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Preface

Hawassa University Journal of Law (HUJL) is an endeavor of the School of Law of Hawassa University, which is established with the aim of creating a platform whereby scholarly works get an outlet in expanding the frontiers of knowledge. The journal publishes scholarly works on law-related issues, policies, theories and problems relevant to Ethiopia within local, national, regional and international settings in the form of peer-reviewed articles as well as notes, case comments and book reviews. The Journal aims to advance legal scholarship through research and inquiry, and provide a forum for academicians, researchers, lawmakers, judges, practitioners and policymakers to publish their researches and ensure accessibility for readers at large. In its past six volumes, HUJL has enabled the publication of various works, among others, coming from the academia, researchers, lawmakers, judges, policy-makers and practitioners.

This peer-reviewed volume covers a wide range of legal issues such as internally displaced people, administrative contracts, prisoner rights, commercial arbitration and labor law. The volume also contains a contribution focusing on the land law of Ethiopia, published under the notes corner and two case comments emphasizing on decisions of the Federal Supreme Court Cassation Division – one concentrating on labor and the other on delegation of judicial powers. Initially, this volume was planned for publication under two issues, whereby one issue would exclusively focus on labor matters. However, due to a range of factors, among others, the small number of submissions pertaining to labor matters and the rigorous review process these submissions were required to follow, it was not possible to find enough articles to publish this volume in two different issues. For this reason, we were forced to merge the regular issue with the labor law submissions that were initially intended as an independent issue.

In conclusion, I wish to extend my gratitude to ILO-*Siraye* program project at Hawassa University for being part of the collaboration. I would also take this opportunity to thank contributors and reviewers, who contributed their share to make the publication of this volume a reality.

Beza Dessalegn (Ph.D.)

Editor-in-Chief

Contents

Articles

Note

Case Comments

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A Critical Look at the National Institutional Mechanisms towards the Protection and Assistance of Conflict-Induced Internally Displaced Persons in Ethiopia

Behaylu Girma♣

Abstract

Internal displacement is one of the forced migration types that is increasing in an alarming rate which lacks global attention. The issue was an international agenda in the early 1990s, yet, there is no well-established international organization responsible to assist and protect IDPs. It is the state that is primarily taking the responsibilities. The study used qualitative research methodology and examined the institutional responses, gaps and the human rights protection of conflict-induced IDPs in Ethiopia. It has been found that there are scattered institutional structures at the federal and regional levels. The response of the Ethiopian Disaster Risk Management Commission, which is the primarily responsible organ, is reactive and sporadic. There is cluttered coordination and the issue of conflict-induced internal displacement becomes an appeal of rare attention by the three branches of the government. Besides, there is less engagement of CSOs and National Human Rights Institutions. These disparities have challenged the protection and assistance of IDPs in the country. Thus, conflict-induced IDPs become the subject of rare international attention and less national protection. Therefore, it is time for Ethiopia to revise its institutional structure and address the plights of conflict-induced IDPs in the country.

Keywords: Ethiopia, IDPs, Kampala Convention, Institutional Frameworks, Human Rights Protection

♣ LL.B (Mekelle University); LL.M (Bahir Dar University); PhD Candidate, Addis Ababa University, School of Law Center for Human Rights. The writer is grateful to all those who gave the constructive comments on the development of this article. The writer can be reached at destabehaylu@gmail.com

1. Introduction

Internal displacement is one wave of forced migration that individuals are displaced from their place of origin and become refugee within the territory of their own country.[1] Every year, millions of people are forced to leave their homes because of conflict, violence, developmental projects, and climate change.[2] Some 71.1 million people were living in internal displacement as of the end of 2022 which is a sharp increase compared with 2021 and mostly the displacement has been caused by conflict, violence, and disasters.[3] These numbers are not mere data; rather they tell about the suffering of human life and the disparate situation of the internally displaced persons.

The problem worsens in the global south and displacement of individuals has become a defining characteristic of sub-Saharan Africa.[4] Natural disasters, conflict, and human rights abuses are the main triggering factors of displacement.[5] However, conflict and violence become the most triggering factors of displacement.

Internal displacement is one of the challenges Ethiopia has faced at different times and remains pervasive throughout the country's history. Natural disasters, conflicts and developmental projects are the frequent causes of displacement in the country.[6] However, since 2017 conflicts have become the main driver of displacement and the country has witnessed the displacement of millions of IDPs within its territory. In Ethiopia, as of March 2022, an estimated 5,582,000 persons were displaced within the country due to armed conflict and natural disasters.[7]

[1] Internal Displacement Monitoring Center, Internal Displacement, retrieved on 3/27, 2023, available at Internal displacement | IDMC (internal-displacement.org)
[2] Internal Displacement Monitoring Center, Retrieved on 9/3/2019, available at http://www.internal-displacement.org/internal-displacement/history-of-internal-displacement
[3] Internal Displacement Monitoring Center retrieved on 5/23/2023 available at https://www.internal-displacement.org/sites/default/files/publications/documents/IDMC_GRID_2023_Global_Report_on_Internal_Displacement_LR.pdf
[4] Crisp, J. (2010), Forced displacement in Africa: Dimensions, difficulties, and policy directions. *Refugee Survey Quarterly*, *29*(3),
[5] Mehari Taddele Maru, Causes, Dynamics, and Consequences of Internal Displacement in Ethiopia, working paper, May 2017, p. 16
[6] Ibid
[7] Relief web, Response to Internal Displacement in Ethiopia Fact Sheet - January to March 2022, retrieved on 5/23/2023, available at https://reliefweb.int/report/ethiopia/response-internal-displacement-ethiopia-fact-sheet-january-march-2022

IDPs are individuals of a country and the state has a primary obligation to ensure and protect their human rights.[8] In doing this the state should have a strong institutional structure. Particularly, in cases of conflict-induced internal displacement, the IDPs become susceptible to different types of human rights violations and are forced to live in dire conditions. During the three phases (before, during, and after) of the displacement, numerous protection concerns are encountered by the IDPs, and the plights of the IDPs become severe mainly before and during the displacement. During these stages, displaced persons lack protection and have become vulnerable to different types of human rights violations. This includes violence, intimidation, killings, looting, property destruction, house burning, and other violations that would force them to flee from their homes.[9] Thus, the state has the primary obligation to respond to and address the plights of the IDPs based on the available institutional structures.

Therefore, this research has employed a qualitative research methodology and attempted to critically examine and addressed to what extent the Ethiopian federal and regional government's institutional arrangements are adequate and coordinated for conflict-induced IDPs in the country. It also inquired the responses, coordination approaches, gaps, and challenges in protecting the rights of conflict-induced IDPs in the country.

2. A Nutshell on the Development of International Institutional Frameworks

It was in the early 1990s that internal displacement became one of the international agenda and was recognized as an important issue of global concern.[10] At this juncture, internal displacement was a subject with neither a clear definition nor normative and institutional frameworks that demands a guide for effective responses of states and international humanitarian actors.

It was the preparation of the Guiding Principles on Internal Displacement that prompted the international community to think about the need for an institutional structure and different ways

[8] Africa Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009), Uganda, Kampala, article 3, 4 and 5

[9] United Nations General Assembly. (2018), '*Report of the special rapporteur on the human rights of internally displaced persons',* retrieved 11/20/2019 available at https://reliefweb.int/sites/reliefweb.int/files/resources/G1810255.pdf, p. 8

[10] Internal Displacement Monitoring Center, An Institutional History of Internal Displacement, retrieved on 6/13/2022 available at, An institutional history of internal displacement | IDMC (internal-displacement.org)

of arrangement.[11] In 1992, the newly appointed representative[12] for IDPs was assigned a task to study the existing legal and institutional frameworks and to provide possible recommendations to address the gaps in the protection and responses of IDPs.[13] The representative examined the existing laws, and institutional structures, and suggested three alternatives to the institutional arrangements for dealing with problems related to IDPs.

The establishment of a new organization was the first option though not realized because of political and financial constraints.[14] Politically, states have the primary responsibility to safeguard their citizens and the issue of sovereignty becomes the subject of contestation. In addition, international organizations have a secondary role in supporting the states' responsibility and the establishment of a new organization is assumed to be a challenge for the state sovereignty. Besides, the increasing number of IDPs assumed to demand huge resources, and this was inconceivable and financially challenging.[15]

The second suggestion was the assignation of the responsibility of IDPs to an existing UN agency.[16] The United Nations High Commissioner for Refugees (UNHCR) was the potential and suggested agency to take up the responsibility to protect the displaced individuals.[17] The UNHCR has experiences with the responses of refugees, and IDPs also encounter similar challenges as the refugees a are sheltering within the territory of the state. However, because of the large number of IDPs around the globe which has doubled the number of refugees, it was argued that the organization would lack the institutional capacity to provide assistance and protection to IDPs.[18]

The development of a collaborative approach among different relevant agencies coordinated by a central mechanism was the third and most feasible option which was approved and agreed to be

[11] Ibid
[12] In 1992, in response to the growing international concern about the large number of internally displaced persons throughout the world and their need for assistance and protection, the Commission on Human Rights through resolution 1992/73 requested the United Nations Secretary-General to appoint a representative on internally displaced persons and Francis M. Deng was appointed.
[13] Elizabeth Ferris and Sarah Deardorff Miller, Institutional Architecture: Does the International System Support Solutions to Internal Displacement? Research Briefing Paper
UN Secretary-General's High-Level Panel on Internal Displacement August 2020
[14] Brun, Research guide on internal displacement, retrieved on 6/13/2022, available at Possible topics and framework for a research guide on internal displacement (mnstate.edu) p.8
[15] Ibid
[16] Ibid
[17] Supra note 13
[18] Supra note 14

applied.[19] To this effect, the Inter-Agency Standing Committee for Internal Displacement was established and in 1997 an Emergency Relief Coordinator was appointed as the focal point to take responsibility for coordinating the UN agencies on issues related to internal displacement.[20] Accordingly, all of the UN agencies are supposed to work jointly coordinated by the UN Emergency Relief Coordinator (ERC) at headquarters and the Resident/Humanitarian Coordinators (HR/RC) in the field and are expected to address the needs of the internally displaced.[21]

The Collaborative Approach worked from 1999 to 2005 and did not go further. It faced with different challenges and was not very successful in assisting the IDPs. The response was conducted in a dispersed manner and the approach resulted in no accountability mechanisms for IDPs.[22] The coordinator and the authority many times lacked coordination and led the agencies to have effective responses to IDPs. This is because there were inconsistencies in the management of forced migrants including internal displacement, overlapping of mandates, and absence of organizations that had an explicit mandate to assist or protect IDPs, are the major challenges faced by the Collaborative Approach.[23]

Thus, in 2005, the Inter-Agency Steering Committee (IASC) decided to establish a new system based on clusters that were intended to cover the gaps in the Collaborative Approach and to have effective assistance and protection.[24] However, still, the main challenge is lack of international institutional responsibility and there is no single UN agency that has a specific mandate to work on IDPs. Hence, many UN agencies are working and giving responses to IDPs without compromising their core mandates and this has challenged the IDP's response process and protection concern. Similar to the situation in the international arena, there has not been any specialized institutional mechanism for the protection and assistance of IDPs in Africa. However,

[19] Ibid
[20] Dennis McNamara, 2006, Humanitarian reform and new institutional responses, Putting IDPs on the map: achievements and challenges in commemoration of the work of Roberta Cohen, Forced migration review special issues, P.9
[21] Ibid
[22] Supra note 4, P. 9
[23] Ibid
[24] Elizabeth Ferris and Sarah Deardorff Miller, 2020, Institutional Architecture Does the International System Support Solutions to Internal Displacement, Research Briefing Paper UN Secretary-General's High-Level Panel on Internal Displacement, P.2

institutions within the frameworks of refugee protection and human rights have taken some steps and developments to address it in a fragmented and tentative manner.[25]

Article 8 of the Kampala Convention also imposed an obligation to the Africa Union to work in cooperation and share information on issues of internal displacement with the African Commission on Human and People's Rights and the Special Rapporteur of the African Commission on Human and People's Rights for refugee, returnees, IDPs and Asylum seekers.[26] Nonetheless, the issue lacks global attention. Even though Africa has a binding convention, the gaps at the international level become a challenge at the regional level too.

3. Synopsis of National Institutional Mechanisms

The state has the primary responsibility of maintaining law and order and ensuring full and equal access to justice for everyone within its jurisdiction.[27] This includes ensuring that all institutions and agents of the State: the executive, legislative, and judiciary have a responsibility to respect and protect the human rights of all individuals including the IDPs. To this effect, states are required to take all appropriate legislative, administrative, and other activities to prevent violations of rights, investigate violations effectively and prosecute or take the necessary measures against those allegedly responsible for such violations.[28]

The Guiding Principles on Internal Displacement and the Kampala Convention emphasize that the primary responsibility of protecting and assisting IDPs is shouldered within the national governments.[29] These documents and other international human rights instruments imposed an obligation on states to ensure that IDPs can benefit from effective, appropriate, and sustainable protection and assistance. The international community also has a responsibility to support the national government to build its capacity to prevent, protect and respond to situations of internal displacement and to assist them in early recovery efforts following humanitarian crises. In doing

[25] Abebe, Allehone M. (2017), *The emerging law of forced displacement in Africa development and implementation of the Kampala Convention on internal displacement*, Routledge,
[26] See Article 8 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009
[27] The Brookings Institution-University of Bern Project on Internal Displacement, 2005, Addressing internal displacement a framework for national responsibility, retrieved on 18/3/2022 available at Framework_fin.qxp (internal-displacement.org),
[28] Ibid
[29] See Article 5 of the Kampala Convention and Principle 3 of the Guiding Principles on Internal Displacement

this the international framework for national responsibility which is prepared by the Inter-Agency Standing Committee (IASC) is a key document, which sets out 12 steps for governments to take action to ensure IDP's protection and assistance.[30] This framework asserts that each branch of the government has the responsibility to protect and participate in the response process.

The executive authorities of the government have the primary responsibility for directing all protection and assistance activities toward the IDPs. It is the executive branch that has the main responsibility and the overall governance of the state. This responsibility mainly involves preventing conditions that lead to internal displacement, protecting citizens and habitual residents of the country against arbitrary displacement, mitigating the adverse effects of displacement, and working on durable solutions.[31] The executive also has a responsibility to designate a national focal point or the lead agency for internal displacement and allocate specific tasks to the national and local government institutions and different government departments.[32] It is the responsibility of national executive authorities to mobilize and allocate sufficient resources to address the needs of IDPs and to ensure that government staff and policymakers are adequately trained on the rights of IDPs and the government's responsibility.[33]

On the other hand, the legislative authority is responsible for reviewing and adopting legislation, approving the budget, and generally overseeing the government's response to internal displacement.[34] The judicial authorities also have a responsibility to ensure that domestic, regional, and international laws relating to IDPs are properly applied and those responsible for violating these laws are brought to justice.[35]

Furthermore, the national human rights institutions and CSOs have a responsibility to work with the government and other humanitarian partners in addressing the needs of IDPs. These institutions will participate in different aspects like monitoring, investigation, and advocacy and would support the government response process and protect the rights of IDPs.

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[30] The Brookings Institution-University of Bern Project on Internal Displacement Addressing Internal Displacement: A Framework for National Responsibility, 2005

[31] Erin Mooney, National responsibility and internal displacement: a framework for action, retrieved on 3/28/2023 available at FMR 23 Supplement mc bw.indd (fmreview.org)

[32] Supra note 30

[33] Ibid

[34] Global Protection Cluster Working Groups, 2006, Hand-Book for the Protection of Internal Displacement, P. 68

[35] Ibid

Designating a national institutional focal point on internal displacement is essential to have comprehensive responses and to facilitate coordination within the government and between local and international partners. Also there are different designations of institutional structures and options for the protection and responses of IDPs.

In some countries, responsibility of the internally displaced people is added to the mandate of an existing executive government agency, such as the government body charged with refugee issues or the Department of social welfare.[36] In other countries, a separate body is designated to focus exclusively on IDPs or a government committee, a working group is established that regularly brings together officials from the relevant ministries to jointly discuss IDP needs, facilitate coordination with the international community, and develop strategies for ensuring effective response.[37]

However, whichever institutional option is selected, the institution must have a mandate for both protection and assistance. Besides, its staff should be trained and be aware of IDPs related laws including the Guiding Principles and the Kampala Convention.[38]

4. The Federal Government Institutional Arrangement and Responses

In the Ethiopian federal state structure, both the federal and state governments have considerable legislative, executive, and judiciary power.[39] The 1995 Federal Democratic Republic of Ethiopia Constitution (FDRE constitution) specifies the power of the federal government and left out the undesignated power to the regional governments.[40]

Ethiopia seems it has preferred and adopted the establishment of a single institution the National Disaster Risk Management Commission that is responsible for the protection and responses of IDPs. Nonetheless, this institution mainly focuses on assistance rather than the protection of IDPs. Thus, other national institutions are supporting the protection and response process towards internal displacement and conflict-induced IDPs in the country. The following are the main institutions primarily responsible for the needs of IDPs in the country.

[36] Ibid
[37] Ibid
[38] Ibid
[39] Article 50 (2) of the 1995 FDRE Constitution
[40] Ibid Articles 51 and 52

4.1. Ethiopian Disaster Risk Management Commission

The first formal government disaster management institute was established in 1974 and is known as Disaster Relief and Rehabilitation Commission (DRR) which was mandated to provide relief assistance to internal displacement.[41] At that time, Ethiopia had a unitary state structure and this national institution was responsible to give protection and assistance to internal displacement at the national level. However, as the name indicates the response of the commission focused on relief and rehabilitation and was limited to prevention, mitigation, and responses to natural disasters displacement. Particularly, the commission was established for responses to natural disaster displacement and it was futile to conflict-induced internal displacement.

In 1993, the government enacted the first National Policy Directives on Disaster Prevention and Management (NPDPM) and in 1995, the National Disaster Preparedness and Prevention Commission (DPPC) has established. This institution has a mandate for relief supplies and disaster prevention by linking relief to development.[42]

The FDRE Constitution also imposes an obligation to the government to take necessary measures to avert any natural or man-made disasters and to provide timely assistance to the victims.[43] In this regard, the NDRMC was established as an autonomous federal government office having the prime responsibility to protect and respond to the needs of IDPs.

This institution has gone through different institutional structures and in 2004 it was named Disaster Prevention and Preparedness Authority (DPPA) focusing on emergency responses and practically relief oriented.[44] In 2009, following the Business Process Re-engineering (BPR) study, which was conducted by the Ministry of Agriculture and Rural Development (MoARD), the Disaster Risk Management and Food Security Sector (DRMFSS) was established. The DRMFSS, which consists of the Early Warning and Response Directorate (EWRD) and the Food Security

[41] The Relief and Rehabilitation Commission was established in June 1974 following the outbreak of famine in the two northern provinces of Ethiopia Wollo and Tigray. It was given the mission of preventing disasters by tackling their root causes - Prevention, building in advance the capacity necessary to reduce the impact of disasters - Preparedness, ensuring the timely arrival of necessary assistance to victims of disasters, and working on emergency response.

[42] Proclamation no. 10/1995 a Proclamation to provide for the establishment of the disaster prevention and Preparedness Commission

[43] Article 89 of the 1995 FDRE Constitution

[44] Proclamation No. 383/2004, Disaster Prevention and Preparedness Commission Establishment /Amendment Proclamation

Programme Directorate, is responsible for the overall coordination and leadership towards the implementation of the Disaster Risk Management (DRM) approach.[45] In 2015, the sector was changed to National Disaster Risk Management Commission and mandated full DRM pillars including prevention, mitigation, preparedness, responses, recovery, and rehabilitation under the supervision of the Prime Minister.[46]

However, practically, the Commission focuses on response, recovery, and rehabilitation activities.[47] It hardly works on prevention and mitigation and gives less attention to conflict-related internal displacement. The commission has the responsibility to coordinate, follow up and evaluate disaster risk reduction, disaster response, and rehabilitation programs for disaster victims.[48] In addition to this, following the official declaration of a disaster, it is empowered to mobilize resources from domestic and international sources: to utilize secured resources for emergency responses such as during and after displacement.[49] It also establishes national and local structures of internal displacement governance, ranging from the Federal to District level. During and after displacement, the Commission was empowered to assist IDPs by mobilizing resources from domestic and international sources and utilizing secured resources such as food and non-food items.[50]

The Commission is empowered to collect data related to IDPs by leading and coordinating the development as well as revision of displacement risk profiles.[51] It also serves as a national information center for displacement risk management and provides support for similar repositories at the regional level. The commission in cooperation with the International Organization for Migration Displacement Tracking Matrix collects displacement-related data and releases the report to the international community and demands to participate in the response process.

[45] Ibid
[46] Regulation No. 363/2015, National Disaster Risk Management Commission Establishment Council of Ministers Regulation
[47] Interview conducted with a member of the National Disaster Risk Management Commission, February 21, 2021, Addis Ababa.
[48] Proclamation No. 383/2004, Disaster Prevention and Preparedness Commission Establishment /Amendment Proclamation
[49] Ibid Article 6
[50] Ibid
[51] Ibid

Generally, the Commission undertakes and coordinates all types of studies and assessments that are conducted at the national level in different stages of displacement. Because of such functions, despite the roles of other institutions within the nation, the Commission plays the primary and pivotal role in the responses to IDPs.

