of antinomy between the two. I say this because there are people who correctly argue that there is no legal inconsistency which puts investors and states in to dispute except for only policy dispute of the host states themselves.[5] Her allegation that stabilization clauses restrict the right to regulate in the public interest is not supported by appropriate evidence since protective value of a stabilization clause lies not in barring the state from exercising legislative power for public interest, but

[3] Supra note at 1

[4] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach, P. 6*

[5] Katja Gehne &Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment,* NCCR Trade Working Paper, No 2013/46 (January 2014), P. 20 available at: www.nccr-trade.org

in guaranteeing compensation for any breach that change the equilibrium.[6] The dilemma by host states as to what policy to choose is what is impliedly revealed throughout Jola's book. Secondly, the author could not prove how a concept which is vague, controversial whose international legal status is unknown itself can play a reconciliatory role.[7] The author had admitted that the concept of sustainable development might intensify the antinomy between the two.[8] How could it reconcile while it deepens the antinomy is a kind of paradox. Her suggestion of reconceptualization of stabilization clause in a way that limits their scope is also less convincing since it is not clear whether investors will accept such an underprivileged position and whether host states will apply such a concept with a risk of reduced foreign investment inflow. Besides, she can't prove us whether the tribunals will put aside the clear language of the provisions and use a new idea which was not intended by the contracting parties at the time of making the investment contract. Regarding her recommendation about using sustainable development integration principle to accommodate its three pillars by taking analogy from the vienna convention on the law of treaties, her proposition is still weak in that not all the three pillars of the principle are part of international legal obligation. Hence, signing an investment contract containing stabilization clause is a clear international legal obligation, but host states may not have an international legal obligation on social development and environmental development. Hence, there is no need to refer to VCLT with a view of integrating the three pillars for integration principle since this come in to picture only when two or more international legal obligations occur simultaneously. Her last suggestion of applying sustainable development principle as a meta-principle in judicial reasoning also does not hold much sway as tribunals are not expected to ignore the clear provisions of the contract in favor of a concept whose legal status and meaning is controversial under the guise of judicial reasoning. Besides, foreign investors came to host states not to worry about the sustainable development of the states, but to maximize their own profit. Hence, they are not expected to be governed by a concept which does not exist in the contract and to set aside the clear provisions and intentions of the contracting parties with a view to replace them with such a vague principle.

To conclude, the book has a tremendous value for students, academics, practitioners of law and policy makers engaged in the field of international investment dispute resolution in broadening the horizon of knowledge about stabilization clauses and the controversial issues surrounding it. It provides a thorough appraisal and analysis

[6] Abdullah Al Faruque,Validity and Efficacy of Stabilization Clauses, Legal Protection versus Functional Value, *Journal of International Arbitration* (2006), 23(4), PP.317-336.

[7] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach.*P,106,163

[8] Jola Gjuzi, *Stabilization Clauses in International Investment Law, A Sustainable Development Approach*. P.V

of stabilization clauses and sustainable development. Nevertheless, it is difficult to say that it has realized the main objective the author intended to achieve; that is reshaping stabilization clauses to the benefit of foreign investors, while at the same time mitigating their negative effects on the host state's power to regulate in the public interest using constructive sustainable development approach. The principle of sustainable development, based on its current condition and understanding cannot reconcile the contradiction between stabilization clause and the regulatory power or regulatory space of host states in the manner the author set out in her book; that is to say integration and reconciliation imperatives of the concept of sustainable development as well as the application of principles of law such as non-discrimination, public purpose, due process, proportionality, and more generally, good governance and rule of law cannot be easily applied for granted to reconcile the contradiction between stabilization clause and regulatory rights.

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አመልካች፡- አቶ ንጉሴ ዘርይሁን -ቀረቡ

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ፍ ር ድ

ጉዳዩ፡- የስራ ክርክርን ይመለከታል፡፡ የሰበር አቤቱታ የቀረበው አመልካች በሲቪልሰርቪስ ሚኒስቴር የአስተዳደር ፍርድ ቤት በይ/መ/ቁጥር 044/09 ጥር 30 ቀን 2009ዓ.ም በዋለው ችሎት የሰጠው ፍርድ እና የፌዴራሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚችሎት በፍ/ብ/ይ/መ/ቁጥር 138065 መጋቢት 14 ቀን 2009 ዓ.ም በዋለው ችሎት ይሆንኑ ፍርድ በማጽናት የሰጠው ትዕዛዝ መሠረታዊ የሆነ የህግ ስህተት የተፈጸመበት በመሆኑ በሰበር ታይቶ ይታረምልኝ በማለታቸው ነው፡፡