In 2018, the commission was restructured under the Ministry of Peace[52] and again in 2021, it came under the Prime Minister and was renamed as Ethiopian Disaster Risk Management Commission.[53] However, there is no change in the organizational structure. The early warning and emergency responses directorate and the disaster risk reduction and rehabilitation directorate are the fronts in the responses to internal displacement. There is also a partner cooperation and resources mobilization directorate that is responsible to coordinate the international and national actors in the responses to internal displacement.

Practically, the NDMC along with its Regional, Zonal as well as District centers has provided different humanitarian assistance for IDPs in the nation.[54] However, the commission worked retroactively and the early warning and emergency response directorate of the commission was mainly focused on natural disaster displacement rather than addressing the plights of conflict-induced IDPs.

In Ethiopia, conflict-induced internal displacement mostly occurred because of ethnic or territorial conflict and the issue becomes politicized. This has affected the response process and sometimes the intervention needed a political decision. There is a Disaster Risk Management Council composed of different ministries and is led by the Deputy Prime Minister that would intervene and give directions when mass displacement occurs. This council has bi-annual meetings and evaluates the works of the NDRMC. For instance, following the 2018 huge conflict-induced internal displacement as a result of the Gedeo-Guji and Oromo-Somali ethnic and territorial conflicts and the 2020 northern Ethiopia conflict, the council organized a ministerial task force and attempted

[52] Proclamation No.1097-2018 is a Proclamation to provide for the Definition of the Powers and Duties of the Executive Organs

[53] Proclamation No. 1263/2021 Definition of Powers and Duties of the Executive Organs Proclamation

[54] The Commission has provided different assistance composed of food and non-food items like fifteen kilograms of wheat per month for each individual and 0.45-liter oil, supplementary food for children, clothes, soap, sanitary pads, plastic shelters, blankets, bed sheets as well as different household equipment for IDPs locating at the different part of the country.

to address the plight of the IDPs. However, the response lacked coordination and mostly focused on a forced and premature return process that tradeoffs the human rights of the IDPs.[55]

4.2. The Ministry of Peace

The Ministry of Peace was recently established in 2020, and is one part of the executive organ of the government. The ministry is composed of different directorates and agencies that work on peace and security in general. It has the responsibility to collaborate with the relevant Regional Organs and facilitate the provision of proper protection of citizens as well as identifying factors that serve as causes of conflict.[56] The ministry has the mandate to participate in pre-emptive protection mechanisms and prevent any form of internal displacement by giving training and raising the awareness of the public regarding the positive and negative aspects of displacement as well as the rights and duties of every individual within the country.[57] Furthermore, it has the responsibility to protect individuals from arbitrary displacement, to create a sense of equality among the citizens of the nation, and to protect them from any form of discrimination. It also has to manage the appropriate preparations for natural and man-made disasters to facilitate the resolution of disputes.[58]

Within the Ministry of Peace, there is an Early Warning and Recovery Desk that is responsible to assess and respond to precipitating conflicts.[59] This desk mainly focused on conflict-induced internal displacement and attempted to address the causes of the conflict and work on reconciliation and peace process in collaboration with other desks.[60] Though it was a newly established institution, the Ministry of Peace practically undertook different tasks. It visited IDPs and discussed the issues of effective response and protection with relevant government and

[55] The Guardian, (2019), *Go and we die, stay and we starve*; the Ethiopians facing a deadly dilemma. Retrieved 10/2/2019 from https://www.theguardian.com/global-development/2019/may/15/go-and-we-die-stay-and-we-starve-the-ethiopians-facing-a-deadly-dilemma

[56] See Articles 9 and 13, Proclamation No.1097-2018 a Proclamation to provide for the Definition of the Powers and Duties of the Executive Organs

[57] Ibid

[58] Ibid

[59] Interview conducted with a member of the Early Warning Directorate at the Ministry of Peace, February 17, 2021, Addis Ababa.

[60] In the Ministry of Peace Organogram, there is a conflict governance main executive branch that has three desks Early warning and recovery, Conflict research and analysis, and Conflict follow-up. However, these desks are not well structured at regional levels and on the other hand, most of the conflicts have happened at the regional level.

international organizations. It led and coordinated the provision of humanitarian assistance through the NDRMC.[61]

Thus, the Ministry of Peace is the principal institution within the nation regarding the protection of the rights and freedoms of IDPs with a broad mission of bringing peace and stability across the nation by collaborating with the regional and federal governments as well as other concerned organizations.

Nonetheless, the ministry became negligent to address and prevent the recurrently occurring conflict-induced internal displacement in the country. The task of the NDRMC was also limited to the responses to the humanitarian needs of the IDPs rather than protections. This has challenged the coordination and response process. There is no clear jurisdiction between the works of the Early Warning Desk of the Ministry of Peace and the Early Warning and Emergency Responses Directorate of the Commission.[62] This has created a conflict of interest between the NDRMC and the Ministry of Peace.

In 2021, the government restructured the Council of Ministers and the National Disaster Risk Management Commission becomes out of the Ministry of Peace and made to be directly responsible to the Prime Minister and renamed as Ethiopian Disaster Risk Management Commission.[63] Hence, the Ministry of Peace restructured with new arrangements though it has the power to work on identifying causes of conflicts among local communities that would probably force them into displacement.[64] The task of the Ministry mainly revolved around conflict prevention and reconciliation. It has also a responsibility to protect and addresses the needs of conflict-induced internally displaced persons in the country. Accordingly, it has enacted the National Durable Solution Initiative for all types of displacement and has also a mandate to domesticate the Kampala Convention. However, the split out of the NDRMC from the ministry has raised the concern of jurisdiction and challenged the domestication processes of the Kampala Convention, and also greatly affect the full implementation of the National Durable Solution Initiative. Besides, the Ministry of Peace is challenged to work on protection, and its task mainly relied upon reconciliation and peace-building in which after a huge number of internal displacements occurred in the country.

[61] Ibid
[62] Ibid
[63] Proclamation No. 1263/2021 Definition of Powers and Duties of the Executive Organs Proclamation
[64] Ibid

On the other hand, the NDRMC has the mandate to protect and respond to conflict-induced internal displacement however, it is hardly engaged in the protection and responses to conflict-induced internal displacement. The tasks of the commission traditionally resembled responses than protection and were dominated by natural disaster displacement giving rare attention to conflict-induced and developmental-induced internal displacements.

These have implied that the works of these institutions are mainly dominated by reactive responses than prevention and mitigation. As a result, conflict-induced internal displacement increased from time to time and recurrent challenge in the country. Furthermore, the responses of these institutions are limited to humanitarian assistance, and the human rights protection of the IDPs is compromised.

Hence, understanding such gaps, recently, based on the recommendations of the Ethiopian Human Rights Commission and OHCHR[65], the government has established Inter-Ministerial Task Force to oversee redressed and accountability measures in response to conflict-induced internal displacement and to give responses for the human rights violations committed in the northern part of Ethiopia.[66] The task force set up four committees namely investigation and prosecution, refugees and IDP affairs, sexual and gender-based violence, and resource mobilization committees, and commenced its task. The human rights protection of IDPs and durable solutions are the primary concern of the task force. However, the task force did not fully commence its activities and it will be a premature judgment to examine it.

4.3. The National Human Rights Institutions

The other organizations that are responsible for the protection and responses to IDPs related matters are the National Human Rights Institutions. National Human Rights Institutions (NHRIs) may take the form of Human Rights Commissions, Ombudsmen, or specialized national institutions that are assigned to protect a specific group at risk.[67] These bodies have received their

[65] The joint investigation team of the UN Human Rights Office and the Ethiopian Human Rights Commission (EHRC) investigated the alleged violations of human rights, humanitarian and refugee law committed by all parties to the conflict in Tigray and released the reports on November 2021. One of the recommendations was the establishment of a ministerial-task force to give responses for the human rights violation of internally displaced persons that occurred during the conflict.

[66] Ethiopian News Agency Gov't Establishes Inter-Ministerial Task Force to Oversee Human Rights Violations in Northern Ethiopia | Ethiopian News Agency (ena.et)

[67] Elizabeth Ferris and Sarah Deardorff Miller, 2020, Institutional Architecture Does the International System Support Solutions to Internal Displacement, Research Briefing Paper UN Secretary-General's High-Level Panel on Internal Displacement, P.2

mandate and power from governmental authorities; however, they are also expected to be independent.[68]

These institutions have a broader mandate based on universal human rights standards to both promote and protect all human rights at the national level they must be provided adequate resources by the State to let them serve as a bridge between civil society and the government.[69] The unique position of NHRIs gives them credibility and access to information not often available to government officials or NGOs.[70] As national institutions, they have a good understanding of the country, and the social and political environments within which they operate, and are key national actors.[71] Depending on their mandates, NHRIs can play several roles in the protection of IDPs. They have the responsibility to monitor, conduct inquiries on serious human rights violations, follow up on early warning of displacement, create awareness, and advocate for better human rights protection of IDPs.[72]

In Ethiopia, after Prime Minster Dr. Abiy Ahmed took power, the reshuffle of the Ethiopian Human Rights Commission was one part of the reform. The Commission restructured thematically with one commissioner, deputy commissioner, and three commissioners mandated on issues of Civil, political, and socio-economic rights, women and children rights and disability rights, and the rights of older persons. The issue of internal displacement becomes one of the basic concerns of the Commission and a new directorate has been established and mandated to work on issues of refugee, internally displaced persons, and migrants' rights.

Thus, the Commission conducted different human rights monitoring activities and investigated the alleged human rights violation of IDPs. The Commission also created awareness of the rights of IDPs. It advised the government to ratify the Kampala Convention and advocate for the domestication process.[73] It is also working on a durable solution for IDPs and conducting different consultative workshops with stakeholders, government organizations, and humanitarian partners.

[68] Ibid
[69] Ibid
[70] Global Protection Cluster Working Groups, Handbook on the protection of Internally displaced persons, available at Handbook for the Protection of Internally Displaced Persons (internal-displacement.org) p. 71
[71] Ibid
[72] Supra note 67
[73] Interview conducted with a staff of the Ethiopian Human Rights Commission Refugee, returnee, and IDP Directorate on February 21, 2022, in Addis Ababa.

It is also currently working with other partners on the issues of restorative justice and reconciliation.

However, the commission was negligent and rarely worked on identifying signals and early warning of displacement. It focused on retroactively after conflict-induced internal displacements have occurred. These were evident in the case of Gedeo-Guji and Oromo-Somali conflict-induced internal displacement. The commission released a press statement and conducted monitoring activities after the conflict happened and a huge number of IDPs were displaced.

However, after a new structure has been established, the Commission has aggressively worked on early warning, monitoring, and investigation independently as well as jointly with international organizations. It is also engaged in the preparation of different consultative workshops to enhance the assistance and human rights protection of IDPs in the country. Furthermore, it is currently participating in the domestication processes of the Kampala Convention and advocating for the better protection of IDPs in the country and issues of a durable solution.[74]

States have the primary obligation to protect human rights, however; international human rights instruments would allow individuals to form Non-Governmental Organizations /NGOs/ and Charitable Societies and Organizations /CSO/s to work on the promotion and protection of human rights. The role of civil society in the protection and promotion of the human rights of IDPs is indispensable. Particularly, in developing countries like Ethiopia civil societies are expected to have a great role. Accordingly, the new Organizations of Civil Societies Proclamation No. 1113/2019 came up with a broad range of mandates for national and international CSOs to work on the promotion and protection of human rights.

However, the work of these CSOs remains limited in terms of addressing the growing number and plights of IDPs. Most of the CSOs are negligent to work on the human rights and protection of IDPs.

The Ethiopian Human Rights Council is a Non-Governmental Organization that extensively works on the realization, protection, and promotion of human rights in Ethiopia. Since its establishment in 1991, the Council was remaining the only human rights monitoring and reporting NGO in the

[74] Ibid

country. The council has extensive experience and a good reputation in its human rights monitoring and reporting activities.[75]

However, in terms of conflict-induced internal displacement, the task of the Ethiopian Human Rights Council is limited and mainly focuses on reactive activity. The council did not go further than releasing statements and conducting research on the dared condition of conflict-induced IDPs in the country. The council did not have an active presence in conflict-induced IDP areas and was limited in closely working with government organizations and humanitarian partners. It is mostly releasing a press statement at the Addis Ababa level and lacks an active regional presence in different parts of the country.

Furthermore, CSOs like CEHRO (Consortium of Ethiopian Human Rights Organizations) have been extensively lobbying and pushing the government to ratify the domestication of the Kampala Convention. However, their tasks need to be consistent and should address the real challenges of IDPs.

4.4. The Legislative Body and IDPs

The legislative branch of the government is the responsible organ to enact different internal displacement-related laws and check out the work of other branches of the government. The legislative authority (national parliament), is responsible for reviewing and adopting legislation, approving a budget, and overseeing the government's response to internal displacement in general.[76]

There is a gap in the international normative frameworks, and the enactment of national legislation is an essential cure for better protection and assistance of IDPs. [77] In this regard, the national parliaments play a crucial role in protecting internally displaced citizens through legislative action. The legislator also has a responsibility to lobby the government (or executive) to sign the relevant treaties and incorporate the standards into a specific IDP law.[78] The development of a national IDP

[75] Interview conducted with a staff of the Ethiopian Human Rights Council on February 2022, in Addis Ababa.
[76] Global Protection Cluster Working Groups, Handbook on the protection of Internally displaced persons, retrieved on 6/8/2022 available at Handbook for the Protection of Internally Displaced Persons (internal-displacement.org) P. 69
[77] Handbook for Parliamentarians No 20 – 2013, Internal Displacement: Responsibility and Action
[78] Ibid

law should therefore be a national priority. It can ensure not only that IDPs are better protected and assisted, but also that the country complies with its international obligations to provide such protection and assistance.[79]

In Ethiopia, the House of People's Representatives is the national legislative body and is responsible to enact different national laws. Nonetheless, until now there are no IDP-specific laws that are enacted by the House. It is after a decade that the house has approved the ratification of the Kampala Convention and which has not been domesticated yet. There is a Legal and Justice Committee in the House; however, its work was limited to visiting the IDP sites and it did not advise the House for the enactment of IDP-related legislation. Besides, the issue of conflict-induced internal displacement is politicized and lacks legislative attention by the House. On top of this, the HPRs failed to examine the executive responses toward conflict-induced IDPs in the country and to enact proper normative frameworks.[80] It also became negligent to question the work of the executive organ on the responses and protection of conflict-induced IDPs in the country. The House of Federation and the House of People Representatives have allocated a budget for the National Disaster Risk Management to address the issue of internal displacement. However, there is a challenge on the institutional responsibility towards conflict-induced IDPs and they are living in dared conditions. Particularly there is a challenge in realizing durable solutions for conflict-induced IDPs. Hence, in most cases, the task of the House mainly focused on retroactively rather than identifying and minimizing the root causes of conflict-induced internal displacement in the country and enacting legislation.

4.5. Mandates and role of the Judiciary branch and IDPs

The judiciary has a great role in the protection and adjudication of conflict-induced internal displacement cases. Access to justice is a basic right as well as a key means of defending other human rights and ensuring accountability for crimes, violence, and abuse. Justice plays an important role in combating impunity, ending discrimination and poverty, and paving the way for peace and national reconciliation.[81] Efforts to strengthen the rule of law and ensure full and equal

[79] Ibid
[80] Interview conducted with a member of the legal drafting and disseminating directorate at the Ministry of Justice, February 2021, Addis Ababa
[81] Global Protection Cluster Working Groups, Handbook on the protection of Internally displaced persons, retrieved 19/2/2022 available at Handbook for the Protection of Internally Displaced Persons (internal-displacement.org) p. 71

access to justice for all, including internally displaced persons (IDPs) should form part of the humanitarian response from the outset of an emergency.[82] In most cases, IDPs encounter challenges in accessing justice because of their displacement situations. Beyond the humanitarian response, strengthening the rule of law and promoting access to justice should be planned as early as possible.[83]

The ability to access justice is essential to combat impunity and prevent and respond to protection risks and concerns.[84] IDPs and other affected populations, however, often lack or have limited access to justice owing to several factors.

First, armed conflict, generalized violence, and collapse of institutions and infrastructure frequently resulted in a breakdown in the rule of law and access to justice.[85] In some cases, the functioning justice system remained out of reach for displaced individuals and communities owing to discrimination, marginalization, and poverty.[86] Having fled their homes and lost their livelihoods as well as the protective presence of their families and communities, IDPs found themselves at an increased risk of violence, exploitation, and abuse at the same time their access to justice and other remedies was curtailed because of the displacement.[87]

Second: the lack of clarity of legislation in terms of prosecuting persons involved in creating the IDP situation is a challenge in the prosecution and adjudication processes. The Kampala Convention specified that states have a responsibility to ensure individuals' responsibility for acts of arbitrary displacement. The state should criminalize arbitrary internal displacement and make accountable those who have participated and violated the human right of the IDPs. In doing this, the state may use domestic laws or international criminal laws.

In Ethiopia, there is no specific provision of the code that deals with internal displacement and conflict-induced internal displacement in particular. Rather, all provisions of the criminal code are applied to crimes committed on conflict-induced IDPs like ordinary citizens of the country. Besides, the criminal code provisions that deal with genocide and war crimes against civilians have

[82] Ibid
[83] Ibid
[84] Ibid
[85] Ibid
[86] Ibid
[87] Ibid

direct applicability to crimes committed against conflict-induced IDPs. However, Ethiopian criminal law lacks deficiency and there is no clear provision that prohibits arbitrary displacement or makes individuals responsible for their violations. This has affected the effectiveness of investigations and prosecution of persons involved in displacement-linked crimes, and complicated vindications availed to IDPs themselves;

The judiciary in Ethiopia has a slight role in the protection of internally displaced persons. Until now there are no issues that are brought before a court of law and serve as a landmark case. Besides, the gap in the normative frameworks and institutional structure affects the judiciary in the protection of conflict-induced IDPs in the country and the lack of clear criminal provision also exacerbates the situation. As a result, there is the question of accountability and in most cases, conflict-induced internal displacement ended with reconciliation and the perpetrator failed to be accountable. The response process is mostly dominated by political decisions and the issue of accountability becomes neglected. This is evident from the recurrently happened conflict-induced internal displacement in different parts of the country like Oromia, Somali, Benshangul Gumuz, and the recent conflict in the northern part of the country; Tigray, Amhara, and Afar.

Thus, all of these institutional responses were disorganized and seemed to have failed to address the root causes of the displacement, because of gaps in the normative and institutional frameworks, the response processes were mostly sporadic, it also focuses on retroactively and politically dominated.

This has made the displacement situation to continue in different parts of the country. Particularly, for the last few decades, Ethiopia was hampered by natural disaster displacement mostly caused by drought. These days, conflict becomes the main driver of displacement and the displacement situation has remained vicious in the country.

4.6. The Regional Governments Institutional Structure and Responses

Regional and local governmental authorities have closer contact with IDPs sheltering in their region than the central government and they are in a better position to understand the problems they face.[88] In most cases, national policy decisions are made at the central level and the

[88] Supra note 81, p. 69

involvement of local government authorities is essential for the implementation and coordination of protection and assistance activities on the ground.[89] The local administration also plays a critical role in allowing access to IDPs and other civilian populations at risk. Moreover, in decentralized States, or where national authorities lack sufficient capacity, provincial, regional, or local government authorities may be the main interlocutor for humanitarian agencies.[90]

In the Ethiopian federal state structure, there is a National Disaster Risk Management Commission that is responsible for the protection and responses to internal displacement in the country. At the local level, each regional government has its Disaster Risk Management Office/Bureau/ Agency and/or Authority. Some of the offices are responsible for the regional presidents while others are under the regional Agriculture Bureau.[91]

For instance, in the Somali regional state, the disaster risk management bureau is under the structure of the president, and the structure is extended to the district level.[92] The Somali region has experience in IDP management, particularly in disaster-induced displacement. The region is the only and the first one that has enacted a regional durable solution strategy in 2017 and revised it in 2022.[93] The region is the opener in enacting a durable solution strategy before the federal government and has established durable solution working groups. During the Oromo-Somali conflict-induced internal displacement the bureau was highly engaged in the protection and responses process. It was the Early Warning Directorate that was primarily responsible for and engaged in the protection and assistance of IDPs. Thus, in coordination with the federal DRMC, the Office addressed the needs of the IDPs and tried to work on durable solutions.

Similarly, to this effect, in Oromia and SNNP regional states the disaster risk management bureau was responsible for the president. The structure was also established at the zonal and district levels.

[89] Ibid
[90] Ibid
[91] Interview conducted with a member of the National Disaster Risk Management Commission, February 2021, Addis Ababa.
[92] Interview conducted with the Somali regional state DRMA focal Person, February 2021
[93] Somali Region Durable Solutions Strategy 2017-2022

During the Gedeo-Guji conflict, it was the zone and District disaster risk management focal point that was highly engaged in the response and protection process. The zone administration also had an early warning and response team that is primarily responsible for responding to the IDPs.[94]

5. Protection Approach and Coordination: Global and National

Globally there is no institution solely established for the protection and response to IDPs. The task was assigned to different UN agencies to take the responsibilities and engage in the response process.