በመዝገቡ ከተያያዙት የውሳኔ ግልባጮች መረዳት እንደሚቻለው የአሁኑ ተጠሪ መስሪያ ቤት የበላይ ኃላፊ ከድሲፕሊን ኮሚቴው የቀረበውን የውሳኔ ሃሳብ ተመልክተው አመልካች ከታህሳስ 17 ቀን 2007ዓ.ም ጀምሮ ባልታወቀ ምክንያት በስራ ገበታ ላይ አልተገኙም በማለት ከታህሳስ 17 ቀን 2007ዓ.ም ጀምሮ የስራ ውላቸው እንዲቋረጥ ውሳኔ ሰጥቷል፡፡

አመልካች ይህን ውሳኔ በመቃወም ለፌዴራሉ ሲቪል ሰርቪስ ሚኒስቴር አስተዳደር ፍርድ ቤት የይግባኝ ቅሬታ ያቀረቡ ሲሆን ቅሬታውም በአጭሩ ከተጠሪ ፍቃድ ወስጄ እረፍት ላይ እያለሁ የጫማ ኢንፌክሽን እና የቁርጭምጭሚት ውልቃት ደርሶብኝ በህክምና ላይ መሆኔን አሳውቄ ተጠሪም እስከ ህዳር 30 ቀን 2007ዓ.ም ድረስ ደመወዝ የከፈለኝ እና በህመሜም ምክንያት

የመ/ቤቱን ማስታወቂያ መከታተል የማልችል መሆኔ እየታወቀ ከታህሳስ 17 ቀን 2007ዓ.ም ጀምሮ የስራ ውሴ እንዲቋረጥ መወሰኑ ተገቢ አይደለም የሚል ነው፡፡

ፍርድ ቤቱ ተጠሪ ቀርቦ መልስ እንዲሰጥ ቢያዘውም ባለመቅረቡ የመከራከር መብቱ ታልፎ የይግባኝ ባይን ክርክር ሰምቶ ተጠሪ በአመልካች ላይ ያስተላለፈው የስራ ስንብት ህጋዊ ነው ወይስ አይደለም የሚለውን ጭብጥ በመያዝ መርምሮ አመልካች ከደረሰባቸው የጫማ ኢንፈክሽን እና የቁርጭምጭሚት ውልቃት አዳማ ሆስፒታል ታክመው ከህዳር 3/2007 እስከ ሚያዝያ 30/2007ዓ.ም ድረስ በህክምና ፍቃድ ላይ የነበሩ መሆናቸው፣ ሰኔ 2 ቀን 2007ዓ.ም ቁርጭምጭሚታቸው በብሎን ታስሮ እስከ ታህሳስ 6 ቀን 2008 ዓ.ም ድረስ በህክምና ክትትል ላይ የነበሩ መሆኑን፣ ነሀሴ 10 ቀን 2008ዓ.ም በተጻፈ አመልካች የስኳር ታማሚ እና በሶዶ ሆስፒታል ለ3ኛ ጊዜ ቀዶ ህክምና የተደረገላቸው እና በአዳማ ሆስፒታል በክትትል ላይ የሚገኙ መሆናቸውን እና መጋቢት 1ቀን 2008ዓ.ም እና ሚያዝያ 3ቀን 2008ዓ.ም በተጻፈ አቤቱታ ከደረሰባቸው የጤና መታወክ የተሻላቸው መሆኑን በመግለጽ ተጠሪ ወደ ስራ እንዲያሰማሯቸው ለተጠሪ የጠየቁበት ደብዳቤ እና ተጠሪ ሰኔ 2ቀን 2007 ዓ.ም. የጻፈላቸው የስንብት ደብዳቤ ግንቦት 23/2008ዓ.ም የደረሳቸው መሆኑን የሚገልጽ ማስረጃ አቅርበዋል፡፡