In 1997, the UN assigned the overall responsibility of coordinating the protection and assistance of internally displaced persons to the emergency relief coordinator the senior UN humanitarian official.[95] In December 1999, the IASC adopted a policy expressly for the protection of IDPs that sought to spell out the process for implementing the collaborative responses both at headquarters and in the field. In the beginning, it was the collaborative approach that has been preferred by the international community because it allows for a comprehensive and holistic response, involving various agencies and spanning all phases of displacement.[96] Hence, all of the UN agencies were supposed to work jointly, coordinated by the UN Emergency Relief Coordinator (ERC) at headquarters and the Resident/Humanitarian Coordinators (HR/RC) in the field.

However, the approach was not very successful in assisting IDPs; rather it faced with several critical voices in the ongoing debate over the management of IDPs.[97] There was particular concern about the absence of predictable leadership and accountability in key sectors or areas of responsibility. Guidance was not being implemented effectively, agencies continued to pick and choose areas of involvement and the Humanitarian Coordinator was frequently unable to identify reliable actors in key sectors.[98] This led to ad hoc and under-resourced responses. The serious

[94] Interview conducted with Gedeo and Guji Zones DRMA focal persons, March 2021, Dilla
[95] Dennis McNamara, 2006, Humanitarian reform and new institutional responses, Putting IDPs on the map: achievements and challenges in commemoration of the work of Roberta Cohen, Forced migration review special issues, P.9
[96] Ibid
[97] Ibid
[98] Ibid

problem of coordination persisted and many IDPs continued to fall through the cracks, leaving their pressing needs unmet, and serious questions remain unanswered.[99]

Consequently, in response to these widely publicized deficiencies, the ERCs' office in December 2005 came up with a sectorial approach called the Cluster Approach or commonly known as cluster leads under which different agencies would be expected to carve out areas of responsibilities based on their expertise and carry them out regularly in emergencies.[100] This was approved by the Inter-Agency Standing Committee (IASC) (chaired by the ERC and composed of the heads of the major UN humanitarian and development agencies). The agencies agreed to designate global cluster leads especially for humanitarian emergencies in nine sectors/areas of activity which in the past either lacked predictable leadership or where there was considered to be a need to strengthen leadership and partnership with other humanitarian actors (such as between NGOs, international organizations, the International Red Cross and Red Crescent Movement and UN agencies).[101]

The main rationale of this approach is to strengthen the partnership and ensure more predictability and accountability in international responses to humanitarian emergencies, by clarifying the division of labor among organizations and defining their roles as well as responsibilities within the key sectors of the response.[102] Moreover, it would enable these key actors to act as the provider of last resort.

The cluster approach is about transforming a may-respond into a must-respond attitude.[103] It is about achieving more strategic responses and improved prioritization and available resources by clarifying the division of labor among organizations and better defining their role and responsibilities.[104] The approach would be applied in all countries with humanitarian crises, both in conflict-related humanitarian emergencies and in disaster situations.[105] However, the cluster

[99] Ibid
[100] 'IASC Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response,' IASC 2006, https://interagencystandingcommittee.org/working-group/documents-public/iasc-guidance-note-using-clusterapproach-strengthen-humanitar
[101] Ibid
[102] Ibid
[103] Dennis McNamara, 2006, Humanitarian reform and new institutional responses, Putting IDPs on the map: achievements and challenges in commemoration of the work of Roberta Cohen, Forced migration review special issues, P.9
[104] Ibid
[105] Ibid

approach may not constitute radical reform for instance the establishment of a new UN agency with a specific mandate for protecting and assisting IDPs.[106]

5.1. Protection Approach and Coordination in Ethiopia

Ethiopia has largely experienced the role of humanitarian partners/aid agencies in the 1970s when drought displaced a massive number of IDPs in the country. It was also at this time that the government established the first Relief and Rehabilitation Commission.[107] Since then, different UN agencies, INGO, and NGOs have participated in the response process to conflict and natural disaster displacement. However, the establishment of the Ethiopian Humanitarian Fund (EHF) in 2006 has played a great role in financing different humanitarian partners and advancing responses to natural and man-made disasters.

In response to the 2018 mass conflict-induced internal displacement, the Ethiopian government collaborated with the international humanitarian community, setting up Emergency Operations Centers (EOCs) in the affected areas, particularly in Gedeo and Guji zones.[108] Hence, sectorial clusters led by the government and co-led by international organizations responded to the critical needs of displaced persons, including food, nutrition, health, protection, and non-food items.[109] Additionally, the International Organization for Migration (IOM) and the government conducted displacement tracking of IDPs.[110] The government's willingness to work collaboratively with the UN, donor governments, and international non-governmental organizations (INGOs) on the response was highly welcomed and marked a departure from the prior government, which did not openly acknowledge the existence of conflict-induced IDPs.[111]

Nonetheless, during the response process, there were challenges. For instance, there were few humanitarian organizations based in southern Ethiopia at the onset of the Gedeo-Guji conflict-induced IDPs.[112] Government permissions for such groups to operate were required at the local

[106] Ibid
[107] Ethiopian Humanitarian Fund, retrieved January 2023, available at About EHF 15 November 2022[33] (unocha.org)
[108] Refugees International The crises below the headlines CONFLICT DISPLACEMENT IN ETHIOPIA
[109] Ibid
[110] Interview conducted with a member of the National Disaster Risk Management Commission, February 21, 2021, Addis Ababa.
[111] Abebe, Allehone (2017), *The emerging law of forced displacement in Africa development and implementation of the Kampala Convention on internal displacement*. Routledge, Taylor, and Francis Group London/New York
[112] Ibid

levels, and the lines of communication between these levels of government were not always clear.[113] Many of the aid organizations that did work in Ethiopia oriented towards long-term development assistance and responded to slow-onset crises like droughts.[114] There were no experiences in the protection and responses to conflict-induced IDPs. Besides, EOCs were only created in climate-induced emergencies based in Addis Ababa; they were never been deployed at the local or regional level.[115] However after Gedeo-Guji conflict-induced internal displacement, different EOCs have been established in the areas where a massive number of displacements have occurred.[116]

5.2. Protection Approach and Durable Solutions

Durable solutions are one of the human rights of IDPs which would help them to minimize future risks and lead their life sustainably and peacefully. There are three options for a durable solution as return, relocations as well as re/integrations.[117] It is the government's primary responsibility to seek long-lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for the best durable solutions. The humanitarian partners have a secondary role and support the government in realizing a durable solution for the IDPs. IDPs are the center for choosing the best durable solution. Based on the government resources and humanitarian partners' support, the rights of the IDPs will be protected.

For instance, in the case of Gedeo Guji conflict-induced internal displacement particularly on the issue of a durable solution, the EOC was not able to hear the voices of humanitarian partners; rather it was engaged in implementing premature and forced return plans of the government.[118] As a result, humanitarian partners on the ground were unclear as to why the government shifted abruptly to conduct forced returns. The government's return plan became disconnected at every level between the NDRMC and the EOCs; between humanitarian actors and the government.[119] Hence, by late September, the government already moved to return most of the IDPs in Gedeo and

[113] Ibid
[114] Interview Conducted with a focal person from the Office of High Commissioner for Human Rights East Africa Regional Office, Somali Filed Office, August 2021
[115] Ibid
[116] The establishment of the Emergency Operation Center at Gedeo-Guji was the first in terms of conflict-induced internal displacement. Later on, it was also established in Somali, Amhara, Afar, and Tigray regional states.
[117] Kampala Convention 2009, Article 11
[118] Ibid
[119] Ibid

West Guji; however, the majority of them at that time were in secondary displacement sites near their home areas.[120]

On the other hand, in the Somali Region of Ethiopia, a durable solutions working group was established in 2014.[121] The group was mainly established aiming in response to natural disaster displacement. When the 2018 conflict-induced internal displacement occurred, the regional and federal governments used such a platform and attempted to protect and assist the IDPs.[122] Furthermore, contrary to the Gedeo-Guji cases in the Oromo- Somali conflict-induced IDPs, the Federal and Oromia Regional Governments opted for relocation other than return as a durable solution.[123] Hence the Oromia regional government relocated the IDPs to some areas on the outskirt of Addis Ababa like Legetafo, Sululta, Sebeta, and Kuye Feche.[124]

On the other hand, among IDPs who were displaced from Oromia to the Somali Regional State, the majority of them were sheltering at College found in the Somali Regional State and at the Millenium Park Dire Dawa town while others were living with the host community at different parts of Somali Regional State.[125] Besides, the Oromia and Somali regional government has also relocated some of the IDPs to different place including Oromia and Somali regions.

6. Challenges and Gaps in the Institutional Responsibilities

The gaps in the normative frameworks are also reflected in the institutional structure. It is the National Disaster Risk Management Commission that is established as the primary institution in the protection and response of IDPs in the country. The commission was restructured and amended its name at different times.

The commission was established in 1974 primarily aiming at responding to natural disaster displacement which occurred at that time. However, most of the Commission's recent activities are also dominated by natural disaster displacement. The task of the commission is mainly focused on responses and there was a gap in the human rights protection of the IDPs.

[120] Focus Group Discussion with Gedeo-Guji IDPs, Oromia Regional State, Bule Hora town, June 2021
[121] Interview Conducted with Somali regional state DRMO focal person, Jigjiga, August 2021
[122] Ibid
[123] Interview conducted with Oromia regional state DRMO Bule Hora town, June 2021
[124] Ibid
[125] Interview conducted with Somali regional state DRMO focal person, Jigjiga, August 2021,

The Commission works as a national institution and the regional governments also have their regional disaster authority, bureau, or office. Some of these regional organizations are responsible for the regional President while others are under the structure of the Agriculture Bureau. These affected the comprehensive responses and coordination between the federal and regional governments. Besides, these regional organizations mainly focused on natural disaster displacement, and the issue of conflict-induced internal displacement was an appeal to rare attention.

Furthermore, there is no regional disaster risk management authority in some of the regional states, particularly in towns. The structure mostly exists at the Zone and Districts levels. This impacted the response process in towns that did not have the structure and the experiences in the protection and responses of IDPs.

There were also gaps in the task of CSOs and national human rights institutions. These institutions have the primary role in the protection of the IDPs; however, most of them participated reactively and it was limited to giving press statements and issuing letters. They did not properly engage in monitoring activities and identified the prevailing gaps on the ground. Thus, these disparities at the institutional level have been challenging the protection and assistance of IDPs in the country.

7. Conclusion

The issue of internal displacement has risen since the 1990s; however, the international community failed to establish an independent institution because of the nature of the discipline and the concept of state sovereignty. The international community preferred a multi-agency response and adopted a coordination approach. This approach was not effective because there were no accountability mechanisms and the multi-agencies were focused on their respective activities. These hindered the IDP's protection and response process. Accordingly, the international community replaced the coordination approach and changed it with cluster one, and assigned a lead agency for each cluster.

Ethiopia was frequently affected by natural disaster displacement and it was in 1974 that the first relief and rehabilitation institution was established. For the last decades, this institution changed its structure and was renamed at different times. However, its scope mainly stuck on natural disasters and failed to address the plights of conflict-induced IDPs in the country.

In 2018 the Ethiopian government made reforms and established a new Ministry of Peace that had the role of protection and response to internal displacement. Besides, the government has ratified the Kampala convention and given the responsibility of domestication to this Ministry. The Ministry has enacted a national durable solution initiative and established an early warning system though it was not effective to stop conflict-induced displacement; rather it has increased throughout the country. The Ministry did not domesticate the Kampala Convention yet.

The role of the legislative and judiciary branches of the government was minimal and invisible. There were no comprehensive laws or judicial decisions that served as a precedent in the protection and responses to conflict-induced IDPs.

The national human rights institutions were the base and independent organs to monitor and support the protection and responses to IDPs. Nonetheless, these institutions were not properly functioning; mainly they were focusing on releasing press statements than engaging practically in the protection and responses process and working on early warnings. Thus, the lack of a strong and comprehensive institutional framework affects the response and protection process.

Therefore, the federal and regional governments should designate an institutional focal point to provide meaningful protection and assistance to IDPs and revisit the structural arrangement, and mandate responsible for human rights protection and assistance to conflict-induced internal displacement. The institutional mandates towards the protection of conflict-induced internal displacement have to be clear and undergone through regional levels. The issue of conflict-induced IDPs needs special attention and the participation of different international, NGOs. The federal and regional governments should support the work of UN agencies, humanitarian partners, CSOs, and National Human rights Institutions engaging in the human rights protection of IDPs. Also the government should strengthen the coordination mechanisms between humanitarian partners and follow a rights-based approach. Besides, in cases of conflict-induced internal displacement, having institutional structures is not enough; rather the political decision has a great role in ensuring a durable solution for the IDPs. Hence, the government should make the responses to internal displacement a political priority

Unionization in Industrial Parks: The Case of Hawassa Industrial Park

Andualem Nega Ferede[♣]
Yirgalem Germu Berega[♣♣]
Anbesie Fura Gurmessa[♣♣♣]

Abstract

Trade Unions play various roles for the protection and realization of workers' rights, such as decent raises, affordable health care, job security, and a stable schedule. Despite the emphatic recognition that has been shown in several international, regional and national laws, the actual realization of the right to unionization has not been an easy task for the employees whose major decent work destiny hangs over the right to unionize. Therefore, the main objective of this study is to identify the legal frameworks regulating the right to unionize in the Hawassa Industrial Park (HIP) with the view of determining operational challenges and entry point for advocacy. The study employed both doctrinal and non-doctrinal research methodology and a mixed research approach. Accordingly, relevant tools, interview, questionnaire and personal observation were devised. By doing so, the research showed that the majority of the employees are part of trade unions (75%) although the research also revealed the existence of different challenges with regard to unionization in Hawassa Industrial Park. Currently, one of the main problems in the formation and the activities after the formation of trade unions in HIP is low awareness of the workers, labour union leaders and employers regarding unionization and its contributions. The employees, despite their membership in one of the unions, are not fully convinced that the union is established with the objective of protecting their rights at work place. Because of this lopsided understanding, they are not committed to the membership that has negatively affected the acceptance and effectiveness of the unions. Hence, it is recommended that there is a need to raise the awareness of the employees about the benefits of joining the unions beyond the mere membership. In order to improve the working conditions the employees' commitment and participation in the unions should be reinforced.

Keywords: Unionization, Hawassa Industrial Park, Trade Unions, Workers' Right

♣ LLB, LLM, Assistant Professor of Law at Hawassa University School of Law, Contact Address: andualemnega1983@gmail.com, +251913 298133

♣♣ LLB, LLM, LLM, Lecturer of Law at Hawassa University School of Law, Contact Address: yirgalemg45@gmail.com, + 251 9 12 01 46 22 ORICD ID: https://orcid.org/0000-0002-1952-9946

♣♣♣ LLB, LLM, Assistant Professor of Law at Hawassa University School of Law, Contact Address: burqa2020@gmail.com, +251911300591

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1. Introduction

The enforcement of labour right protections which is acknowledged under international, regional and nation laws is the very challenging issue throughout the world though the degree varies from nation to nation. More importantly, for the employees whose decent work destiny hangs over the labour rights, the enforcement of these laws has no alternative. The same challenging stories have been witnessed in the Ethiopian labour market since the country has recorded the lowest manufacturing industries with trade unions.[1] Compared to many other jurisdictions, industrial relations are of a very recent occurrence in Ethiopia since most of the economic activities are dominated by rudimentary private undertakings.[2] Therefore, workers have had to struggle for the establishment of this right with successive regimes that have ruled this country. "The formation of trade unions has never been seen as a healthy move in Ethiopia by all successive governments."[3] Even with the current government, the right to unionization is a subject matter that both the employer and the government still look at with worries[4] and this is more seriously challenged when it comes to the Industrial Parks.[5]

In Ethiopia, industrial parks are established with a unique arrangement of labour and capital intensive setting with aim of reconfiguring the country`s balance of payment through boosting foreign trade.[6] This feature has made the industrial parks one of the

[1] Philippe Alby, Jean-Paul Azam, Sandrine Rospabe, "Labor Institutions, Labor-Management Relations, and Social Dialogue in Africa*,"* (2005). Washington, D.C.: World Bank Group, p. 10, available at http://documents.worldbank.org/curated/en/516591468768335618/Labor-institutions-labor-management-relations-and-social-dialogue-in-Africa, last visited on August 5, 2022. It was reported in the study that "First, note that in Ethiopia and Uganda, a very high %age of manufacturing firms (respectively, 80 % and 90 %) declare having not even one unionized worker."

[2]Anchinesh Shiferaw and WondemagegnTadesse, *Rights Protection in the Labour Markets of Ethiopia Research Reports from Selected Cities*, (2020) Center for Human Rights, Addis Ababa University, p. 9

[3] Ibid, p. 21; see also Mehari Reda, *Privatization in Ethiopia: The Challenges It Poses to Unionization and Collective Bargaining*, (2015) The University of Warwick, p. 7.

[4] Supra Note 2, p.9

[5]Gebeyaw Nega, Labor Dispute in Industrial Parks of Ethiopia: The Case of Bole-Lemi Industrial Park (BLIP) (2021), Unpublished, Master's Thesis, Addis Ababa University, pp. 69-70

[6] Zhang, X. et.al. Industrial park development in Ethiopia Case study report, 2018.

most highly protected business sectors, with little regard to other important societal values like rights of the employees.

The Hawassa Industrial Park, as a flag-ship project, is considered one of the most important parks in the country. The assessments so far conducted shed a dim picture regarding the rights of the employees in the park. One such right of the employees that is generally undermined is the right to unionization. At the early stage of the HIP employees were precluded from establishing trade unions. Even after the formation, the unions were made so ineffective by employing different tactics such as hindering the unions to function as effectively as the International Labor Organization (ILO) documents or as the national legislations require. Thus, this study essentially attempted to assess and present the general conditions of the right to unionization within Hawassa Industrial Park.

Accordingly, the main objective of this study was to identify the legal frameworks regulating the right to unionize in the Hawassa Industrial Park with the view of determining operational challenges. With the framework of the general objective stated, the study addressed the following specific objectives: examining the legal framework regulating the protection of the right to unionize in the Hawassa Industrial Park; investigating the major legal and operational challenges undermining the protection of the right to unionization in the Park; identifying the major stakeholders in the protection of the rights with their respective roles; and establishing important lessons that can be drawn for the purpose of general application.

To address, these objectives, the study employed both doctrinal and non-doctrinal research methodology. Through doctrinal research, the content, principles and gaps of policy and legal instruments related to right to unionization in the industrial parks has been inquired. Through the utilization of non-doctrinal method, the enforcement of laws and policies related right to unionization in Hawassa Industrial Park has been investigated empirically.

The research used information gathered from international instruments, FDRE Constitution, policy documents, and Ethiopian Labour Proclamation and the various relevant regulations and directives as primary sources. Information obtained from informants through structured and semi-structured interviews, questionnaires and personal observation by the researchers was also considered as primary data. In this regard, the concerned stakeholders, which include the government bodies, Hawassa Industrial Park management organs, employers, as well as workers and their representatives were interviewed to incorporate first-hand information about the situation on the ground. Secondary data was obtained via the analysis of various documents from different governmental and non-governmental organizations and works of relevant scholarly. Accordingly, books, journals, periodicals, newspapers, magazines, conference papers, related to right to unionization were consulted. Once the relevant data was secured through the above methods, data was analysed utilizing mixed research techniques and interpretation tools.

Purposive and snowball sampling techniques were used to select the interviewees. Random and availability sampling was also employed to select subjects of the research addressed by questionnaire. Following the methodology chosen, 394 employees were selected to respond to the enquiry through questionnaires and eight people were selected for key informant interview purposively based on the expertise they had on the subject matter under consideration and the offices they assumed. Since Hawassa hosts Southern Nations, Nationalities, and Peoples' Region (SNNPR) Bureau of Labour and Social Affairs and Sidama Regional State Bureau of Labour and Social Affairs, key informants were interviewed from both Regional States and two officials were interviewed from the Ethiopian Investment Commission as an important stakeholder in the process of unionization. Further, two union leaders were interviewed to check the realties with regards to the operation of the unions in the park and one soft skill trainer with the purpose of gathering the level of the understandings of the employees with regards to the rights and obligations in their working life. Finally, one key informant was interviewed from Confederation of the

Ethiopian Trade Union (CETU) as one of the most important stakeholders when it comes to the right to unionization. According to the official documents of Hawassa Industrial Park the total number of workers in July of 2022 was 24,108. This made up the total size of target population of the study. The sample size was determined by using the formula (Yamane, 1967; Cochran, 1963):

$$n = \frac{N}{1+Ne^2}$$

Where;

n- Is sample size

N – Total size of the target population

e –the level of error and given N = 24,108and e= 0.05 level sample error

$$\text{Then, } n = \frac{24{,}108}{1+24{,}108\ (0.05)^2} = \frac{24{,}108}{1+24{,}108\ (0.0025)} = \frac{24{,}108}{61.25} = 393.6$$

Hence, the sample size (n) is 394

Devising the above methodology, this piece depicts the scene, the nexus between unionization vs. human right protections; the legal regimes regulating the right to unionize; the scenario of unionization in Hawassa Industrial Park; the conclusion and the way forward.

2. Setting the Scene

Ethiopia, over the course of the country's development history, has undergone various policies and strategies that were designed to facilitate industrialization process. Considering only the reign of the Ethiopian People's Revolutionary Democratic Front (EPRDF), the country had Agricultural Development Led Industrialization (ADLI) and other similar strategies aimed at poverty reduction with different success rates. Among similar other successive development strategy, the Growth and Transformation Plan II (GTP II) was vital for inclusive development. GTP II was designed to serve as a springboard towards realizing the national vision of becoming a low middle-income country by 2025, through sustaining the rapid, broad based and inclusive economic growth, which accelerates economic

transformation and the journey towards the country's renaissance.[7] With this vision to make Ethiopia a leading manufacturing hub in Africa by 2025, the government of Ethiopia placed high focus on industrial park (IP) development and expansion.[8] It is thus, with this aim that the government has opened up the development of IPs for both domestic and foreign private investors by providing a vast range of fiscal and non-fiscal incentives.[9]

Hawassa IP is among the most prominent IPs, applauded as a flagship project by the government specializing in textile and garment products. It was designed to serve as a blueprint for the development of future parks. As of July 2022 the Park employed 24,108 workers excluding staff and service providers who reside in the compound. At full capacity, the park is expected to generate employment opportunity for close to 60,000 workforces.[10]

Industrial parks are the main hub for economic growth in many countries, providing job opportunity for citizens. It is also assumed that by clustering into industrial parks, small, medium and even large scale enterprises can take advantage of public infrastructures, economies on construction and facilities, gain access to nearby skilled labor markets, and other critical inputs to propel overall economic development.[11] However, some news outlets show that workers in industrial parks

[7]Second Growth and Transformation Plan (GTP II: 2016-2020), Available at: https://en.unesco.org/creativity/policy-monitoring-platform/second-growth-transformation-plan Accessed on: August 6, 2022.
[8]Ethiopian Investment Commission (EIC), Industrial park in Ethiopia: Incentive package, 2017.
[9]FDRE Investment Proclamation No. 1180/2020, 26th Year No. 28, 2020, Addis Ababa, Arts. 17-24.
[10] Company Profile of Hawassa Industry Park, Available at: http://www.investethiopia.gov.et/images/Covid-19Response/Covid-19Resources/publications_May-20/HIP-Production-Company-Profile---07092017.pdf Accessed on August 6, 2022.
[11] UNIDO, International Guidelines for Industrial Parks, (2019), p. 16, available at https://www.unido.org/sites/default/files/files/202005/International_Guidelines_for_Industrial_Parks_EN.pdf Accessed on August 6, 2022.

are at increased risk of various forms of labour rights violation that manifests itself for instance in the form of stifling the right to unionization.[12]

Freedom of association is one of the fundamental rights that all the international, regional and domestic legislation have so far recognized. This recognition of the importance of the right is associated with the enabling nature of the right.[13] Meaning freedom of association is important right not only for its own purpose but because the right is an instrument for the purpose of securing other human rights.[14] The right to association is related to human nature since mankind has been organizing itself from time immemorial until the current times for the purpose of dealing with challenging issues in their day to day life.[15]

Following the identification of the importance of the right, as has been mentioned above, major international legal instruments have incorporated this right in one form or another. In terms of recognition, the instruments herein under can be mentioned as important instruments that have incorporated this right: The Universal Declaration of Human Rights(UDHR) (1948), Article 20(1) declares 'everyone has the right to freedom of peaceful assembly and association,' the International Covenant on Civil and Political Rights (ICCPR)(1966), Article 22 says 'everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests,' the International Covenant on Economic,

[12]Addis Fortune "Labour Union Struggle Faces Stiff Resistance in Hawassa Park" available at https://addisfortune.news/labour-union-struggle-faces-stiff-resistance-in-hawassa-park/ accessed on August 5, 2022.

[13] Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, (2020). P.610. Paul wrote in this regard that the right"---enables the very existence of political parties, allowing pluralist expression in a multi-party system, and offering choice in popular representation."

[14] Charalampos Stylogiannis, Freedom of Association and Collective Bargaining in the Platform Economy: A Human Rights-Based Approach and an over Increasing Mobilization of Workers (2021)**,** International Labour Review, p. 21

[15]Anayet Hossain and Korban Ali, Relation between Individual and Society (2014), *Open Journal of Social Sciences*, **2**, 130-137

Social and Cultural Rights ICESCR (1966) affirms 'the right of everyone to form and join the trade unions of his/her own choice'.

There are also other specialized instruments that have recognized the right testifying to its importance in supporting the interests of ethnic, religious or linguistic minorities, racial minorities, children, the disabled workers, including migrant workers, refugees, stateless persons, and those suffering from gender inequality.[16]

When it comes to the right of workers to unionization, the ILO is one of the first international organizations that have attached the importance of this right to the establishment of decent working conditions.[17] This importance seems to have been recognized because workers have always struggled to establish decent working conditions because of the power imbalance between the employer and the employee presenting him as a daily laborer.[18] The motto of 'freedom of contract' that allowed the two parties that are inherently unequal to determine all the working conditions brought about a significant misery because of the difference between the capitalist and the employee. Capital, in the name of profit, managed to appropriate the 'lion's share' of the wealth created while labour received the lesser, at times even the minimal amount, in the form of wages. As a matter of fact it was not only a matter of monopolizing profit; power in labour relations was also exclusively possessed by the capital in that the employer had absolute prerogative in commanding and controlling the labour force.[19] In the general analysis, the doctrine of freedom of

[16]Framework Convention for the Protection of National Minorities (1995, International Convention on the Elimination of All Forms of Racial Discrimination (1965), (ICERD), Convention on the Rights of the Child (1989), Convention on the Rights of Persons with Disabilities (2006), ILO, Convention concerning Freedom of Association and Protection of the Right to Organise, C87, 9 July 1948, ICESCR, Art. 8 (trade unions),, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, Convention Relating to the Status of Refugees, 28 July 1951, Convention Relating to the Status of Stateless Persons, 28 September 1954.

[17] The ILO Constitution, Preamble paragraph one states that the Organization established partly in, "---recognition of the principle of freedom of association---"

[18] M Serrano & E Xhafa et al (Eds.) Trade Unions and the Global Crisis: Labour's Visions, Strategies and Responses ILO (2011) Page xi.

[19] E. Bruce Kaufman, *The Global Evolutions of Industrial Relations* (Geneva: ILO), 2004:24)

contract has entailed excessively low wages and long working hours coupled with unsafe and unhealthy working conditions. This can be considered the starting point for the employees to imagine organizing themselves into some form of association to remedy what has been created by the unfavorable conditions of negotiating with the employer alone. So, the history of trade unions all over the world is a history of struggle for greater social justice, both in societies and at the work place.[20]

After realizing the pitfalls of the doctrine of freedom of contract, the workers decided that their individuals endeavor to have a better outcome from the negotiation would also not bear any fruit. It is in this manner that the desire to organize and fight for their rights at workplace came about. As it was mentioned herein above, the ILO took these rights seriously and came up with several binding and soft instruments in the form of recommendations, like *Convention 87 on Freedom of Association and Protection of the Right to Organize* and *Convention 98 on the Right to Organize and Collective Bargaining*. The ILO has also emphasized the importance of this right on several occasions like in *the ILO Declaration on Social Justice for a Fair Globalization* (2008) in which it was stated that freedom of association is a fundamental right and recognizing the right which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives.[21] In this regard it has been enunciated that the right to freedom of association constitutes an 'enabling right' which is an effective protection that can be crucial for the actual exercise of other human rights and labour standards, something that has also been pointed out by the ILO Committee of Experts.[22]

[20]Deset Abebe, Trade Union Rights of Government Employees in Ethiopia: Long overdue! (2017), p. 110, available at https://www.researchgate.net/publication/312024060_Trade_Union_Rights_of_Government_Employees_in_Ethiopia_Long_overdue accessed on August 5, 2022.

[21]The ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008

[22] ILO, Giving Globalization A Human Face, International Labour Conference, 101st Session, (Geneva, 2012) p. 38

Ethiopia has been at the forefront in the adoption of the freedom of association and domestication of international instruments and making part of the constitution. The country has ratified all the important Bills of Rights that incorporate this freedom and as only African country to became member to the ILO in 1923, that has ratified 23 conventions including 8 Fundamental Conventions.[23] In addition, the freedom to form trade union is one of the core rights incorporated in the FDRE Constitution.[24] The Labour Proclamation No. 1156/2019 also explicitly recognizes the right to unionization with the necessary procedure to follow in the formation and operation of trade unions.[25]

3. The Nexus between Unionization and Workers Right Protection

Unions are teams of individuals coming together to guarantee their interest. Union members work together to negotiate and enforce a contract with management that guarantees their work related rights and interests, such as decent raises, affordable health care, job security, and a stable schedule.[26]

Workers have two potential sources of leverage with respect to their employers: (1) the implicit threat that they could quit and take a job elsewhere, and (2) the presence of a union that can represent their interests via collective bargaining. However, the first source of leverage record-high job openings rates—will not last forever. But when workers are able to come together, form a union, and collectively bargain, their wages, benefits, and working conditions improve.

Unionization has all round benefits. Labour unions improve wages and working conditions for all workers, whether they are union members or not. Unions help

[23]The ILO Ethiopia Fact sheet available at: https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---sro-addis_ababa/documents/publication/wcms_759979.pdf, accessed on August 3, 2022.
[24] FDRE Constitution, Article 42 (1, A), "This right includes the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests."
[25]Labour Proclamation 1156/2019, Art. 113 (1).
[26] AFL-CIO, Unions Begin with You, 2023 Available at: https://aflcio.org/what-unions-do Accessed on August 6, 2022.

reduce wage gaps for women workers and workers of colour as witnessed in American labour protection policies.[27] Union members have better job safety protections and better paid leave than non-union workers, and are more secure exercising their rights in the workplace. Workers with union representation enjoy a significant pay premium compared to non-union workers. The Bureau of Labour Statistics reports non-union workers earn just 85 % of what unionized workers earn ($1,029/week vs. $1,216/week). When more workers have unions, wages rise for union and non-union workers. The converse is also true: when union density declines, so do workers' wages.[28]

As a show case a study conducted in America in 2021 shows that a worker covered by a union contract earns 10.2% more in wages on average than a peer with similar education, occupation, and experience in a nonunionized workplace in the same sector.[29] Furthermore, unions raise wages for women and reduce racial/ethnic wage gaps. For instance, hourly wages for women represented by a union are 4.7% higher on average than for nonunionized women with comparable characteristics. Black workers represented by a union are paid 13.1% more than their nonunionized Black peers, and Hispanic workers represented by a union are paid 18.8% more than their nonunionized Hispanic peers.[30]

A research by Farber et al. confirms that unions have historically helped, and continued to help, close wage gaps for Black and Hispanic workers (which also means that the decline of unionization over the last four decades has contributed to the increase in the Black–white wage gap over that period).[31] Unions are not only good for workers; they are good for communities and for democracy. High

[27] U.S. Department of Labor, An official website of the United States government. https://www.dol.gov/general/workcenter/union-advantage Accessed on August 6, 2022.
[28] Ibid
[29] Asha Banerjee, et. al, Unions Are Not Only Good for Workers, They're Good for Communities and for Democracy. Economic Policy Institute, December 2021.
[30] Ibid.
[31] Farber et.al, 'Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data' (2021) Quarterly Journal of Economics, Vol. 136, no. 3 pp. 1325–1385

unionization levels are associated with positive outcomes across multiple indicators of economic, personal, and democratic well-being.[32]

A 2019 study conducted by the New York University Stern Centre for Business and Human Rights discovered that garment factory workers in Ethiopia are the lowest paid in any major garment-producing country worldwide. They earn below 26 dollars a month, almost nine times lower than what their counterparts earn in Kenya and three times lower than the workers in Bangladesh. The value showed almost no increase in Birr, except some adjustments on benefits, while witnessing a 38pc decline in dollar terms due to the depreciation of the Birr since then. This is a situation labour leaders believe that could have been averted if there had been unions representing the workers.[33]

4. Legal Regimes Regulating the Right to Unionize

As it was briefly discussed in the introductory section, the legal consideration of the right to unionize was first established in the preamble of the Constitution of the International Labor Organization (ILO) in 1919.[34] The ILO continued with the emphasis on the right to unionize in its Conventions No. 87 (C87) of 1948 and Convention 98 of 1949.[35] The first Convention, in particular, is considered to have been the first of its kind in terms of articulating the substantive elements essential for the purpose of organizing the employees and the employers into an association of their own choosing. Accordingly, the C87 accentuates that freedom of association is right for workers and employers to form and join organization of their own choosing, without prior authorization. These rules and procedures established in the

[32] Asha Banerjee, supra note 29.
[33] Paul M Barrett and Dorothée Baumann-Pauly, The Garment Workers of Ethiopia are World's Lowest Paid (2019), Centre Business and Human Rights, New York University Available at: https://bhr.stern.nyu.edu/blogs/2019/5/22/report-the-garment-workers-of-ethiopia-are-worlds-lowest Accessed on 06 August 2022.
[34] The ILO Constitution, Preamble paragraph one states that the Organization established partly in, "---recognition of the principle of freedom of association---"
[35]Convention 87 on Freedom of Association and Protection of the Right to Organize and Convention 98 on the Right to Organize and Collective Bargaining.

work place can draw up their constitutions and freely partake in the union related activities including assuming leadership positions.[36]

The second one is Convention 98, which entered into force as a complement to the first Convention to protect the employees against antiunion activities and helping them organize in groups and negotiate for the betterment of their rights. After a successful organization, employees and employers can engage in the negotiation of wages and other conditions of employment by an organized body of employees which would eventually produce collective agreements that can improve the working conditions. There are also other ILO legislations, recommendations as well as declarations dealing with the freedom of association as a core labour rights which will be elaborated in the subsequent sections of this study. Ethiopia as a long standing member of the ILO since 1923 has not only ratified these two core Conventions, but also all eight Conventions despite the challenges discussed above.[37]

On a global level, the UDHR has a general recognition of the right to association, but the right to form and join trade union was recognized in the two Covenants in 1966.[38] Ethiopia has ratified both the Covenants,[39] and as per the FDRE Constitution, these Covenants are the integral part of the law of the land.[40] Ethiopia is also a party to regional human rights instruments that recognize the right to work and to form and take part in trade union, like the African Charter on Human and Peoples Rights.[41]

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[36]ILO, Convention No. 87, Art. 2&3.

[37]The ILO Ethiopia Fact sheet available at https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---sro-addis_ababa/documents/publication/wcms_759979.pdf. Accessed on August 3, 2022.

[38]UDHR Article 20(1) 'everyone has the right to freedom of peaceful assembly and association,' the ICCPR (1966), Article 22 'everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests,' the ICESCR (1966)'the right of everyone to form and join the trade unions of his/her own choice'.

[39]Ethiopia has ratified the ICCPR and ICESCR in 1993, the UN Treaty Bodies database, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59 Accessed on August 3, 2022.

[40] The Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta ,1st year No.1, Addis Ababa-21st August ,1995, Art. 9(4). (hereafter referred as the FDRE Constitution)

[41] African Charter on Human and Peoples Rights, Art. 15. This provision states that "every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".

All these discussions recognize the right in Ethiopia based on international and regional bills of rights. The next section considers how the right is treated in domestic legislations.

In considering the normative framework regulating the right to unionize, the fitting place to start is the FDRE Constitution itself. The Constitution is rather elaborate in its recognition and establishment of workers' rights starting from the right to work and other important components that constitute decent working conditions.[42] One of the most important rights in this regard is "the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests."

The other important domestic legislation is the Labour Proclamation No. 1156/2019 that establishes "workers and employers shall have the right to form and organize trade unions or employers' associations, respectively, and to actively participate therein."[43] The Proclamation is the most important legislation not only because it recognizes the right to unionize, but also because it categorically forecasts the relevance of the workers' association with regards to collective bargaining and agreements that can be reached with the instrumentality of the unions. Hence why the Proclamation explicitly recognizes "any trade union shall have the right to bargain with one or more employers or their association…"[44] The same principle applies to employers with regards to the right to negotiate where the Proclamation provides that "any employer or employers' associations shall have the right to bargain with their workers organized in a trade union."[45]

Employers are required to restrain from illegal acts under this law. Among these acts, employers can not coerce or in any manner compel any worker to join or not to join a trade union (14 (1) (d)); or to continue or cease membership of a trade union; or to

[42] The FDRE Constitution, Art. 42.
[43]Labour Proclamation, 1156/2019, Art. 113 (1).
[44] Ibid, Art. 126
[45] Ibid

require a worker to quit membership from one union and require him to join another union; or to require him to cast his vote to a certain candidate or not to a candidate in elections for trade union offices. In addition, termination based on the worker's nation, sex, religion, political outlook, marital status, race, colour, family responsibility, pregnancy, disablement or social status (26(2) (d)) also serves for union members. Consultation with trade union during reduction 2(3) is another prerequisite under this law. The law also dictates protections for union members and leaders which include union leave (82), detailed provisions of trade unions (113-124), collective agreement (125) and bargaining (126).

The last one is the specific law that is applicable to the Industrial Parks that are operating throughout the country. The Industrial Parks Proclamation, which provides that investors that engage in entrepreneurial activities in all industrial parks shall follow the Labour Proclamation and other relevant laws protecting the rights of the employees.[46] In this regard, one can also consider investment laws of the country and other bilateral investment treaties the country has concluded in the facilitation of investment processes throughout the country.

5. The Scenario of Unionization in Hawassa Industrial Park

5.1. Formation of Trade Unions

Hawassa Industrial Park is one of the flagship parks in the country when it comes to the process of developing industrial parks and currently hosts more than 20 manufacturing units engaged principally in textiles and garment production and export. In these factories, there are 24,108 employees (as of July 2022) that undertake various production activities. As it is well understood, one of the most challenging issues when it comes to the right to unionization is the right to membership as assessed by this research. Among the participants of the questionnaire, 75.2% of them were members of trade unions established in the industrial park. This can be considered that an encouraging number of workers are participating in unionization

[46] Industrial Parks Proclamation, Proc. No. 886/2015, Federal Negarit Gazeta Year 21, No.39, Addis Ababa- April 2015, Art. 28.

efforts. When looking at the number of workers participating in trade unions: the share of employees that were members of a trade union in the UK in 2021 was 23.1 %.[47]On the other hand, total labour union "density" of US workers in 2020 was 10.8%, compared to 20.1% in 1983. As per the statistics presented by the US Bureau of Labour Statistics in 2021 "the union membership rate of public-sector workers (33.9 %) continued to be more than five times higher than the rate of private-sector workers (6.1%)".[48]Confirming the possibility of this high number of labour union density Mr. Chanyalew from CETU and Mr. Legesse from the Bureau of Labour and Social Affairs told the research team that except 2 companies (comprising 3322 workers or 13.77 % of employees in the industrial park) in the park and currently all companies have their own trade unions.[49]

There are various factors that hindered the rest of the workers from joining unions: first, 19.3% of the workers responded that they have failed to join trade unions because of lack of understanding on the concept of unionization. This reason was also affirmed by the interview of the representatives of the workers', representatives of employers', CETU and Bureau of Labour and Social Affairs.

Second, representatives of trade unions also provided that companies were not happy with the establishment of associations in their work place. However, this narrative is supported by only 7% of the respondents, among this figure 5% of them said there is no freedom of forming a union within Hawassa Industrial Park and 2% of them said employers are not willing for the formation of the union.

Third, 4% of the respondents provided that the pre-existing workers' unions are not fruitful in bearing their responsibilities and this are perceived as a discouraging factor for unionization. However, representatives of trade unions and the informant

[47]Trade union density in the UK 1995-2021 – Stastics available at https://www.statista.comAccessed on 12 Sep. 2022

[48] US Bureau of Labour Statistics, Economic News Release, Union Members Summary, available at https://www.bls.gov/news.release/union2.nr0.htmaccessed on 13 September 2022

[49] Interview with Legesse Legib, Sidama Regional State's Labour, Skill and Enterprises Development Bureau (Employer and Employee Division) 25 Aug. 2022.

from Sidama Bureau of Labor and Social Affairs argues that the trade unions are highly effective in the protection of workers' right and creating forum for dialogue among workers. [50]

As discussed above, the worker's awareness about unionization is manifested in their response and the table below reveals that 61.4% of the workers have responded that they have either medium or low awareness about unionization.

Awareness of workers with regard to unionization	Frequency	%
Very High	72	18.3
High	80	20.3
Medium	160	40.6
Low	68	17.3
Very Low	14	3.5
Total	394	100.0

Table 1: awareness of workers with regard to unionization in Hawassa Industrial Park

5.1.1. The Status of Trade Unions in Hawassa Industrial Park

In the vicinity of the Hawassa Industrial Park there are two regional offices which are mandated to assist and follow up the unionization process. These are the Southern Nations, Nationalities and Peoples Regional State Bureau of Social and Labour Affairs (SNNPR BOLSA) and the Sidama National Regional State Bureau of Social and Labour Affairs (SNRS BOLSA). At the initial stage in the history of Hawassa Industrial Park this task was assigned for SNNPR BOLSA. Later, the mandate is transferred to the newly emerged Sidama National Regional State (SNRS BOLSA). Thus, the information gathered from these two government offices differ in phases. Facts from the initial phase were gathered from the SNNPR BOLSA and later facts were gathered from SNRS BOLSA.