ተጠሪ የአመልካችን የስራ ውል ለማቋረጥ ምክንያት ያደረገው አመልካች በስራ ገበታቸው አልተገኙም በማለት ታህሳስ 27/2007 እና ጥር 7/2007 ተደጋጋሚ ማስታወቂያ በማውጣት ሰኔ 2/2007 ዓ.ም በተጻፈ ከታህሳስ 17/2007ዓ.ም ጀምሮ የስራ ውሉ መቋረጡን የገለጸበት ደብዳቤ ግንቦት 23/2008ዓ.ም እንዲደርሳቸው በማድረግ መሆኑ ተረጋግጧል በማለት አትቶ እና የፌዴራል መንግስት ሰራተኞች አዋጅ ቁጥር 515/1999 አንቀጽ 42/5ን ጠቅሶ አመልካች በህክምና ላይ የነበሩ መሆናቸውን ለተጠሪ እንደገለጹ እስከተረጋገጠ ጊዜ ድረስ በአዋጁ አንቀጽ 42(3) መሰረት ለመጀመሪያዎቹ 3 ወራት ከሙሉ ደሞዝ ጋር፣ ለቀጣዩ 3 ወራት ከግማሽ ደሞዝ ጋር፣ ለመጨረሻዎቹ 2 ወራት ያለ ደሞዝ ተጠሪ ፍቃድ መስጠት ያለበት መሆኑ ተደንግጓል፡፡ ስለሆነም

አመልካች ከስራ ገበታቸው ከቀሩበት ከታህሳስ 17/2007ዓ.ም ጀምሮ 8 ወር ሲቆጠር እስከ ነሀሴ 16 ቀን 2007ዓ.ም ድረስ ተጠሪ አመልካችን የመጠበቅ ግዴታ ነበረበት በማለት ደምድሞ ከታህሳስ 17/2007ዓ.ም ጀምሮ አመልካች በነበራቸው የህክምና ፍቃድ ምክንያት ለመጀመሪያዎቹ 3ወራት እና ቀጥሎ ላሉት 3 ወራት በአዋጁ መሰረት ክፍያ እንዲፈጽም፣ አመልካች የጠየቁት የጥቅማ ጥቅም ክፍያ ላልተሰራ ጊዜ የሚከፈል አይደለም በማለት ውድቅ በማድረግ አመልካች ወደስራ ልመለስ ጥያቄንም በተመለከተ አመልካች ወደስራ ልመለስ በማለት ጥያቄ ያቀረቡት መጋቢት 1/2008ዓ.ም ሲሆንበአዋጁ መሰረት የአመልካች የስራ ውል ከሚቋረጥበት ነሀሴ 17/2007ዓ.ም በኃላ በመሆኑ ክርክራቸው ተቀባይነት የለውም በማለት ውሳኔ ሰጠ፡፡

በዚህ ውሳኔ ላይ ይግባኙ የቀረበለት የፌዴራሉ ጠቅላይ ፍርድ ቤት ውሳኔው ጉድለት የለበትም በማለት በፍ/ብ/ሥ/ሥ/ህ/ቁ 337 መሰረት ይግባኙን ሰርዟል፡፡ የሰበር አቤቱታው የቀረበው ይህን ውሣኔ በመቃወም ለማስለወጥ ነው፡፡ አመልካች ሚያዝያ 10/2009 ዓ.ም ያቀረቡት የሰበር አቤቱታ መሰረታዊ ይዘት ተጠሪ ቀርቦ ባልተከራከረበት ባልጠየቀው ዳኝነት አስተዳደር ፍርድ ቤቱ የኔን አቤቱታ ብቻ መርምሮ መወሰን ሲገባው ይህ ታልፎ የተሰጠው ውሳኔ አግባብነት የሌለው መሆኑን በመግለጽ ውሳኔው እንዲሻር የሚጠይቅ ነው፡፡ ቅሬታቸው ተመርምሮ ለሰበር ችሎት እንዲቀርብ እና ተጠሪ መልስ እንዲሰጡበት ተደርጓል፡፡ ተጠሪ ውሳኔው እንዲፀና በመጠየቅ መልስ የሰጡ ሲሆን አመልካችም ክርክራቸውን በማጠናከር የጽሁፍ የመልስ መልስ ሰጥተዋል፡፡ የጉዳዩ አመጣጥ አጠር ባለ መልኩ ከላይ የተገለጸው ሲሆን በበኩላችን የግራ ቀኙን ክርክር ለሰበር አቤቱታው መነሻ ከሆነው ውሣኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ ክርክሩ በተመራበት ሥርዓትም ሆነ በተሰጠው ውሳኔ የተፈፀመ የህግ ስህተት ስለመኖር አለመኖሩ መርምረናል፡፡

የአመልካች ቀዳሚ ቅሬታ አስተዳደር ፍርድ ቤቱ ተጠሪ ቀርቦ ባልተከራከረበት የኔን ክርክር ብቻ መርምሮ መወሰን ሲገባው ይህ ታልፎ የተሰጠው ውሳኔ ተገቢ አይደለም በማለት ሲሆን አስተዳደር ፍርድ ቤቱ ተገቢውን ማጣራት አድረጎ የወሰነ በመሆኑ ቅሬታው ተቀባይነት የለውም እንዲባል ተከራክረዋል፡፡ በመሰረቱ የድሲፕሊን ኮሚቴው የውሳኔ ሃሳቡን ለመሥሪያ ቤቱ የበላይ ኃላፊ የሚያቀርበው ተገቢውን ማጣራት አድርጎ የምርመራውን ሙሉ ይዘት የሚያመልክት የምርመራ ሪፖርት በማዘጋጀት ስለመሆኑና፤ የምርመራው ውጤት የተከሳሹን ጥፋተኝነት የሚያረጋግጥ ከሆነ የውሳኔ ሃሳቡ ሊወሰድ የሚገባውን የቅጣት እርምጃ ማመልከት እንደሚኖርበት፤ የፌዴራል መንግስት ሰራተኞች የዲስፕሊን አፈፃፀምና የቅሬታ አቀራረብ ሥነ ሥርዓት ለመደንገግ ከወጣው የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 77/1994 አንቀፅ 19 እና 49 ድንጋጌዎች መገንዘብ ይቻላል፡፡

በመሆኑም በስር አስተዳደር ፍርድ ቤቱ ክርክር ተጠሪ ቀርቦ ያልተከራከረ ቢሆንም አመልካች ያቀረቡትን የይግባኝ ቅሬታ አስተዳደር ፍርድ ቤቱ የሚመረምረው የዲሲፕሊን ኮሚቴው ግራ ቀኙ ካቀረቡት ክርክር አንጻር የሰጠው ውሳኔ ተገቢ መሆን እና ያለመሆን ጋር በማገናዘብ ሊሆን እንደሚገባ በፍ/ብ/ሥ/ሥ/ህግ ቁጥር 347 ላይ ተደንግጎ ይገኛል፡፡

ተጠሪ በአስተዳደር ፍርድ ቤቱ ቀርቦ ባይከራከርም ለዲሲፕሊን ኮሚቴው ክስ አቅርቦ ያስወሰነው እሱ ነው፡፡ በመሆኑም የተጠሪ ክርክር በኮሚቴው ውሳኔ ላይ ተያይዞ እንደሚገኝ አጠያያቂ ካለመሆኑም በተጨማሪ ይህንን አስመልክቶ የቀረበ ክርክር የለም፡፡ አስተዳደር ፍርድ ቤቱ የሰጠውን ውሳኔ አግባብነት በተመለከተ የፌደራል መንግስት ሰራተኞች አዋጅ ቁጥር 515/1999 አንቀጽ 42(5) መሰረት ሰራተኛው ከአቅም በላይ የሆነ ምክንያት እስካላጋጠመው ድረስ መታመመን ለመ/ቤቱ ማሳወቅ እንዳለበት፣ በዚህ መልኩ መታመመን ላሳወቀ የመከራ ጊዜውን ለጨረሰ ሰራተኛ በአዋጅ ቁጥር 515/99 አንቀጽ 42(2) መሰረት ህመሙ ከደረሰበት ጊዜ ጀምሮ ባሉ ተከታታይ 12 ወር ውስጥ ለ8 ወራት ፍቃድ ሊሰጥ እንደሚገባ እና በዚሁ አንቀጽ ንኡስ

አንቀጽ (3)ላይም ለመጀመሪው የ3ወር ጊዜ ከሙሉ ደሞዝ ጋር ለሚቀጥለው 3 ወር ጊዜ ከግማሽ ደሞዝ ጋር ለተከታዩ 2 ወር ያለደሞዝ ፍቃድ ሊሰጥ እንደሚገባ ተደንግጎ ይገኛል፡፡ በተጨማሪም በዚሁ አዋጅ አንቀጽ 79(1) ላይ በዚህ ጊዜ ውስጥ ወደ ስራ ለመመለስ ያልቻለ ሰራተኛ በህመም ምክንያት የስራ ውሉ ሊቋረጥ እንደሚገባ ተደንግጎ ይገኛል፡፡