[50] Ibid

An informant from SNNPR BOLSA said that, at the beginning, Industrial Park Development Corporation (IPDC) and Ethiopian Investment Commission (EIC) were highly resistant against the establishment of trade unions in the Park. On the other hand, the workers were requesting SNNPR BOLSA to form trade unions.[51] They were confident that the unions will help them to ensure their right and to bargain for the increment of wage. EIC's concern was the unionization procedure, its outcome and the stand of the workers that may affect the Foreign Direct Investment (FDI). Up until the Government SNNPR hand over the jurisdiction to the newly formed Sidama Regional State, there were no trade unions in the Hawassa Industrial Park.[52] Currently, the unionization procedures and follow up is led by the Sidama Regional State's Labour, Skill and Enterprises Development Bureau. The companies had previously formed labour council which was set to safeguard the interest of the employer and requested stakeholders from regional offices to effect the registration of such labour councils. However, an informant from BOLSA confirmed that the office refused the registration request citing absence of legal ground to do so.[53]

An informant from SNRS BOLSA explained that so far the office registered 21 trade unions from Hawassa Industrial Park. However, it is also noted that employers did not have an interest to establish trade unions in their company. Some workers were not also willing to participate as executive committee members, for fear of revenge from the side of employer lack of positive outlook and limitation of capacity. Some of the leaders may also resign from the leadership position in the union to receive an offer from the companies for wage increment and better position. In recent year the IPDC and EIC have shown willingness towards the establishment of the unions in

[51]Interview with Hasen Abidurahman, South Nation Nationalities and Peoples Regional State, Bureau of Labour and Social Affairs, Peaceful Industrial Relations Directorate, Expert, Hawassa 24 Aug. 2022.

[52]Ibid

[53]Ibid

the park, this statement is also supported by the Coordinator of CETU-Hawassa Branch.[54]

5.1.2. The Role of Labour Organizations in Unionization Process

Informants from CETU and other stakeholders mentioned that there are challenges and obstacles from the state, employers, politicians, management members, trade union leaders and workers. They explained that the unionization process in Hawassa Industrial Park was a very onerous task. During the formation stage challenges from the politicians, state, management, employers and even from the workers were unbridgeable. Politicization of the process was the most challenging thing during the formation of trade unions. For this reason, it took about 2 years to organize unions. At the commencement years of the industrial park, the idea of forming trade unions in the park was neglected by many of the stakeholders for the interest of attracting better FDI. In addition, workers perceive CETU as part of the government structure. Thus, frequent meetings, and discussions with different stakeholders and trainings were mandated to create awareness. After extensive pressure and campaigning, stakeholders assisted CETU to start the unionization process. The resistance from the employers, workers, middle level managers and frustration of labour union leaders were factors that slowed the motion in this regard. Furthermore, some labour union leaders favour the employers rather than workers. CETU also lacked the time to organize each individual labour union and select leaders. For instance, one informant mentioned that "to select the representatives, employers gave them only ten minutes".

In general, the overall environment of IPDC was not good for the unionization process. Because of the challenges, CETU was forced to facilitate the formation of trade unions outside the premises of the industrial park. Especially Chinese companies were against unionization. Others follow Chinese companies' footsteps.[55]

[54]Interview with Legesse Legib,Sidama Regional State's Labour, Skill and Enterprises Development Bureau (Employer and Employee Division), 25 Aug. 2022.
[55]Interview with Chanyalew Aweke, CETU Hawassa branch office, 26 Aug. 2022.

To solve these unionization challenges, CETU has also organized different training modalities which involved the trade union leaders. Trainings on Ethiopian labour law and leadership skill were the areas frequently addressed in these trainings. Leaders were encircled with different problems some were partisan, others were labour aristocrats, and some others were incapable.[56]On the other hand, the data collected from the workers via questionnaire is not in line with these assertions of CETU. Rather, absolute majority of the respondents i.e. around 82% of them responded that either the stakeholders including national and international labour organizations are not active in the unionization process or the informants are not aware of the efforts of the organizations. Even those respondents who know about these bodies, the significant majorities 38.7% are not informed about which organization/ stakeholder has better contribution for the unionization process. Relative majorities who are informed about the existence of the participation of these organizations noted that, CETU has better contribution when compared to other stakeholders. In general, the data implied that the role of labour organizations in the unionization process still exists at an infant stage requiring strong actions.

Participation of Labour Organizations in Unionization Process	Frequency	%
Yes	72	18.3
No	195	49.5
I have no idea	127	32.2
Total	394	100.0

Table 4: The Role of Labour Organizations in Unionization Process in Hawassa Industrial Park

5.2.Major Challenges of the Trade Unions

The research informants from trade unions' side, enlisted different obstacles in the process of unionization and even after the formation of the union. The informants mentioned that leaders of the unions are not allowed to perform their duties genuinely. They are not encouraged to perform their duties with the objective of

[56]Ibid

protecting the rights of the employees but rather they are there for the purpose of playing symbolic role. The so called "labour council/workers' council" is established and recognized by the employers as a representative of workers. However, none of the leaders are freely elected by workers and do not have a legal recognition. Additionally, because of the pressure from the employers, union leaders seem timid in terms of aggressively working for the interests of the union and the employees. On the contrary, partisan and subservient leaders towards employers are promoted and favoured to represent the workers. Effective leaders are discouraged and ignored and their movement is controlled, requiring the approval of employers. The other challenge of trade unions is related to office access and healthy environment to run meetings, discussions and to coordinate workers which is systematically denied.[57]

Therefore, the relationship between committed trade union leaders and companies in the Industrial Parks is not positive. Systematically, leaders are excluded from benefit packages and subjected to different work related abuses. They are usually excluded from salary increment, better position, and allowances. Though one of the informants from the trade union leaders affirmed that employers facilitate trainings for trade union leaders, the other informant disagreed with this statements. The employers prefer those union leaders who are assailant for the benefit of the employers rather than for workers.[58]There are even real cases entertained through court as a result of employers' work place violence against trade union leaders. Gradually, those leaders who represented the voice of the workers are side lined and those pseudo leaders are encouraged to work against the interest of workers. Employers lobby false leaders through increment and position. On the other hand minor mistakes are duly considered against the interests of genuine leaders. In some companies, new leaders are forcedly recruited. Some workers enrolled in the leadership position without understanding the contributions of the trade unions. Some are not intentionally

[57] Interview with KI 1, Trade Union Leader, 23 Aug. 2022.
[58]Interview with KI 1, Trade Union Leader at Hawassa Industrial Park, 25 Aug. 2022.

interested in the roles of the trade unions and work against the objectives. Some workers are forced by the employers not to give the 1% contribution.[59]

Companies generally consider trade unions as a threat for their business objective. Though, the roles of trade unions are two fold through safeguarding workers right and the long term goals of the company. These pillar objectives are not well understood from the side of the company and from some workers themselves. Under the current status of trade unions, maintaining the bargaining power and creating peaceful work environment within the work place is a far-fetched concept. Dealing with hostile company managers who violate workers' rights is the nasty task in the works of trade unions. Companies perceive trade unions as a threat and they don't like to solve problems through bargaining. They rather choose to side-line and ignore the union leaders and conspiring with those who represent the interest of the company rather than the workers.

One of the Key Informants stated the following challenges regarding unionization: absence from work place, high attrition, and language barriers. He added that the overall relationship between companies and trade unions is very poor. Companies are not interested and happy about the existence of strong unions since they do not understand the ultimate objective of trade unions. Likewise, the trade unions are poor to advocate and realize their objective.[60]

5.3.1 Problems Related to Understanding the Role of Trade Unions

Representatives of trade union argue that they are striving to protect the right of the workers through negotiating and mediating some issues with employers. However, only 19.8% of respondents believe that their rights are better served through the unions.

The data indicated that strike was taken as a means to protect workers' rights provided under Article 158 of the Labour Proclamation. 19.8% of the respondents

[59]Ibid
[60]KI 3, (Soft Skill Trainer of a company Operating in Hawassa Industrial Park), 26 Aug 2022.

responded that there was a strike to foster the right for unionization in the Park. Although this figure is not confirmed by trade union leaders, before the establishment of the trade unions in the park, strikes were prevalent occurrences to achieve demands. Trade union leaders explained that such actions have significantly decreased in recent periods. As evidenced under various writings, trade unions may play a role in the protection of worker's right before resorting to industrial actions [61] because unionization will increase the workers' collective bargaining power. In line with this assertion, 85.1% of the respondents were confident that the unions will increase their collective bargaining power (see chart 1 below).

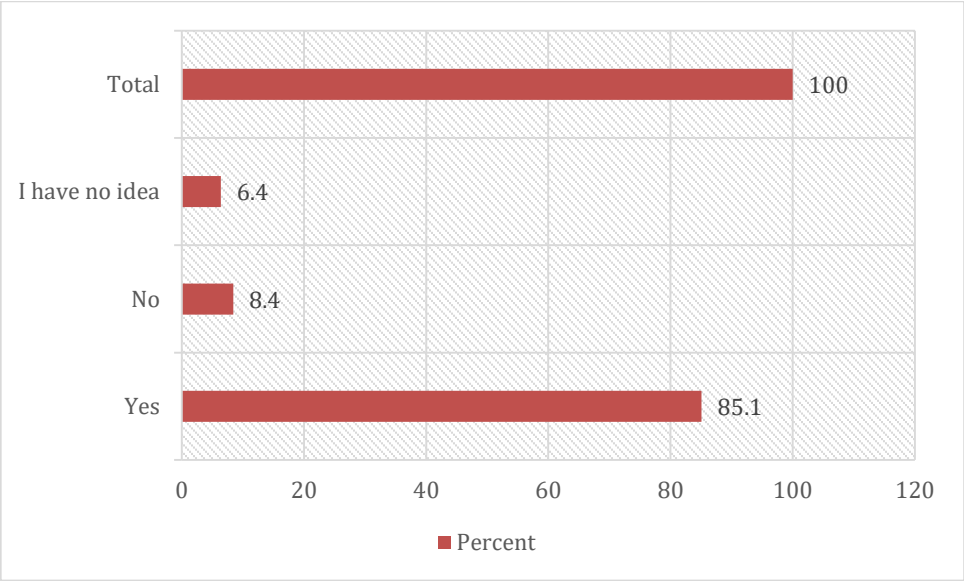

Chart 1: The role of Trade Unions to increase collective bargaining power of workers

[61]Nkechi S. Owoo et. al. The role of unions in improving working conditions in Ghana, Partnership for Economic Policy, Policy Brief, No. 161, January 2017, Available at https://portal.pep-net.org/document/download/30135 accessed on 13 Sep. 2022

In addition to increasing their bargaining power 78.7% of the respondents also believe that unionization assists them to realize better working conditions and wages for workers (see table 2 below).

The role of Unionization to realize better working conditions and wages for workers	Frequency	%
Yes	310	78.7
No	59	14.9
I have no idea	25	6.4
Total	394	100.0

Table 2: The role of Unionization to realize better working conditions and wages for workers

5.1.2 Problems Related to the Responsiveness of Labour Unions for Members in Hawassa Industrial Park

Regarding role of trade unions, there are divided opinions among workers. Some understand their objective and work together to realize their goals, while others are not ready to work with trade unions and some others are against them. The workers have seen some strong trade union leaders being fired from their work and this action further affirms the opinions of those workers against trade unions as unions are not competent enough to protect their own leaders. The awareness and capacity of workers and trade union leaders is a challenge, and their bargaining skill is very week. Employers end up creating symbolic trade unions as a result; they sidestep trade unions and approach EIC seeking advice. Thus, the unionization process in Hawassa Industrial Park exists at an infant stage as per the informant from the interview.[62]A relative majority of the informants from the questionnaire assert that trade unions are responsive for their members. However, in line with the argument from the representatives in the EIC, significant portion of the members believe that their trade unions are not responsive for the members, or they are ignorant regarding the unions day to day activity. From this observation it is possible to conclude that labour unions are required to function for the ultimate objectives of their formation, and they have to be alerted for the interests of the members.

[62]Yoftahe Tekalign, EIC Call Center, Established as a means of grievance handling mechanism and information exchange with workers.

Responsiveness of Labour Unions for Members	Frequency	%
Yes	242	61.4
No	76	19.3
I have no idea	76	19.3
Total	394	100.0

Table 3: Responsiveness of Labour Unions for Members in Hawassa Industrial Park

5.3.The Change with Regards to the Right to Unionize in the Past Year

This question was framed to solicit data with regards to worker's right status in the preceding year following different policy measures taken against the sector. Similarly, the questionnaire was framed with the aim of addressing factors which affect the unionization process or those events which affect the workers right to unionization. In this regard, informants were not in a position to understand the changes or they were indifferent from the previous year. Thus, only 20% of the respondents were cognisant of the changes in last year with regard to the right in the unionization process.

The Change with Regards to the Right to Unionize in the Past Year	Frequency	%
Yes	39	9.9
No	242	61.4
I have no idea	113	28.7
Total	394	100.0

Table 6: The Change with Regards to the Right to Unionize in the Past Year in Hawassa Industrial Park

5.4.The Effect of Suspension from Africa Growth and Opportunity Act (AGOA) on the Activities of Trade Unions in Hawassa Industrial Park

It is understandable that after the Covid-19 pandemic, the threat against trade unions and workers' rights in general is related with Africa Growth and Opportunity Act (AGOA) suspension following the war in the northern part of Ethiopia and extended hostility among the warring parties and the action taken by the American government. The informants repeatedly explained that employers associate every problem and questions of right with AGOA suspension and are not ready to listen to the workers voice. Union Leaders were suspended from benefit packages on the pretext of AGOA. Workers were systematically reduced by forcing them to submit resignation letter. There were also illicit activities to reduce workers. Employers follow anti-worker rights policy and deny the allowance of workers mentioning the AGOA suspension as a justification for the denial. Even the office arranged for trade unions before AGOA was denied after that. [63]

The role of AGOA suspension is very harmful against workers right and unionization as the researchers learnt it from the interview. It is the best defence for employers to deny the rights of workers and to only preserve their interests. They cite AGOA as a reason for their failure to fulfil the rights of workers.[64]Thus, AGOA is another challenge for unionization. Companies took it as the best defence scenario to defend their interests. The informants mentioned that the Covid- Pandemic, AGOA and other factors forced the government to change the attitude towards workers in protecting their right in better way opposite to its back track.[65]

Consistent with the information given by the informants, the respondents through questionnaire supplement the above narratives. 45% of them agreed with the effect of AGOA suspension on their unionization process. 25.7% of the respondents have

[63] Interview with KI 4, Trade Union Leader, 26 Aug. 2022.
[64] Interview with Sisay Getachew Ethiopian Investment Commission Hawassa Industrial Park Brach, Peaceful Industrial Relations Officer, 24 Aug. 2022.
[65] Interview with Chanyalew, supra note 55.

no idea in this regard. Only 29% of the respondents responded that AGOA has no effect on their right. Thus, it is possible to conclude that suspension from AGOA was one of the factors which strongly affected the workers right in general and unionization process in particular.

The Effect of Suspension from AGOA on the Activities of Trade Union in Hawass Industrial Park	Frequency	%
Yes	178	45.0
No	115	29.2
I have no idea	101	25.7
Total	394	100.0

Table 7: The Effect of Suspension from AGOA on the Activities of Trade Union in Hawassa Industrial Park

6. Conclusion and Recommendation

6.1. Conclusion

Hawassa Industrial park as a first and flagship park in Ethiopia has 20 factories and 24,108 employees engaged in manufacturing activities. In the park, the majority of the employees are part of trade unions (75%) although this research revealed the existence of different challenges with regard to unionization in Hawassa Industrial Park. In the initial stage of the park, all the stakeholders, including the EIC, the IPDC and the park management and factories had a very negative perspective towards the establishment and the operation of trade unions. As time goes on, this attitude has changed and currently one of the main challenges in the unionization process and operation at HIP is employers' failure to understand the positive role of trade unions; the awareness of workers and labour union leaders regarding unionization and its contributions.

The employees, despite their membership in one of the unions, are not fully convinced that the unions are established with the objective of protecting their rights at work place. Because of this lopsided understanding, they are not committed to the membership and that in return has negatively affected the acceptance and effectiveness of the unions in the eyes of the employees. More importantly it

negatively affected their dealings with the management staff. This problem might emanates from several contributing factors, but the roles of the unions leaders needs to be mentioned. This is because the fundamental duty of the leaders must be to make sure that every employee is aware of the benefits of trade unions in terms of addressing their grievances through their official and collective dealing with the employers. Trade union leaders, however, have been reported to have low courage and their poor engagement with the cases. They do not like to be stretched to the end. Fear of revenge and interest are the problems witnessed from the side of trade union leaders.[66]As such, there is still a big gap in relation to the capacity of the leaders of trade unions when it comes to performing their leadership activities to the best of what is expected of them.

On the part of the companies, there is still skewed understanding of the role of the trade unions. Consequently, companies they are not ready to capitalize the capacity of trade union in raising the awareness of the workers about the rights and obligations that are expected of them in their daily performances. They are not ready to recognize the trade union leaders and cooperative with them. They make sure that the leaders are kept unnecessarily busy loaded with extra assignments so that they cannot entertain claims. They even try to lobby the trade union leaders to work in favour of them. They systematically devise different measures such as halting the activities of trade unions, firing the leaders, and disallowing their incentives are the to discourage the leaders.[67]Besides, these companies have undermined the roles that the unions could otherwise play in establishing and protecting the industrial peace and the amount of productivity that can ensue from these peaceful operations by over emphasizing on the negative side of trade union.

When it comes to the establishment of the industrial peace and a consequent raise in productivity of the companies, there should be no doubt that everyone benefits., The

[66]Ibid.
[67]Ibid.

establishment and operation of effective trade unions should be the priority of the stakeholders if the country has to benefit from the industrial parks. In this regard there were indicators that trainings were delivered for trade union leaders and workers by different stakeholders especially by CETU and EIC though the effort was not sufficient.[68]

The suspension of AGOA has also dealt a serious blow to the right of the employees in the Hawassa Industrial Park and probably throughout the country. It is undeniable that the companies lost their lucrative financial benefits following the suspension of AGOA. Thus, as a nation the country needs to find ways to recompense for the lost advantages. However, it is an alarming revelation that the companies took this unfortunate incident as a blanket cover to wipe out all the benefits that used to accrue to the employees and more importantly the systematic blockade of union related activities. In general, the employers are creating a hostile environment against trade union activities citing the suspension from AGOA benefits. Despite this reality, there is no logical justification to undermine the works of the unions under the pretext of the suspension from the AGOA benefits.

As mentioned herein above, one of the findings of this study is the overwhelming majority of the employees are part of trade unions. The participation of the majority of the employees in the unions does not, however, answer the demand for unionization since there are several bottlenecks that thwart the operation of the unions as it has been justified in the preceding parts. So, the following points can be raised in the form of a recommendation for further improvement.

- It is seen that all the employees are not aware of the benefits of unionization on equal level. So, the awareness of the employees about the benefits of joining the unions beyond the mere membership in terms of improving the

[68]An informant from EIC

working conditions and as such their commitment and participation should be bolstered.

- Some of the suspicion about the effectiveness of the unions emanates from the weak performance of the unions and their leaders. Therefore, the leaders should update themselves with the roles they can play in promoting and protecting the rights of the employees and at the same time in serving as a bridge between the employees and the employers
- The stakeholders, as it has been reported above, are providing some training that can serve as starting point for unionization. However, their intervention needs to be strategic in such a way that they can fill the gaps in the understandings of all the parties in this engagement.
- The companies are the partners in the unionization process and because of that reason they should cease on their policy of antagonizing the unions and their leaders with the view of establishing a smooth and conducive working conditions.
- Finally, the negative impact of AGOA on the unionization process need to reckoned with both by the employers and the government. The companies cannot take the suspension of AGOA as an excuse to block the exercise of right. The government should also play its constructive part in helping the companies solicit an alternative for the lost benefits.

THE EXISTING CONFUSION AND NEW DEVELOPMENTS OF ARBITRABILITY OF ADMINISTRATIVE CONTRACTS IN THE ETHIOPIAN LEGAL SYSTEM

Yosef Workelule Tewabe[♣]

Abstract

This article claims the existence of inconsistencies under the old Ethiopian laws regulating the arbitrability of administrative contracts and the confusion among legal scholars and practitioners because of the inconsistent stipulations of the old legislation. It also shows the reader the improvements made by the New Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 to resolve those inconsistencies and confusions. Further, the article indicates how far the new arbitration proclamation goes to find solutions to the existing confusion and to influence the current practice of adjudicative bodies in Ethiopia. By using a descriptive qualitative data analysis method, the study has revealed the existence of major improvements in resolving the existing confusion on the arbitrability of administrative contracts under the new proclamation, which prohibits arbitrability of administrative, contracts unless specifically allowed by law, and repealed all pre-existing legislation that confused the subject matter and made it difficult for implementation. Finally, the study has also given special focus to the discretion given to the legislators to allow arbitrability of administrative contracts through special legislation and it is recommended that this discretion should be used only with a sufficient justification, such as where the public interest and investment flow-related reasons require doing so.