ወደ ተያዘው ጉዳይ ስንመለስ አመልካች በህመም ምክንያት ስራ ለመግባት ያለመቻላቸውን ለመ/ቤቱ ካሳወቁበት ከታህሳስ 17 ቀን 2007ዓ.ም ጀምሮ ህጉ እሰሚፈቅደው 8ወር ጊዜ ድረስ በደሞዝ እና ያለደሞዝ ፍቃድ ሊሰጣቸው የሚገባ በመሆኑ በዚህ ጊዜ ውስጥ ያልተከፈላቸው ደሞዝ ታስቦ እንዲከፈላቸው አስተዳደር ፍርድ ቤቱ ከወሰነ በኃላ የአመልካች ወደ ስራ ልመለስ ጥያቄያቸው የቀረበው መጋቢት 1 ቀን 2008ዓ.ም ሲሆን የ8 ወር ጊዜው የሚያበቃው ነህሴ 16 ቀን 2007ዓ.ም በመሆኑ ጊዜው ካለፈ በኃላ ያቀረቡት ወደስራ ልመለስ አቤቱታ በህጉ ተቀባይነት የለውም በማለት

የሰጠው ውሳኔ እና ይህንን ውሳኔ በትእዛዝ በማጽናት የፌደራሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የሰጠው ውሳኔ መሰረታዊ የሆነ የህግ ስህተት ተፈጽሞበታል ለማለት የሚያስችል የፍሬ ነገርም ሆነ የሕግ ነጥብ ሳይኖር ይህ ችሎት የአመልካችን ቅሬታ የሚቀበልበትን መሰረታዊ ምክንያት አላገኘም፡፡

በመሆኑም ከላይ በተዘረዘሩት ምክንያቶች የሲቪል ሰርቪስ ሚኒስቴር አስተዳደር ፍርድ ቤት የሰጠው ፍርድ እና የፌዴራሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት ጉዳዩ በይግባኝ ቀርቦለት ይግባኙን በመሰረዝ የሰጠው ትዕዛዝ መሰረታዊ የህግ ስህተት የተፈፀመበት ባለመሆኑ ተከታዩን ወስነናል፡፡

ው ሳ ኔ

1. በሲቪል ሰርቪስ ሚኒስቴር የአስተዳደር ፍርድ ቤት በይ/መ/ቁጥር 044/2009 ጥር 30 ቀን 2009 ዓ/ም ተሰጥቶ በፌዴራሉ ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት በፍ/ብ/ይ/መ/ቁጥር 138065 መጋቢት 14 ቀን 2009 ዓ.ም በዋለው ችሎት በትዕዛዝ የጸናው ብይን በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348(1) መሰረት ጸንቷል፡፡

2. አመልካች ጊዜው ካለፈ በኃላ ያቀረቡት ወደ ስራ ልመለስ አቤቱታ ውድቅ ተደርጎ በተሰጠው አስተዳደራዊ ውሳኔ የተፈፀመ መሰረታዊ የሆነ የሕግ ስህተት የለም ብለናል፡፡

3. ግራ ቀኙ በዚህ ፍርድ ቤት የወጡትን ወጪና ኪሳራ የየራሳቸውን ይቻሉ፡፡

መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የሰ.መ.ቁ. 19519

ሰኔ 03 ቀን 2005 ዓ.ም

ዳኞች፡-

ፀጋዬ ወርቅአየሁ

ጌትነት መንግስቴ

ሰለሞን ጎራው

ሃብታሙ ውለታው

ኃ/ማርያም ሞገሥ

አመልካች ..... ወርቁ ተገኘ

ተጠሪ ..... የባህር-ዳር ከተማ አገልግሎት ጽ/ቤት

መዝገቡ ያደረው ለምርመራ በመሆኑ መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ከመዝብ ምርመራው እንደተረዳነው አመልካች ታህሣሥ 22 ቀን 2002 ዓ.ም በተፃፈ የይግባኝ አቤቱታ የባህር-ዳር ከተማ አስተዳደር የቦታ አቅርቦት የሥራ ሂደት ግንቦት 24 ቀን 2001 ዓ.ም በወራሚት ቀበሌ ገበሬ ማህበር ሆድ ገበያ ተብሎ ከሚጠራው ሥፍራ በ1989 ዓ.ም የወላጅ አባቴ የነበረውን እና በ1996 ዓ.ም በስሜ የተመዘገበልኝን

በምስራቅ ያረጋል መጩ

በምዕራብ መንገድ

በሰሜን አወቀ ከበደ

በደቡብ ምትኬ ምግባር

የሚያዋስኑትን አንድ ቃዳ ተኩል መሬት ለኢንቨስትመንት ይፈለጋል ተብሎ ሲወሰድ ካሣ እንዲከፈላቸው በተደረገው የጥናት ዝርዝር ውስጥ ስማችሁ አልተካተተም በሚል ካሣ ሊከፈልህ አይገባም ተብሎ የተወሰነብኝ ስለሆነ ፍርድ ቤቱ ካሣ እንዲከፈለኝ ይወስንልኝ በማለት ቅሬታውን ለባህር-ዳር ከተማ አስተዳደር የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት አቅርቧል፡፡

የባህር-ዳር ከተማ አስተዳደር የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤትም ይግባኙን ያስቀርባል ብሎ ተጠሪ መልስ እንዲሰጥበት አድርጓል፡፡

በዚሁ መሠረት ተጠሪው ለክርክሩ ምክንያት የሆነው መሬት በ1989ም ሆነ በ1996 ዓ.ም በአመልካች ስም ያልተመዘገበ እና በህገ-ወጥ መንገድ የያዘው ስለሆነ ካሣ ሊከፈለው አይገባም በማለት ተከራክሯል፡፡

ፍርድ ቤቱም የግራ ቀኙን ማስረጃ ከመረመረ በኋላ አመልካች ያቀረበው የ1996 ዓ.ም የይዞታ ማረጋገጫ ከዋናው ጋር ያልተገናዘበ፤ የግብር ደረሰኞችም ለየትኛው መሬት እንደተከፈለ የማያረጋግጡ በመሆኑ የአመልካች መከራከሪያ ተቀባይነት የለውም፤ የይዞታ ማረጋገጫ ሊሆኑትም አይችሉም በማለት የከተማው አስተዳደር የቦታ አቅርቦት የሥራ ሂደት የሰጠውን ውሳኔ አጽንቷል፡፡

ይህ የሰበር አቤቱታ የቀረበው ይህን ውሳኔ በመቃወም ሲሆን በቂ ማስረጃ እያለኝ፣ ማረጋገጥም እየተቻለ ተገቢው ማጣራት ሳይደረግ ካሣ ሊከፈልህ አይገባም መባሌ ሥህተት ስለሆነ የሥር ፍርዱ ይሻርልኝ፤ በቂ የሆነ ካሣ እንዲከፈልም ይወሰንልኝ በማለት ጠይቋል፡፡ ክርክሩም በዚሁ ተጠናቋል፡፡

እኛም መዝገቡን መርምረናል፡፡ እንደመረመርነውም በግራ ቀኙ መካከል የቀረበውን ክርክር ከማየታችን በፊት የባህር-ዳር ከተማ አስተዳደር የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት በአመልካች የቀረበለትን ይግባኝ መርምሮ ለመወሰን ሥልጣን ነበረው ወይስ አልነበረውም የሚለውን ማየት አስፈላጊ ሆኖ በማግኘታችን እንደሚከተለው አይተነዋል፡፡

እንደሚታወቀው ለህዝብ ጥቅም ሲባል የሚወሰዱ የይዞታ ቦታዎችን በተመለከተ ባለይዞታዎች የሚኖራቸውን መብት እና አፈፃፀሙ ምን መምሰል እንዳለበት ለመግዛት የወጣው አዋጅ ቁጥር 272/94 ነው፡፡ በዚህ አዋጅ በአንቀጽ 16 (3) ላይ እንደተደነገገው የይዞታ ቦታቸውን ስለህዝብ ጥቅም እንዲለቁ የሚወሰንባቸው ሰዎች ማስጠንቀቂያ ሲደርሳቸው በመጀመሪያ ትዕዛዙን ለሰጠው ክፍል፤ ውሳኔው ያልተሻሻለላቸው እንደሆነም ትዕዛዝን ያስተላለፈው አካል