Keywords: Arbitration, Arbitrability, Administrative Contracts, Ethiopia

[♣] LL.B. (University of Gondar), LL.M. in Business and Corporate Law (Bahir Dar University), Lecturer in Law, University of Gondar, Law School, Attorney, and Legal Consultant He can be reached at yosyworkelule@gmail.com or workeluleyosef@yahoo.com for any inquiries.

1. Introduction

Arbitration is one of the out of court dispute settlement mechanisms existing in today's global business environment. The business community's interest in an arbitration proceeding has increased over time. Parties to a given contractual transaction may refer their case to an arbitration dispute settlement institution either based on their contractual arbitration clause or arbitral submission. When a party to a contract wants to utilize an arbitral process for their dispute settlement proceedings, one of the major issues that come to mind is the arbitrability question. Arbitrability is the arbitrator's jurisdiction to adjudicate a given case.

In an administrative contract, to which at least one contract party is a public body, arbitrability is one of the contending issues in the legal jurisprudence due to the state's involvement in the contract and therefore the representation of public interests. In Ethiopian jurisprudence, administrative contract arbitrability continues to be an unsettled issue between legal scholars and judicial practitioners. There has been confusion in the interpretation of rules incorporated in the civil code and the civil procedure code.

The civil code has mentioned nothing about arbitrability, while the civil procedure code explicitly categorises administrative contracts as non-arbitrable subject matter with a rule that restricts the civil procedure code rules from affecting the rules of the civil code, which has mentioned nothing about non-arbitrability. By taking this as a basis of argument, scholars in the area of Ethiopian arbitration law and Ethiopian courts have regularly argued about the non-arbitrability of administrative contracts. This was a big question for both the academics and the practitioners.

Now Ethiopia has a new comprehensive arbitration and conciliation, working procedure proclamation intended to resolve the defects of existing legal arrangements in the area. This article addresses the concept of administrative contracts, the confusion created by Ethiopian law regarding the arbitrability of

administrative contracts, and the improvements achieved by the promulgation of the new Arbitration and Conciliation, Working Procedure Proclamation.

2. Administrative Contracts and Contracts in General in the Ethiopia Legal System

2.1.Contracts in General

The term 'contract' refers to an agreement between two or more persons that creates legal obligations to give, to do, or to refrain from doing something.[1] Furthermore, for contracts to have legal effect, all validity requirements for the formation of the contract should be fulfilled. The most common validity requirements for the formation of a valid contract are consent, capacity, objects, and form.[2] The law, which governs contracts, can be broadly classified as general contract law and special contract law.[3] The general contract law provisions are equally applicable to all types of contracts, while special contract laws apply only to a specific type of contract for which purpose the legislation is designed.[4] In the Ethiopian contract law regime, under the civil code of Ethiopia, about five special types of contract have been recognized. These include agency contracts, sales contracts, contracts for custody, contracts relating to immovable and administrative contracts. Except for administrative contracts, all are forms of civil contracts.

[1]Civil Code of the Empire of Ethiopia Proclamation, 1960, *NegaritGazeta Gazette Extraordinary*, Proclamation No. 165/1960, 19th Year No.2, Art 1675.
[2]Ibid Art 1678-1730.
[3]Ibid Art 1676.
[4]In Ethiopian law, the general contract provisions from Art 1675 - Art 2026 have equal applicability for all forms of contracts unless special contract provisions govern the issue differently. When there is a discrepancy between the two, Ethiopian law gives preference to special contract law provisions. The general contract law also applies in non-contractual matters when the relevant law does not provide a solution.

2.2.Administrative Contracts

In modern state theory, a state and its administration now play a wider role in the provision of public service than was the case in the past.[5] The provision of public service and fulfillment of public needs have become the major functions of the government, especially in developing economies like Ethiopia.[6] The role of the state in the provision of public goods and services and its relations with individuals has increased over time.[7] Most of the state's relations with companies are affected by contracts.[8] In such contracts, the freedom of contract of the administrative bodies might be affected by certain conditions or restrictions specifically provided by law.[9]

These contracts concluded by the state for its affairs with private or public enterprises can be referred to as '*public contracts'*.[10] In different jurisdictions, public contracts may have their peculiar characteristics and system of regulation.[11] In some countries, all public contracts are set in the same category and are subject to similar treatment where as in other countries, public contracts may be classified into two different categories. The first category is the category of public contracts that have similar treatment to private contracts, i.e. contracts between any two private (non-public) parties, and they are not subject to special rules and procedures. The second category constitutes public contracts (*administrative contracts*) that receive different treatment than private contracts and are subject to special rules and procedures.[12]

[5]Khalifah Alhamidah, '*Administrative Contracts And Arbitration, In Light Of The Kuwaiti Law Of Judicial Arbitration No. 11 Of 1995*', *Arab Law Quarterly*, Vol. 21, No. 1 (2007), 35-36.
[6]Ibid (Emphasis Added By The Writer)
[7]Dr. FarouqSaber Al-Shibli, '*The Disputes Of Administrative Contracts: The Possibility Of Using Arbitration According To The Jordanian Arbitration Act 2001'*, *Journal Of Legal, Ethical And Regulatory Issues*, Philadelphia University, Volume 21, No. 2, (2018) 1-17.
[8]Ibid
[9]Sabin I. SUBEV, '*Arbitration Clause In A Contract For Public Procurement, International Conference Knowledge-Based Organization'*, "VasilLevski" National Military University, Veliko Tarnovo, Bulgaria Vol. XXI No 2, (2015), 517-519
[10]Id
[11] Khalifah Alhamidah (n5), 36-38
[12]In the US public contracts are defined concerning public funds as "any contract in which there are public funds provided through private persons may perform the contract and the subject of the contract

The distinction between these two forms of contract emerged within the French legal system in its administrative law '*the Conseil d'Etat*'.[13] Unlike private contracts, administrative contracts laws treat parties to the contract unequally.

In Ethiopian law, the Ethiopian Civil Code of 1960 introduced the concept of administrative contract. Before the enactment of its civil code, Ethiopia had no clear law on public contracts.[14] Rene David, the main drafter of the Ethiopian Civil Code, has transplanted the concept from the French legal system. Ethiopian legal scholar Mulugeta M. Ayalew in his book on Ethiopian contract law described this scenario in the following manner:

> *"The French distinction between administrative contracts and civil contracts is imported into the Ethiopian legal system by the Civil Code. In France, administrative contracts are governed by administrative law and civil contracts are subject to the provisions of the French Civil Code. In Ethiopia, civil and administrative contracts are governed by the Civil Code and are adjudicated by the regular courts. However, administrative contracts are one of those specific contracts having special provisions for regulation provided*

may ultimately benefit private person". In England, even though there is no private–public contract law distinction, there is a position held by the state that, the administration can't be involved in contracts restricted to its discretionary power. Whereas, in civil law countries two categories of contracts in which the state administration involves itself exist. The first consists of those contracts which provide for the purchase of goods and services for public purposes. The second consists of those which are used to govern the relationships between public services and individuals. While contracts in the first category are governed by private laws such as; civil or commercial laws the second category contract will have special Rules and Procedures. This distinction as mentioned before backs from the French legal system administrative law. In the French legal system the distinction between these two contracts does not end within a statutory stipulation it also extends to differences in the courts of adjudication. The French legal system established ordinary courts for private matters or criminal trials, and administrative court cases involved public administration. They also have differed in legal instruments incorporated. Administrative contracts law has been constituted in the French administrative law, not in the privacy laws pack.

[13]Yosri Alassar, *'The Arbitration In Administrative Contracts In Egypt, France, And Kuwait', Journal Of The Union Of Arab UniVersities* Vol.13, No.14, (2001), 3-88.

[14]The Civil Code, (n1), Art. 3131–3306

> *in the Civil Code. Accordingly, Articles 3131–3306 provide rules applicable to administrative contracts. In drafting the part of the Civil Code on administrative contracts, Rene David relied on French administrative law, and hence there is not much difference between Ethiopian law and French law as far as the substance of the law governing administrative contracts is concerned."*[15]

Articles 3131 - 3306 of the Ethiopian Civil Code are not the only law governing the administrative contract. Other sources are the statutes establishing administrative agencies, the new procurement proclamations, the civil procedure code, and other relevant laws, which should be assessed before deciding on a particular administrative contract issue. The civil code of Ethiopia clearly defines the administrative contract in Article 3132.[16] In this definition, Ethiopian administrative contract law, like French law, specifically determines the scope of administrative contracts and creates a boundary between public or government contracts considered private contracts and administrative contracts that are treated differently, so, where this paper refers to administrative contracts, they should be understood within their meaning provided under Article 3132 of the Civil Code.

There are different type of contracts. A contract shall be deemed an administrative contract where:

(a) It is expressly qualified as such by the law or by the parties, or

(b) It is connected with an activity of the public services and implies permanent participation of the party contracting with the administrative authorities in the execution of such service, or

[15]Ayalew, Mulugeta M. '*Ethiopia'. In International Encyclopaedia of Laws: 'Contracts', Edited By J. Herbots.*
Alphen Aan Den Rijn, NL: Kluwer Law International, 2010.
[16]The Civil Code, (n1), Art. 3132.

(c) It contains one or more provisions, which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals. Furthermore, a contract whereby a contractor binds himself in favor of an administrative authority to construct a public work in consideration of a price is also an administrative contract.

Ethiopian administrative contract law recognizes only three forms of remedies for the other party: revision of the contract, termination of the contract, and compensation remedies. Unlike the remedies under the Contract and the Civil Code, these remedies have strict conditions to be met in the interest of the Contractor.

(a) A revision of the contract should be justified by the general public interest.

(b) Termination: The party who has contracted with the administrative authorities may require the termination of the contract where intervention by the administrative authorities has its effect to upset the general economy of the contract.

(c) Compensation claims for obstruction of the contract due to the administrative authorities' intervention or an unforeseeable event can be provided, but they should be limited to the actual loss incurred.

The administrative authority, on the other hand, can unilaterally terminate the contract if it can be justified by the general public interest. The non-performance of the obligation by an administrative authority entitles the other party neither to fail to perform his obligations under the contract unless such non-performance makes performance impossible nor to invoke non-performance to suspend the performance of a contract.

3. The Concept of Arbitrability and Administrative Contracts

3.1. Arbitrability

The core of this article is jurisdiction in case of a dispute between parties to an administrative contract. The conclusion of contracts is not an end in itself as contractual relationships are about parties' efforts to perform agreements, under the contract drafted to that end.[17] When the parties to the contract fail to meet their obligations, a dispute may arise between them. In due course, they may need an independent organ to entertain their case and award a final decision. In ordinary cases, ordinary public courts are the primary institutions to adjudicate disputes and give binding decisions.[18] Due to court procedures, the associated costs, and the time it takes to entertain cases, ordinary courts are not the primary choice for adjudicating disputes in today's business world.[19]

An important consideration can be that parties may agree to keep arbitral proceedings confidential, while dispute resolution before an ordinary court is public. Under Ethiopian law, contracting parties have the right to determine an institution that entertains their case, unless limited by special reasons, i.e., public interests or policy.[20] Thus, parties may agree to refer their dispute to arbitrators instead of ordinary courts. Particularly, parties to an administrative contract may stipulate in the contract that disputes are to be submitted to a specified arbitration institution but may also jointly decide at the time of the dispute to refer their case for Ad hoc resolution by institutional arbitrators.[21]

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[17]Michael F. Hoellering, '*Arbitrability Of Disputes'*, *The Business Lawyer*, American Bar Association, Vol. 41, No. 1, (1985), 125-144.

[18]Aron Degol, notes on arbitrability under Ethiopian law, *MIZAN LAW REVIEW*, Vol. 5 No.1, (2011), 150.

[19]Asam Saud Alsaiat, '*Disputes In Administrative Contracts And The Possibility Of Utilizing; Arbitration To Solve Them'*, Public Policy And Administration Research, Vol.5, No.6, (2015), 45-48

[20]Ibid

[21]Ibid

If well managed, arbitration can save time and money as well as provide a range of additional benefits. Arbitration is the best-known alternative to court litigation. The WIPO arbitration center guideline has defined arbitration as "a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute."[22] In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. The principal characteristics of arbitration include its consensual nature; the parties' freedom to choose arbitrator(s), the forum, seat, and venue of arbitration; its neutrality and potential to avoid home court advantages; the confidentiality of the whole procedure; the finality of the award given by arbitrators; and ease of enforcement with the support of the New York Convention, to which more than 165 countries are parties.

The question of arbitrability, i.e. whether or not a dispute can be brought before arbitrators, will come into mind in different circumstances including during contract negotiations, when the arbitrators assess their jurisdiction, upon execution of an arbitral award before an ordinary court, and in appeal. There are substantive and procedural conditions that must be fulfilled for disputes to be arbitrable, i.e. to allow parties to refer a case to arbitration[23]. These substantive and procedural requirements may differ from jurisdiction to jurisdiction. Arbitrability can be broadly categorized into streams: substantive/objective arbitrability and procedural/subjective arbitrability.[24] Substantive arbitrability depends on the question of whether the arbitrator has the authority to decide on the underlying substantive issue.

Substantive arbitrability is based on general criteria such as public interests and other policy considerations. This may mean that a dispute regarding a topic of public interest may not be resolved in arbitration but can only be brought before a public

[22] WIPO ADR, Guide to WIPO Arbitration, 8.

[23]A. Redfern, And M. Hunter, '*Law And Practice Of International Commercial Arbitration*, London, (1986)

and David, Rene, '*Arbitration In International Trade*', Kulwer Law And Taxation Publishers, Netherlands, (1985).

[24] Michael F. Hoellering, (n17), and Aron Degol, 2011, (n18)

court. Procedural arbitrability however focuses on the procedural aspect of exercising arbitration agreements. Procedural non-arbitrability may arise from a waiver of arbitration rights, time limits and laches, termination or expiration of contracts, or/and other similar factors.[25]

Ethiopian law also distinguishes between arbitrable and non-arbitrable subject matters. As Aron Degol mentioned in his article, civil matters such as family, succession, property, and extra-contractual disputes, labor disputes, maritime and commercial disputes, and criminal matters punishable upon complaints are arbitrable subject matters in Ethiopian jurisprudence.[26] He further stated that matters which are not clearly stated in the law as arbitrable subject matters should be categorized as non-arbitrable subject matters.[27] Aron also classifies administrative contracts as arbitrable subject matters according to Ethiopian jurisprudence, but in practice, the arbitrability of administrative contracts under Ethiopian law was a contending issue amongst legal scholars before the enactment of the new conciliation and arbitration procedure proclamation.

3.2. Arbitrability of Administrative Contracts

Arbitrability of administrative contracts is one of the hot issues in international and national arbitration law jurisprudence. Different writers in the area discussed the issue from different perspectives.[28] Two opposing ideas must be considered; the first idea supports the arbitrability of administrative contracts and tries to define the benefits of arbitration. The second idea supports the non-arbitrability of administrative contracts and tries to identify the risk of subjecting administrative contracts to arbitration.[29] Besides these two divergent theoretical positions, countries

[25]Id
[26]Aron Degol, (n18), 51-157
[27]Ibid
[28]Kahlifah Alhamidah (n5), 11
[29]Asam Saud Alsaiat, 'Discussion About Advantage And Disadvantages Of Arbitration' (2015), 46-47

also have to oppose, partly political aims in rendering administrative contracts arbitrable or non-arbitrable.[30]

4. Past Experiences on Arbitrability of Administrative Contracts in the Ethiopian Legal System

In Ethiopian jurisprudence, the question of the arbitrability of administrative contracts is an unsettled issue among scholars and judicial practices. The existence of contending views in the area between legal scholars and courts stems from the incompatibility of the legal provisions designed to deal with the issue.[31] In Ethiopian law, the civil code, the civil procedure code, and procurement proclamation No. 430/2005 are the appropriate legal documents to investigate the legality or otherwise of arbitration in administrative contracts. These legal documents contain confusing stipulations on the arbitrability of administrative contracts.

Art 315(2) of the civil procedure code proposes, "*No arbitration may take place in relation to administrative contracts as defined in article 3132 of the civil code or in other cases where it is prohibited by law*." In the same provision, under sub-article 4 the civil procedure code contains a confusing stipulation as it reads *"Nothing in this chapter*[32] *shall affect the provisions of Articles 3325 – 3346 of the Civil Code*". Meanwhile, the civil code provisions[33] referenced by sub-article 4 are silent about the arbitrability or otherwise of administrative contracts. The procurement proclamation also says nothing about the arbitrability question.[34]

This silence of the civil code provisions from Art 3325-3346 divides scholars and judicial practitioners on the arbitrability of administrative contracts in the Ethiopian

[30]Yorsi Alassar, (n13).
[31]Civil Procedure Code Decree, NegaritGzeta, Decree No. 52/1965, 25th Year, No. 3, Art 315(2) And (4) and The Civil Code, (n1), Art. 3325-3346.
[32](Including The Art 315(2) Stipulation)
[33]The Civil Code, (n1), Art 3325 – 3346
[34]Determining Procedures of Public Procurement and Establishing Its Supervisory Agency Proclamation, 2005, Federal NegaritGazeta, Proclamation No. 430/2005, 11th Year No.15.

legal system. Some of the below quoted legal scholars argued the silence of the civil code should be interpreted positively and arbitration of administrative contract disputes should be allowed. Moreover, some others considered the civil code silence negatively and by connecting with the civil procedure code prohibition argued in favor of administrative contracts non-arbitrability under Ethiopian law.

Bezzawork, in his most cited article on '*the formation, content, and effect of an arbitral submission under Ethiopian law*', takes a position in favor of the arbitrability of administrative contracts.[35] From the beginning, he disregards the stipulation of the civil procedure code about arbitrability. He argues that deciding on the arbitrability of administrative contracts is the subject matter of the substantive laws and it should not be constituted in the procedural law. Therefore, the civil procedure code incorporation of specific rules on the arbitrability of administrative contracts is the drafter's mistake. If that is the case, we should rely only on the civil code provisions and the silence should be understood as *"anything that is not prohibited is presumed to be permitted."*[36] He further mentions that:

> *"Even if one holds the contrary view that disputes arising from administrative contracts are not capable of settlement by arbitration under Art. 315 (2) of the c.p.c., in practical terms it is of minimal effect. This is so because many administrative authorities that are likely to be involved in domestic and international transactions and arbitration are empowered by law to settle their disputes by arbitration. One can cite the following as examples: the Ministry of Mines and Energy, the Marine Transport Authority, the Civil Aviation Authority, the Ethiopian Transport Construction Authority, the Ethiopian Water Works Construction Authority, and the Ethiopian Building Construction Authority. The argument that can be forwarded is that these establishment proclamations, by empowering the above state bodies to settle*

[35]Bezzawork Shimelash, '*The Formation, Content, And Effect Of An Arbitral Submission Under Ethiopian Law'*, *Journal Of Ethiopia Law*, Vol. 17, (1994), 83-85.
[36]Ibid

disputes by arbitration, have impliedly amended the ·prohibitive Civil Procedure Code provision."[37]

Zekarias Kenea also after concluding the existence of confusion between the civil procedure code provision and the civil code stipulation implied alternative solutions to avoid the confusion.[38] Zekarias questions "*If nothing in Book 4 Chapter 4 of the Civil Procedure Code affects the provisions of Articles 3325-3346 of the Civil Code, and nothing as to whether or not matters arising from Administrative Contracts are arbitrable is mentioned in Articles 3325-3346, could Article 315(2) be given effect? In other words, if the overriding texts of Articles 3325-3346 of the Civil Code are silent as to whether or not disputes emanating from Administrative Contracts are arbitrable; can't that be taken as an implication that even disputes arising from Administrative Contracts are arbitrable in so far as nothing express is stated in Articles 3324-3325 that they are not? Or should there be a manifest contradiction between the two Codes' relevant texts for Articles 3325-3346 to be overriding?*"[39] While he suggested the latter prevail over the former rule and thus the laws' hierarchy as a solution,[40] he left the issue without answering all questions. Aron Degol also categorized administrative contracts in the arbitrable subject matters group in the Ethiopian legal system. He strongly argued that; "*If there were restrictions to the type of disputes to be submitted to arbitration, surely the legislator would have stipulated them in the substantive law, i.e. the Civil Code. The legislator, however, did not provide any restriction."*[41]

Tecle Hagos Batha recommends that to have a clear stand on arbitrability, the country must establish an administrative court, or repeal Art 315(2) of the civil

[37]Ibid P. 85 Para. 2
[38]Zekarias Keneaa, Arbitrability in Ethiopia: Posing the Problem, *Journal of Ethiopia Law*, Vol. 17, (1994), 119-121.
[39]Ibid.
[40]Ibid.
[41]Aron Degol, (n18), 154-155.

procedure code.[42] Even though Tecle does not state his position clearly, he seems to favor the non-arbitrability of administrative contracts in Ethiopia's legal regime. Ibrahim Idris another Ethiopian law scholar, cited by Bezzawork, is also in favor of non-arbitrability. His thinking on Article 315(2) is on the contrary position of Bezzawork. Indiris notes that the stipulation under Article 315(2) is not a substantive issue rather it is a procedural rule, enacted to incapacitate arbitrators to adjudicate administrative rules. He further believes that deciding on arbitrability is a matter of procedural law and not of substantive law.[43] Moving on from an academic viewpoint, the following assesses the Ethiopian courts' diverging opinions on the issue of administrative contract arbitrability.