በሰጠው ውሳኔ ቅሬታ ካላቸው በአዋጁ አንቀጽ 18 (1) መሠረት ለከተማ ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ ማቅረብ ይገባቸዋል፡፡ በፍሬ ነገር ረገድ ጉባኤው የሚሰጠው ውሳኔ የመጨረሻ ይሆናል [አዋጅ ቁጥር 272/94 አንቀጽ 18 (3)]፡፡ ጉባኤው ካሣን በሚመለከት በሚሰጠው ውሳኔ ቅር የሚሰኝ ወገንም ቅሬታውን የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት ባለበት ቦታ ለሚገኘው የከተማ-ነክ ይግባኝ ሰሚው ፍርድ ቤት ያቀርባል፡፡ ፍርድ ቤቱ የሚሰጠው ውሳኔም የመጨረሻ ይሆናል [አዋጅ ቁጥር 272/94 አንቀጽ 18 (4)]፡፡ በከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት እና መሬት እንዲለቀቅ ትዕዛዝ በሚያስተላልፈው አካል መሃል የሚገኘው የከተማ ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ እንደአግባቡ በክልል ወይም በከተማ መስተዳደር ከፍተኛው የሥልጣን አካል በሚወስነው መሠረት እንደሚቋቋም በአዋጅ ቁጥር 272/94 አንቀጽ 19 (1)]

ተገልጿል፡፡ ይህን ተከትሎም የአ.ብ.ክ.መ. ምክር ቤት በደንብ ቁጥር 6/94 አወጥቶ ተመሳሳይ አደረጃጀት በመፍጠር ጉባኤውን አቋቁሟል፡፡ ዝርዝር የአሠራር ሥነ-ሥርዓቱን በተመለከተ ምክር-ቤቱ እንደሚወሰን ተገልጿል [ደንብ ቁጥር 6/94 አንቀጽ 15 (1)፣ (3) እና አንቀጽ 19]፡፡ በዚሁ መሰረት የክልሉ ምክር ቤት *መመሪያ* ቁጥር 7/95 በማውጣት ዝርዝር የአሠራር ሥርዓቱን አውጥቷል፡፡ ከዚህ በኋላም *መመሪያ* ቁጥር 40/2000 ወጥቶ በሥራ ላይ ውሏል፡፡ ደንቡ በርዕሱ ላይ የከተማ-ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ ማቋቋሚያ እና የአሠራር ሥነ-ሥርዓት መወሰኛ *መመሪያ* የሚል ቢሆንም ዝርዝሩ ሲታይ በደንብ 6/94 አስቀድሞ የተቋቋመውን የከተማ ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ በመመሪያ በማቋቋም እና ስያሜውንም ሠርዞ የመሬት-ነክ አቤቱታ ሰሚ ጉባኤ የሚል አዲስ አደረጃጀት ፈጥሯል፡፡ እዚህ ላይ አንድ ችግር አለ፡፡ ደንብ ቁጥር 6/94 አስቀድሞ ያቋቋመውን የከተማ-ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ *መመሪያው* እንዳልተፈጠረ በመቁጠር በስያሜውም አዲስ አደረጃጀት ይፈጥራል፡፡ ይሁን እና *መመሪያው* ዝርዝር የአሠራር ሥነ-ሥርዓቶችን ከማውጣት ባለፈ በደንቡ የተፈጠረውን ተቋም እንዳልነበረ በመቁጠር በስያሜ አዲስ ተቋም መፍጠሩ በህጎች አደረጃጀት የሥልጣን እርከን የተፈቀደ አይደለም፡፡ በዚህ ረገድ *መመሪያው* የህጎች የሥልጣን ዕርከን ከሚፈቅድለት በላይ የተራመደ ሆኖ አግኝተነዋል (ultra-virus)፡፡ ስለሆነም በዚህ ነጥብ ላይ *መመሪያው* ተቀባይነት ያለው ሆኖ አላገኘነውም፡፡ በደንቡ የተቋቋመው የከተማ ቦታ ይግባኝ ሰሚ ጉባኤ አሁንም እንዳለ የሚቆጠር ይሆናል፡፡