As Zekarias writes, in a case between *Water and Sewerage Authority Vs Kundan Singh Construction Limited*, the high court decided that Art 315(2) is sufficient to exclude arbitration tribunals from adjudicating administrative contract issues.[44] Moreover, the court argued that since deciding arbitrability or otherwise of the case is a procedural issue; the civil procedure code provision under sub-article 4 of Art 315 can't be affected by excluding arbitration tribunal from entertaining administrative contract disputes. Still, with substantive matters, the civil code provisions can have an overriding role {emphasis added by the writer}.

In another case, between *High Way v Solel Boneh Ltd*,[45] the Federal Supreme Court within the task of interpreting Art 3194(1) was tacitly addressing the issue of arbitrability of administrative contracts by holding that; "*Although by Art.3194 (1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligations, a court is not thereby precluded from ordering specific*

[42]Tekle Hagos Bahta, '*Adjudication and Arbitrability of Government Construction Disputes*', *MIZAN LAW REVIEW* Vol. 3 No.1, (2009), 27.
[43]Bezawerk Shimelash, (n35), 83.
[44]Zekarias Kenea, (n38), and Water And Sewerage Services Authority Vs Kundan Singh Construction Limited, High Court Civil File No. 688/ 79 (Unpublished).
[45] Supreme Imperial Court Of Ethiopia, May 14th, 1965 Published At The African Law Reports, Vol. 1, 1966, Pp. 41-44 As Cited By Tecle H. Bahta

performance of an agreement to submit disputes to arbitration."[46]In a case between *Ethio Marketing Ltd. v Ministry of Information*[47], also the Ethiopian Supreme Court decides on the possibility of making arbitral clauses or submissions by relating its argument with the substantive/procedural dichotomy and by taking the civil procedure prohibition as the drafters' mistake. In another case between *Gebre Tsadik Hagos v Tigray State Bureau of Education*[48], the Tigray Supreme Court was making a decision that precludes administrative contracts from arbitral submission. In awarding this decision, the court supported its arguments with the clear prohibition of Art 315(2) of the civil procedure code.

In the case between *Water Resource Ministry Vs Siyoum & Ambaye General Contractors*,[49] the federal Supreme Court decides in favor of non-arbitrability. In making the decision the court was holding that; "*the appellant's argument that the matter should not be referred to arbitration is based on the theory that the matter, though contractually arbitrable, is inarbitrable in law as it relates to an administrative contract. But, the referred contract does not qualify as an administrative one in respect of which Art 315 (2) of CPC prohibits arbitration. Accordingly, disputes arising out of it may be referred to arbitration according to the contractual stipulation.*"[50]

In the case of *Zemzem PLC Vs Illubabor Zonal Dep't of Education*[51], also the federal Supreme Court cassation division decides on arbitrability of administrative contracts. However, as Tecle Hagos mentioned when the court made this decision,

[46]Tekle Hagos Bahta (n42), 18

[47]Ethio Marketing Ltd. V Ministry Of Information, Ethiopian Supreme Court Decision, March 29, 1975,(Unpublished), Cited By Tecle Hagos Bahta, (n42), 19.

[48]Tigray State Supreme Court, Civil Appeal File No. 962/96 (10/06/96 E.C, Mekelle), (Unpublished)

[49]Water Resource Ministry V Siyoum&Ambaye General Contractors, Federal Supreme Court, Civil Appeal Case No.19659/1997

[50]Hailegabriel G. Feyissa, 'The Role Of Ethiopian Courts In Commercial Arbitration', *MIZZAN LAW REVIEW* Vol. 4 No.2, (2010), 314

[51] ZemzemPLC Vs Illubabor Bureau Of Education, Federal Supreme Court, Cassation Division File No. 16896, Tikmt16,1998 E.C, Addis Ababa

it wasn't taken into consideration the confusing provisions in the civil procedure code under articles 315(2) and (4). The decision was made simply by looking at the parties' agreement and in a poor analogy of their agreement with the general contract law provision Art 1731(contracts are laws between the parties). Nevertheless, this decision has a binding role in other federal and regional courts.

In general, previous experiences with the arbitrability of administrative contracts have caused some dismay among scholars and legal practitioners. They have adopted opposing stands, citing differences in provisions set under Ethiopia's civil code and civil procedure code. Those in favour of administrative contract arbitrability have considered the clear stipulation of non-arbitrablity under Article 315(2) of the civil procedure code, while those in favour of arbitrability have considered the stipulation made under Article 315(4) of the civil procedure code that restricts the civil procedure code rules from contravening the civil code rules on arbitration, as well as the civil code's silence on administrative contract arbitrability. Such confusions have been among the reasons for revising the Ethiopian laws on arbitration and enacting a new comprehensive law governing the area. Currently, Ethiopia has a new arbitration law that regulates the arbitration procedure and other out-of-court dispute settlement mechanisms. Those rules regulating arbitrability under the civil procedure code and the civil code that have been confusing readers are now clearly repealed by the new law and replaced by the rules of the new law.

5. New Improvements in the Arbitrability of Administrative Contracts in Ethiopia

Until April 2, 2021, the arbitration and conciliation-related issues were based on those scattered rules in the civil code, the civil procedure code, and other specific laws. These scattered laws had a limitation in properly regulating the area and surrounded it with a lot of confusing specifications. One of the confusions was revolving around the issue of arbitrability of the administrative contract as briefly mentioned before. Now Ethiopia has a comprehensive conciliation and arbitration

working procedure proclamation, which finds a solution to the difficulties and questions in the old legal arrangement. This law has repealed the provisions of Articles 3318 to 3324 of the Civil Code which deals with conciliation and the provisions Articles 3325 to 3346 of the Civil Code which deals with arbitration, and the provisions of the civil procedure code from Articles 315 to 319,350,352,355-357 and 461 which deals about arbitrator.

The new comprehensive arbitration and conciliation, working procedure Proclamation No. 1237/2021 has come up with a clear-cut statement that can avoid the existing debates on the arbitrability of the administrative contracts. Article 7(7) of the proclamation reaffirmed the civil procedure code Article 315(2) articulation by citing the non-arbitrability of administrative contract, except where it is not permitted by law. The new proclamation also breaks the silence of the civil code rules on arbitration by providing a clear rule on the arbitrability or otherwise of administrative contracts. Now without making a reference to the scholars' debate, the federal Supreme Court cassation bench interpretations, and the general rules of interpretation we can simply conclude that administrative contracts are not arbitrable subject matter only by referring to the clear rules in this proclamation.

Both the national and international arbitration tribunals will not have jurisdiction to entertain cases which are containing administrative contract elements as defined under Article 3132 of the civil code of Ethiopia. However, the proclamation is not providing an absolute prohibition of taking cases involving administrative contracts into the arbitration tribunals rather it unlocks the door for the legislators to determine special circumstances in which case administrative contracts may be subject to arbitration proceedings. This indicates the possibility of referring administrative contracts to the arbitration tribunal when the law has permitted them to act accordingly in specific circumstances. This exceptional rule will have a paramount importance to resolve a practical problem that may highly necessitate using arbitration tribunals over the formal judicial outlets.

Specifically, multinational companies and foreign investors usually do not favor the domestic formal judicial arrangements and completely restricting the use of arbitration arrangements in all circumstances may discourage them in their undertakings with the government. In some selected circumstances and by looking at the benefits it can create for the state, legislatures may allow some areas of administrative contracts to be adjudicated by the arbitral tribunals upon the parties' agreement. The existence of this exceptional rule has also contributed to the permanency of the rule and in the accommodation of new developments without amendment of the proclamation.

For instance, under the Ethiopian Roads Authority reestablishment regulation, disputes that involve the Ethiopian Road Authority can be inferred to be resolved in out-of-court arrangements subject to the approval of the Director General.[52] The investment proclamation also includes a rule that allows the government to agree to resolve investment disputes through out-of-court arrangements, usually investment arbitration tribunals.[53] The public-private partnership proclamation has allowed the government to make an agreement with the private partners to resolve disputes through the dispute settlement arrangements as they agreed, including through arbitration.[54]

In accordance with the Mining Operation Proclamation, any dispute, controversy, or claim between the Licensing Authority and a licensee arising out of or relating to an agreement for reconnaissance, exploration, retention, or mining, or the interpretation, breach, or termination thereof, shall, to the extent possible, be resolved through negotiation. In the event that an agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the

[52] Ethiopian Roads Authority Re-establishment Council of Ministers Regulation, 2011, Federal Negarit Gazeta, Regulation No. 247/2011, 17th Year, No.81 Article 10(2(h).
[53] Investment Proclamation, 2020, Federal Negarit Gazeta, Proclamation No. 1180/2020, 26th Year, No. 28, Article 25.
[54] Public Private Partnership Proclamation, Federal Negarit Gazeta, Proclamation No. 1076/2018, 24th Year, No. 28, Art 61.

procedures specified in the agreement. An arbitral award shall be final and binding upon the parties.[55]

The Petroleum Operation Proclamation also sets a rule on any dispute, controversy, or claim between the government and the contractor arising out of it. Alternatively, relating to the petroleum agreement or the interpretation a breach or termination thereof shall, to the extent possible, be resolved through negotiations. In the event that an agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the Petroleum Agreement.[56]

The public procurement proclamation also gives priority to the rules of the agreements with international organisations or states over the domestic rules to resolve controversies that may arise in projects funded by those entities or states.[57] It states that, to the extent that this Proclamation conflicts with an obligation of the Federal Government under or arising out of an agreement with one or more other states or with an international organisation, the provisions of that agreement shall prevail. Therefore, in our case, if the agreement has a specification about the arbitrability of disputes that may arise in those internationally funded disputes, the arbitral tribunals cannot claim the new proclamation to reject the case, or the courts cannot consider the non-arbitrability rules under the proclamation to assume jurisdiction.

In such a circumstance, the law may specifically liberate administrative bodies to decide how they may resolve disputes after considering the practical circumstances. Therefore, the above proclamations are exceptions to the rule that administrative

[55] Mining Operations Proclamation, 20110. Federal Negarit Gazeta, Proclamation No. 678/2010, Article 76.
[56] Petroleum Operations Proclamation, 1986, Federal Negarit Gazeta, Proclamation No. 295/1986, Article 25.
[57] The Ethiopian Federal Government Procurement and Property Administration Proclamation, 2009, Federal Negarit Gazeta, Proclamation No.649/2009, 15th Year, No.60, Article 6.

contracts are not arbitrable because they fall within the clause "unless it is permitted by law". In other words, administrative contracts that fall within the scope of the above laws are arbitrable. The permission referred to under the proclamation made by the law is not limited to the above legislations; since it has not made a restriction, future legislations may incorporate a specific rule that allows a specific administrative contract issue to be referred for arbitration. In other scenarios, the general principle of non-arbitrability of adminstrative contracts stipulated in the proclamation under Article 7(7) will continue as the governing rule.

The current experience in the Ethiopian courts and arbitral tribunals shows this improvement in the area.[58] Since the enactment of the new proclamation, there has been no confusion about the non-arbitrary administrative contracts among/between the contracting parties and the professionals working in the adjudicative bodies. Disputes on the jurisdiction of courts on administrative contracts have dramatically decreased, and the arbitral tribunals are rejecting issues by affirming that it is out of their jurisdiction if they face cases involving administrative contracts. However, some administrative contracts, including those involving international funding institutions, contracts with the Ethiopian Road Authority, and construction contracts, are still being submitted and entertained by arbitration tribunals claiming the exceptional ground set under the proclamation.

6. Conclusion

Administrative contracts are those contractual undertakings usually involving the state and individuals as contracting parties. In this form of the contract, the state is always representing the public interest. The administrative contract laws are requiring the state to follow a strict procurement and contract mechanism to the benefit of larger good to the public. Likely, to the contracting and the procurement

[58] Interview with civil bench judges at Ledeta Federal First Instance Court and the legal professionals working at the Addis Ababa Chamber of Commerce Arbitration Tribunal.

periods, administrative agencies should have applied a strict procedure in the settlement of disputes that may arise in the meantime.

In the modern world, it is common to see contractual agreements on the dispute settlement arrangement that are concluded either before or after the arising of the dispute. Arbitration is becoming a preferable dispute settlement outlet in all countries. Investors, traders, and different stakeholders in this contemporary world are inclined to arbitral tribunals over courts in need of their overriding role.

The arbitrability of the administrative contract is one of the most debatable subject matters in the world of jurisprudence. There are various arguments made both in favor and against the arbitrability of administrative contracts. The arbitrability advocators try to persuade their readers by referring to the overall importance of making it arbitrable. On the other hand, non-arbitrability advocators indicate the risks that may endanger the public due to the misrepresentation of public officials in the arbitration process.

Based on the experience anddivergent views of the writer and Ethiopian civil bench court decisions, including the cassation bench are the main manifestation of continuing confusion on the arbitrability or otherwise of administrative contracts in the Ethiopian legal system. Since we had no clear-cut legal solution to avoid confusion in the area, in the preceding period scholastic argument and practical outputs have been concerned with justifying their findings with the merit or demerits of relating administrative contracts to arbitration.

The global views on the role of arbitration, the civil procedure code specifications, and the silence of the civil code rules on arbitration are the primary standing points to this scenario. Even there has been some confusion on the procedural or sustentative category of the idea of arbitrability. Some attempt to resolve the problem by considering the general-specific law principle; others prevail over the previous rule and through the instrument of the hierarchy of laws principle.

Unstable decisions of the federal Supreme Court cassation bench decisions in the area had also more complicated the confusion and until the promulgation of the arbitration and conciliation working proclamation, there was a tendency to refer to the cassation bench's latest interpretation as a background of arguments we are making in the area. By this time, it was difficult to simply exert the civil code and the civil procedure code drafter's intention while they are putting confusing rules in different instruments.

The new comprehensive arbitration and conciliation, working procedure proclamation No. 1237/2021 has come up with a clear blue-penciled solution to the confusion in the arbitrability of administrative contracts. Now, we have relatively a comprehensive arbitration law with a clear rule on the non-arbitrability of administrative contracts. The proclamation has further repealed those confusing rules that are regulating the subject matter for decades. The restriction of the new law on the arbitrability of the administrative contract is a reassertion of the civil procedure code specification. The non-arbitrability of administrative contract articulation of the proclamation does not constitute an absolute restriction. The legislators are free to define some areas of administrative contracts that can be subject to arbitration. This authorization will have its role in accommodating practical developments shortly, and contrariwise it may highly endanger the public interest if the lawmakers are uses this discretion to promote the individual interest. Therefore, the legislatures, when they decide in accordance with this discretionary power under the proclamation, should focus on its relevance to the public and contribution to the improvement of investment flow in the state.

Observance of Adult Prisoners' Rights in the Gambella Prison Administration

Khoat Bidit Both[♣]

Abstract

Although there has been a considerable amount of literature recently on the subject of improving prisoners' rights in Ethiopia, research on the subject in the National Regional State of the Gambela Peoples is relatively novel. Apart from Omod Opodhi's 2019 journal article on addressing the psychosocial effects of crime on prisoners in Abobo City Prison and the Ethiopian Human Rights Commission (EHRC)'s 2021 report, which found that the protection of human rights in the Gambela region requires an urgent attention after gathering an extensive evidence on the extent of the abuses and revealing the sadistic treatment of those imprisoned in the Gambela's and Abobo's City prisons, there has not been any previously conducted investigation into the compliance with adult prisoners' rights, or their treatment as such, across the State of Gambela. This article assesses, therefore, the compliance of the Gambela Prison Administration (GPA)—which is not found—with pertinent national, regional, and international standards on adult prisoners' rights. The study was conducted via secondary and primary qualitative case study design, and the analysis employed narrative and content quality analysis techniques, compliance with international commitments and human rights norms and standards addressing adult prisoners' rights, and Articles 19(1) and 22 of the Gambela Constitution, is recommended.

Keywords: Compliance, Imprisoned Rights, City Prison, Gambella, Ethiopia

[♣] LL.B in law from Mekelle University (2019) & LL.M in Human Rights & Justice Studies from Arba Minch University (2022), Lecturer at Gambella University, School of Law. This Article is part of my former LL.M thesis submitted to Arba Minch University, School of Law, & thus benefited from supervision of Dr. Belayneh Berhanu. The auhor can be reached khoatbiditpal@gmail.com

1. Introduction

Prisons have existed in most societies for many centuries and usually they have been in places where individuals were imprisoned until they underwent some legal process and the principal purpose for establishing them in all parts of the world has been to provide rehabilitation and correctional facility for those who have violated the rules and regulations of their society and enable them demonstrate attitudinal and behavioral changes and become law-abiding, peaceful and productive citizens when integrated into the community.[1] Protecting the rights of prisoners, which to this work mean the rights of the adult prisoners serving sentences with the exclusion of the general prison population, namely, juveniles, non-sentenced prisoners, and all other detainees' categories—whose rights this paper does not address,[2] has never been easy. The vast extent and chronic nature of human rights violations in prisons around the world have long troubled the United Nations, evidenced by the promulgation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR) in 1955.[3] Indeed, the failure of the international community to adopt these standards in practice, despite adopting them in theory, has inspired the recent efforts of the United Nations in the field of prisons.[4]

[1]*Human Rights and Prisons: A Manual on Human Rights Training for Prison Officials* (UN New York and Geneva 2005).

[2]The term 'prison' & 'prisoner' shall have their respective meaning assigned to them by Art. 2(8) & (5) of the Gambela prisons proclamation (Gambela prisons proclamation No.197/2021), 1995, Proc. No.197/2021, *Gam. Neg. Gaz*., Year 26, No.14. Next, this paper is reserved only for sentenced adult prisoners and is not applicable to all categories of prisoners & pretrial detainees, such as the arrested, remanded/persons awaiting trail, accused persons/persons charged, etc. However, for the definition & rights of persons accused, see Art. 21 of the Gambela Peoples National Regional State Constitution (Gambela Constitution No.27/1995), 1995, Proc. No.27/1995, *Gam. Neg. Gaz.*, Year 1, No.1. cum Art. 2(9) Gambela prison proclamation No.197/2021; for the rights of persons arrested, see art 20 of the Gambela Constitution; for juveniles' rights and definition, see art 37 (1) (e), and (3) of the Gambela Constitution cum Art. 2(11) of the Gambela prison proclamation No.197/2021; for the rights of persons held & convicted, see Art.22 of the Gambela Constitution No.27/1995; etc.

[3]Human Rights Watch Prison Project: UN Prison Monitoring Report <https://www.hrw.org/legacy/advocay/prisons/un_op.htm> accessed on 12 April, 2022.

[4] Rodriguez Sara, 'The Impotence of being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States'[2006]33NEJCCC <https://law.bepress.com/expreso/eps/1627_2006> accessed on 5 April 2022.

Taking into account the progressive development of international law on the treatment of prisoners since 1945—as no history would be complete without its consideration—the rights of prisoners have their roots in various international and regional human rights treaties and instruments as well as national legislations.[5] In 1948, the General Assembly of the United Nations (UNGA) adopted the Universal Declaration of Human Rights (UDHR).[6] The UDHR of 1948 made, however, no explicit reference to prisoners, although the rights set forth therein, including the prohibition of torture, the provision of the adequate standard of living, the right to a fair trial, and the presumption of innocence, implicitly covered them.[7]

Later, two covenants, which state that prisoners have rights even when they are deprived of their liberty in custody, were adopted. They are the International Covenant on Civil and Political Rights (ICCPR),[8] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9] The ICCPR remains a core instrumental treaty on the protection of the rights of prisoners by stating that '[all] persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person',[10] and envisioning the 'separate treatment of sentenced from accused and adults from juvenile',[11] and further for requiring that 'the reform and social readaptation of prisoners' should be an 'essential aim' of imprisonment.[12] The prohibition of torture and other unlawful treatment of persons deprived of their liberty is also evident from the case-law of its Human Rights Committee,[13] which, inter alia, contains numerous examples of violations of Articles 7 and 10(1) of the Covenant.[14]

[5] Van Zyl Smit (2010), P.507.
[6] (adopted 10 December 1948) UNGA Res 217 A (III).
[7] See eg, UDHR, Arts. 5, 10, 11(1), & 25.
[8] (Adopted 16 December 1966, entered into force 23 March 1976)999 UNTS 171.
[9] (Adopted 16 December 1966, entered into force 3 January 1976) 1993 UNTS 3.
[10] ICCPR, Art.10 (1).
[11] ibid (2) (a) & (b); (3).
[12] ibid 10(3).
[13] ibid Art.28.
[14] See (Aksoy v Turkey) (1996).