የዚህ ተቋም በተግባር አለመኖር ሰዎች *መብቶታቸውን* በአግባቡ ለማስከበር ዕንቅፋት ሊፈጥርባቸው እንደሚችል ይታወቃል፡፡ እንዲህ ሲሆን ተቋሙ ተግባራዊ ሥራውን እንዲያከናውን ለማድረግ ኃላፊነት ያለበትን ክፍል አግባብ ባለው መንገድ በመጠየቅ *መብቶቻቸውን* ማስከበር የሚገባቸው ይሆናል፡፡ ይህን ከማድረግ ባለፈ በተግባር የተቋሙን አለመኖር ምክንያት በማድረግ ብቻ ሰዎች በመሬት ጉዳይ ላይ በመጀመሪያ ደረጃ ትዕዛዝ በሚያስተላልፈው አካል እና በከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት መሃል በካሣ መጠን ብቻ ሳይሆን በፍሬ ጉዳይ ላይም ይግባኝ ሊሰማ የሚችለውን ክፍል በመዝለል ጉዳዮቻቸውን ለከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤቶች በቀጥታ ሊያቀርቡ አይችሉም፡፡ የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤቱ ሥልጣን የከተማ-ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ የሚሰጣቸውን ውሳኔዎች መከለሥ በመሆኑ በዚህ ጉባኤ የተሰጠ ውሳኔ ሳይኖር የይግባኝ ሰሚነት ሥልጣኑን ሊገለገልበት አይችልም፡፡ በፍሬ ነገር ረገድ የአስተዳደሩ አካል የሰጠውን ውሳኔ የሚከልስበትን ሁኔታ ይፈጠራል ወይም ቦታቸውን የሚያጡት ሰዎች በፍሬ ነገር ረገድ በህገ-መንግስቱ የተሰጣቸውን የይግባኝ *መብት* ያጣሉ፡፡ ስለሆነም የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት የከተማ ቦታ ማስለቀቅ ይግባኝ ሰሚ ጉባኤ የሰጠው ውሳኔ ሳይኖር የቀረበለትን ጉዳይ በቀጥታ በይግባኝ የማየት ሥልጣን የለውም፡፡

መመሪያ ቁጥር 40/2000 ተቀባይነት አለው ቢባል እንኳ የአመልካች ቅሬታ ለከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት ከመቅረቡ በፊት *መመሪያው* እንደሚለው ለመሬት-ነክ አቤቱታ ሰሚ ጉባኤ

ቀርቦ ሊታይ የሚገባው ይሆናል፡፡ የዚህ ክፍል በተግባር አለመደራጀት የከተማ-ነክ ይግባኝ ሰሚው ፍርድ ቤት በህግ በግልጽ ከተሰጠው ሥልጣን በላይ ያልተደራጀውን ክፍል ሥልጣን ሠብስቦ እንዲይዝና እንዲሠራበት የሚፈቀድበት የአሠራር ሥርዓት የለም፡፡ ስለሆነም በሁለቱም መንገድ ቢሆን የባህር-ዳር ከተማ አስተዳደር የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት የአመልካቾች ቅሬታ በተጠቀሱት ክፍሎች ላይ ቀርቦ ከመስተናገዱ በፊት ከአስተዳደሩ ውሳኔ የአመልካችን ቅሬታ በቀጥታ ተቀብሎ መወሰኑ ከፍ ሲል በተጠቀሱት ምክንያቶች ከሥልጣኑ በማለፍ የሰጣቸው በመሆኑ ውሳኔው የሚጸና አይደለም፡፡ በመሆኑም የሚከተለውንም ውሳኔ ሰጥተናል፡፡

ውሳኔ

የባህር-ዳር ከተማ አስተዳር የከተማ-ነክ ይግባኝ ሰሚ ፍርድ ቤት የአመልካች ቅሬታ በጉባኤ ከመታየቱ በፊት በቀጥታ ተቀብሎ በማስተናገድ ውሳኔ መስጠቱ ከሥልጣኑ በማለፍ የሠራው (ultra-virus) በመሆኑ ውሳኔው የሚጸና አይደለም፡፡ ስለሆነም የከተማ-ነክ ይግባኝ ሰሚው ፍርድ ቤት የሰጠውን ፍርድ ሽረናል፡፡ ኪሣራ እና ወጪ ይቻቻሉ፡፡

ትዕዛዝ

የተሰጠ ዕግድ ካለ ተነስቷል፡፡ ይፃፍ፡፡

መዝገቡ ተዘግቷል፡፡ ወደ መዝገብ ቤት ይመለስ፡፡