Seven years later, following the UDHR, the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders (UNODC) adopted the SMR in 1955.[15] This was an important start, and subsequently, the UNGA adopted expanded rules, known as the 'Nelson Mandela Rules', in honour of arguably the most celebrated prisoner of the twentieth century.[16] The Rules are based on an obligation to treat all prisoners with respect for their inherent dignity and value as human beings, and to prohibit torture and other forms of ill-treatment. As a result, the Mandela Rules provide states with detailed guidelines for protecting the rights of persons bereft of liberty in general and the sentenced ones in particular. More specifically, detailed guidance on a wide variety of issues ranging from staff training, limitations on the use of solitary confinement, investigation of deaths and torture, requirement of legal counsel, provision of medical and health services, information for prisoners and access to complaint mechanisms/independent inspection to disciplinary measures and sanctions. They prohibit, in the latter case, for example, the reduction of a prisoner's food or drinking water, as well as the use of instruments of restraint that are inherently degrading or painful, such as handcuffs, or shackles.[17]

At the regional levels, the development of regional treaties and standards as well as the role of the regional judicial institutions are useful measures as well to assess the implementation and provision of prisoners' rights.[18] An example of this implementation and provision of prisoners' rights in Africa is Article 5 of the African Charter on Human and Peoples' Rights (ACHPR),[19] which states:

> Every individual shall have the rights to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of

[15] (First adopted in 1957, entered into force in 1977, revised and unanimously adopted on 17 December 2015) UN Doc A/Res/70/175.
[16] UNODC (2017); Mandela (1994).
[17] SMR, r 46(1) (d) & (2).
[18] See van (n 5) & Snacken (2009); Rodley (2011); Snacken (2015).
[19] (Adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. See also American Convention on Human Rights (adopted 22 November 1969, entered into force18 July 1978) (IACHR) 1144 UNTS 123, Art.5; European Convention for the protection of human rights and fundamental freedoms as amended by Protocols No.11 and 14 (adopted 4 November 1950, entered into force in September 1953) (ECHR) ETS 5;213 UNTS 221, Art.3.

> exploitation and degradation of man particularly torture, cruel, inhuman or degrading punishment and treatment shall be outlawed.

In addition, Article 30 of the ACHPR has also established a control mechanism, called the African Commission, with the task of promoting human and peoples' rights and ensuring their protection in Africa. This regional body, operating since 2002 under the auspices of the AU, has played a significant role in improving prison conditions throughout Africa.[20] The Commission has, for instance, extended the rights and protections set forth in the ACHPR to prisoners by availing itself of the SMR, BOP, ICCPR, and embracing several resolutions on the standards of prisons in Africa,[21] which, among others, contain recommendations on reducing overcrowding, making prisons in Africa more self-sufficient, holding prison administrations more accountable for their actions, promoting the African Charter, rehabilitation and reintegration programs, supporting the development of African Charter on Prisoners' Rights from the UN,[22] and encouraging best practices. An additional instrument, the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines),[23] which the commission adopted in 2002, encourages African nations to adopt minimum international standards on prison conditions, and provides detailed instructions on how to achieve them. In this case, the document takes note in its preamble of Article 55 of the UN Charter, Article 5 of the UDHR, Article 7 of the ICCPR, and Articles 2(1) and 16(1) of the CAT, and implores states to support the work of the Special Rapporteur on Prisons and

[20] Report (Rep) of the Special Rapporteur on Prisons and Conditions of Detention in Africa Presented By Hon Commissioner Med S K Kaggwa at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights (Yamoussoukro, Côte D'ivoire 9-22 Oct, 2012).

[21] In pursuit of the mandate, the Commission adopted the Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa. The Commission has also adopted declarations to find common solutions with the problems facing prisons in Africa, inter alia, the Kampala Declaration on Prison Conditions in Africa, adopted in Kampala, Uganda, in 1996, the Arusha Declaration on Good Prison Practice adopted in Arusha, Tanzania, in 1999 and the Kadoma Declaration on Community Service in Zimbabwe in 1997. The Commission has also adopted the Robben Island to monitor state implementation of these provisions.

[22] E/CN.15/2002/CRP.2.

[23] Robben Island Guidelines, ACmHPR, 32nd Ordinary Sess (17th-23rd October, 2002).

Conditions of Detention in Africa as well as advising them to take steps to ensure that the treatment of all people deprived of their liberty is in conformity with international standards. It also contains detailed advice on how to address a variety of issues, including physical conditions of prisons, the use of alternative sentencing to mitigate overcrowding, the role of NGOs, raising staff awareness and training levels, and avoidance of the commingling of the prisons population; and further mandates to everyone deprived of their liberty to have the right to an adequate standard of living, including adequate food, drinking water, accommodation, clothing and bedding, etc; and provides, under provision 34, that states should take steps to improve conditions in places of detention which do not conform to international standards. In this context, the Commission has considered prison condition issues, including overcrowding and lack of access to basic hygiene facilities, medical treatment and adequate food, as amounted to cruel, inhuman or degrading treatment under Article 5 of the ACHPR.[24]

The Ethiopian legal system has equivalent set of legislations for the treatment of imprisoned persons. The 1995 Constitution,[25] the FDRE Criminal Code,[26] and the forthcoming 2020 FDRE Criminal Procedure and Evidence[27] are relevant

[24] See, eg, (Huri Laws v Nigeria) (2000); (Ouko v Kenya) (2000).
[25] FDRE Constitution (FDRE Constitution No. 1/1995), 1995, Arts. 18(1) & 21, Proc. No. 1/1995, *Fed. Neg. Gaz.*, Year 1st, N, 1.
[26]Criminal Code of Ethiopia, 2004, Art.1cum Arts. 87,106, 108, 109, Proc. No. 414/2004, *Fed*, *Neg*, *Gaz.*, (extraordinary issue), 9 May 2005.
[27] This draft law, intended to replace the 2011 Ethiopian Criminal Justice Policy, is relevance to this work, mainly in some of its key provisions, such as art 9, which forbids harsh or humiliating treatment of prisoners, art 22(1), (2), (4), & (5), which respectively require prisons to reform convicted inmates, facilitate their reintegration into society after their release, make it easier for prisoners to communicate with their spouses, friends, and close relatives as well as receive legal, medical, or religious services from their legal counsel, doctor, or priest, warded them in a separate accommodation on the basis of age, sex, offence type, punishment and health status, art 20(9) which requires the public prosecutor to pay for visits to prisons and other places of detention, and art 18(1) (d), (e) and (h) which make it further a mandatory for the justice organs, such as federal or state attorney general, prisons, courts, police, etc, the establishment of a system for the submission of grievances and complaints including those from prisoners, the consistency of the treatment of inmates with the FDRE Constitution and of itself, the establishment of an inspection department which monitors the discharge of their duties comply with the law and identify non-conformities and address them as well. It is hoped that this prison legislation would serve as a stepping stone to overhaul existing prison policies.

legislations. As a regional state, the Gambela Peoples' region has also legislations, including the Gambela Constitution,[28] the Gambela Prisons Commission Proclamation,[29] and associated draft Regulations,[30] which are of significant value to the rights of prisoners. The FDRE Constitution, which is the supreme law of the land as well as the source and basis of legality of all other laws, has, in particular, provided under Article 9(4) that international agreements ratified by Ethiopia are integral to the law of the land, and states further under Article 13(2) that the fundamental rights and freedoms enshrined therein are to be interpreted in a manner consistent with the principles of all international human rights laws, instruments and agreements adopted by Ethiopia. The same principles noted above have been incorporated and articulated in significant detail in state constitutions, guidelines and national policy documents and frameworks, as well as in substantive and procedural laws of both federal and state governments, in which the protection of human rights, including inmates, has been made solid for the protection and enforcement of human rights. In addition to the basic human rights and freedoms provided for in the FDRE and state constitutions, Ethiopia enforces several international and regional human rights treaties and instruments as the country's laws, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[31] which Article 18(1) cum Article 16 of the FDRE Constitution replicated by providing, for instance, that everyone, incarcerated adults included, has the right to be protected from bodily harm, cruel, inhuman or degrading treatment or punishment.[32] On top of that, police and prison administration officers and other law enforcement officials have been trained to enable them undertake their duties in line

[28] Gambela Constitution No.27/1995, 1995, Art.22.
[29] Gambela prison proclamation No.197/2021, Arts. 3 & 26ff.
[30] Regulations—/2021 (unapproved).
[31] (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[32] Jean-Baptiste N & Patrick L, *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guides for Implementation* (apt, Addis Ababa, 2008).

with the rights of citizens to be treated humanely and respecting the rights to security of the persons.[33]

This illustrates that human rights instruments, such as the UDHR, the SMR, the Principles for the Protection of All Persons against any Form of Detention or Imprisonment,[34] the CAT, and the ICESCR,[35] provide a set of rules that help prison administrations and staff perform their duties through policies and practices that are lawful, humane and disciplined. However, given the wide variety of legal, social, economic and geographical realities in the world, it is evident that not all rules are applicable everywhere and at all times,[36] and there is a loss of rights in prisons that continues to occur, even against the recognition of prison jurisprudence that prisoners should not lose all of their rights through incarceration.[37] Equally, despite the best practices set out in many national and international guidelines, it is common knowledge that prison officials around the world are often ignorant of these guidelines and the human rights of prisoners are often not respected.[38] In such facilities, including those in Ethiopia, the main challenge is to ensure that prisoners

[33] *Prison Reform and Rehabilitation in Ethiopia* (UNDOC, 2021)—the new prison curriculum includes modules on prison management in security, rehabilitation, and protection of the rights of prisoners and is aligned with the new Federal prisons proclamation (Federal prisons proclamation No, 1174/2019), 2019, Art.34, Proc. No, 1174/2019, Fed.Neg. Gaz., Year 26, No, 14 (1174/2019). It has similarly incorporated the SMR (Nelson Mandela Rules) as a key component of the training curricula.

[34] (adopted 9 December 1988 UNGA Res 43/173 A) UN Doc (BOP).

[35] FDRE Constitution No. 1/1995, part 2, Art. 9(4).

[36] *Human Rights and Prisons* (n 1); SMR's preliminary observation 2(1).

[37] The (coffin v Reichard) (1944) case was the first in which a federal appellate court ruled that prisoners do not automatically lose their civil rights when in prison rather prisoners retain some constitutional rights; (Minister of Justice v Hofmeyr) (1993) is another case wherein the Supreme Court ruled that prisoner retains all his personal rights save those abridged or proscribed by law; (Wolff v McDonnell*)* (1974) 418 US 539(USC) is further the case where the USA apex court has emphatically stated that it must be realised that a prisoner is a human being as well as a natural person or a legal person, and if a person gets convicted for a crime, it does not reduce him to the status of a non-person whose rights could be snatched away at the whims of the prison administration

[38] *Prison Conditions: The issue (Penal Reform International)* <https://www.penalreform.org.issues> accessed on May10, 2022.

receive humane treatment equivalent to that outside of prisons and to ensure prisoners' autonomy in prison setting decisions.[39]

Further put, the declaration that all human beings, including prisoners of course, have certain inalienable rights recognised by internationally recognised instruments, and that a sentence of imprisonment constitutes only a deprivation of the fundamental right to liberty and does not include the restriction of other human rights,[40] is being hurt in the worlds that are imprisoned, including those in Ethiopia, in which prisoners face years of incarceration in often cramped and filthy food supplies, inadequate hygiene, and little or no clothing or other amenities, with authorities reportedly beat and tortured detainees in prisons and medical care reported to have been inadequate (in some cases) after being beaten.[41] While these conditions are not uniform across the country, their prevalence is a matter of concern and needs to be addressed through prison reform and attention to human rights.[42]

It is on this basis and the principle that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,[43] which none can fulfil, except the right to an adequate standard of living,[44]

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[39] See Mary Katherine Maeve and Michael S Vaughn, *Nursing with Prisoners: The Practice of Caring, Forensic Nursing or Penal Harm Nursing?*'(2001); Torrey E F, 'Jails and prisons—America's new mental hospitals' (American journal of public health, 1995) 85 AJPH, 12; Addisu (2012); Gosaye (2003); Mintewab (2005); Shambal [2007]; Yitayal [2006]; Country Reports on Human Rights Practices: Ethiopia (United States Department of State, Bureau of Democracy, Human Rights, and Labour,2022); Reports on Prison Conditions in Ethiopia (EHRC,2022) <https://www.ecoi.net/en/file/local/2044634/Ethiopia_prison_conditions.PDF> accesed on January 9, 2022. See also SMR, r 5; *Association for the Prevention of Torture* (APT) <https://www.apt.ch/en/knowledge-hub/detention-focus-database/material-conditions-detention> accessed on Feberaury10, 2022.

[40] See Basic Principles for the Treatment of Prisoners (BAP) (adopted 14 December 1990 UNGA Res 45/111) UN Doc A/RES/45/111, Art 5; r 2 cum r 5 of the 2006 European Prison Rules; 1996 Kampala Declaration on Prison Conditions in Africa's second Recommendation on Prison Conditions; Coyle & others [2016], p.72.

[41] Addisu & others (n 39); United States Department of State Rep; EHRC Rep (n 39); Jeremy Sarkin, 'Prisons in Africa: An Evaluation from a Human Rights Perspective, Sulu International Journal', Vol.4. No. 9, Dec. 2008, PP. 22-49.

[42] ibid EHRC Rep.

[43] BAP, pr 1.

[44] ICESCR, Art 11(1), 1st para.

which, includes, inter alia, adequate food, drinking water, accommodation, sanitation, clothing and bedding, etc, GPA has been examined, via three main sections. The first section addresses the adult prisoners' fundamental rights that should be protected in the GPA. The second section presents an analysis on the challenges in ensuring these rights and the identification of what (if any) the Gambela Peoples' Regional Government and/or GPA's correctional authorities have done/are doing to alleviate these challenges. The final section provides a concluding remark on the issue under investigation.

2. Observance of Adult Prisoners' Rights in the GPA

2. 1. Prisoners' rights

2.1.1. Penitentiary Placement and Security Classification

Given the number of hours spent in dorms each day, the living arrangements have a considerable impact on the experience of deprivation, dictating minimum standards of these conditions to uphold human dignity.[45] It is for this reason that, according to international human rights law, prisoners must be classified or awarded dorms in a manner that is appropriate with their status as inmates who have been sentenced, such as separating them from accused inmates and treating them differently.[46] It is documented, notwithstanding this requirement, and although opinion differ, that there are 419 GPA's population in total, of which 417 are adult inmates, and 329 are sentenced adults, accommodated in barracks with accommodation varying from 20-50 or more with no adequate ventilation despite in hot climates, like Gambela region, that ventilation can be greatly improved with air conditioning or the installation of electric fans to allow good air circulation inside.[47] From waking up to going to sleep, it is regularly 7:00 am and 5:00 pm respectively, but going to dorms is changeable depending on the Gambela region's weather condition and was shifted in the course

[45] APT (n 39).
[46] See ICCPR, art 10(2) (a); SMR, r 11(b).
[47] Interview with Philipp Pidak, Commander, Gambella *Prison*, Gambela town, on 21 March 2022.

of this study to 6:00pm; desperately with mentally ill prisoners being kept isolated in their dorm and let out only when going to hospitals.[48]

Despite a widespread tuberculosis and other communicable diseases inside prison, there is yet no classification of inmates on the basis of the health reason, rather prisoners are accommodated together in common dorms,[49] wherein rooms are not appropriately furnished and provided good access to natural light and adequate ventilation, attested by Room 14, a deafening, dirtiest and bustling, hosting as many as 43 inmates, with dirty windows and bed bugs on each torn mattress and on the wall, mosquitoes, with no mosquitoes nets provided; and prisoners are not involved to participate in their being awarded dorms, and are not carefully selected and adequately supervised as well.[50] Nonetheless, special treatments are provided to, for example, those who are faithful and loyal, such as to become committee members.[51]

The concern of overcrowding sometimes forced its authorities to rent outside, as the constant request for funding from the Gambela regional government and/or concerned NGOs to construct new prison dorm rooms, repair windows, doors, etc, remains in vain;[52] likewise, as a part of efforts to ease an overfilling and for improved prison conditions in general, a project is planned targeting former South Sudanese Peoples' Liberation Movement's Military Camp (known as Dhingki in local Nuer

[48] ibid added that mental disorderly inmates' room 7, which is only roofed with fly wood and aluminum sheets, is dirtier & gloomier than any other room in the prison. See Gambela prison proclamation No.197/2021, Art.50 (2) (c).

[49] Interview with Ato Chany Dep, Coordinator of the Gambela *Prison*, Gambela town, on 25 March 2022. He further noted that there is an overcrowding in GPA which does not provide adequate separation from non-infectious detainees (ie detainees with infectious disease are not separated from accommodation block, or non-infected detainees).

[50] ibid.

[51] Pidak (n 47) stated, for example, that if someone is sentenced to 3 years, he/she can serve only 8 months for each month and 24 months in average; Ruon Chony, prisoner, Gambella *Prison*, Gambela town, on 30 April 2022, also stated that Room 4 (also known as Arat band in the prison language parlance, a room where former British colonist envoy—known in Nuer language as a Janguan—was an inmate) is reserved for honest people, & added that Room 8 (also known Bet Mengist in Amharic) is where Riek Machar, the former & current Vice President (but now FVP) of South Sudan & rebel leader was an inmate for being a supposedly political dissident against late Dr John Garang De Mabior (honored as the Sudan peacemaker & founder of the South Sudan).

[52] Interview with Jeremiah Pathot, Inspector, Gambella *Prison*, Gambela town, on 24 March 2022.

parlance) to build a new prison compound wall, on the area of 338 Karo metres, equivalent to 43 metres or hectares, with an estimated cost of birr 1.5 million from the Gambela regional government budget, ensuing, under a wider strategy to modernise it.[53]

On the basis of these observations and evidences presented, it is clear that the prison has complied with Article 33(1) of the Gambela prison proclamation as there is separation between men and women prisoners, and female staff supervise women prisoners (or female block) as those for men.[54] Yet separation failure exists for those tried and sentenced from those listed under Article 33(2), (3), (4) and (5) of the same. In other words, the requirement to hold prisoners separately on the basis of their gender is contrary to popular belief fulifiled in the prison, as is the requirement of privilege under Article 66(1) and (2) of the same proclamation, particularly for the present of a special treatment to those who are faithful and loyal, such as to be committee inmates' elects.[55]

And while the prison complies with Rule 33(a) of the SMR in separating female inmates from their male counterparts, non-compliance with the last sentence of the opening paragraph of the same has been observed, as prisoners with communicable disease are not separated/provided separate accommodation from other prisoners.[56] Similarly, the absence of adequate artificial light provided for prisoners to read or work, as well as windows large enough to enable them to read or work by natural

[53] ibid.

[54] Interview with Nyamal Taidor, prisoner, Gambela *Prison*, Gambela town, on 27 March 2022. She stated as well that there are 14 rooms in the prison, two of which are reserved for female inmates, and added that sanitary pads, soaps and underwear, were one provided by the Gambela Children, Women and Girls Affairs Office, in April 2019.

[55] APT (n 39)'s Extract from the 10th General Rep [CPTINF] (2003)13], para 24. See also Rep of the Working on Arbitrary Detention-A/HRC/7/4, para 5, which makes it imperative to allocate entirely separate premises to women in institution which receive both men and women if it is not possible to detain women in separate institutions, and to keep young prisoners separate from adults, which r 11(a) & (d) of the SMR also envisaged.

[56] See Council of Ministers Regulation on the Treatment of Federal Prisoners (Federal prison regulations No. 138/ 2007), 2007, Art. 5(1)(a), (b), & (3)(d), Proc. No. 138/ 2007, *Fed. Neg. Gaz.*, Year 13, No. 47.

light, is in contravention with the SMR's Rule 14(a) and (b), which call for their provision.

Additional observations and interviews conducted with most inmates and prison staff signpost the prison's non-compliance with almost all stipulations of the SMR regarding prisoners' accommodation, such as sleeping, working, and sanitary conditions. In particular, the prison's inmates' dormitories do not comply with these rules for their not being carefully selected and hence, not suitable to associate with one another in those conditions, and for absence of regular supervision by night in keeping with its nature.[57] Equally, the prison's abject practice of not letting mental cases inmates to come out except when going to hospital contravenes Rule 45(2) cum 43(1)(a) and (c) of the SMR, which prohibits it as torture or another kind of cruel or humiliating treatment.

Its further practice of accommodating prisoners ranging in number from 20-50 or more with no adequate ventilation to allow good air circulation inside, no adequate sanitary installations to enable each prisoner to meet the needs of nature when necessary and in a clean and decent manner, as well as no adequate bathing and shower installations, acts contrary to what are provided under sub-Articles (1), (2) and (3) of Article 34 of its prison proclamation that ensures prisoners shall have an accommodation that preserves their human rights, dignity, security and health during their prison stay. In addition, the proclamation, provides that a prison room is not occupied by prisoners beyond its standard capacity, and that the place where prisoners live shall have sufficient and clean personal hygiene, bathing, and toileting, considering their health, privacy, and personal dignity. Likewise, its regular neglect of all areas regularly used by inmates runs counter to this same provision.

The prison's lack of proper classification of inmates may similarly counteract Articles 19(1) and 22(1) of the Gambela Constitution, which in turn provide that

[57] SMR, rr 14 (a), (b), & 15. See also apt (n 39).

'everyone has the right to protection against cruel, inhuman, or degrading treatment or punishment' and that 'all persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity'.[58]

Its deprivation of inmates of proper accommodation can also be held against CAT's Article 16(1) cum Article 1, which outlaws it as ill-treatment and even torture, because infliction of physical torture or other cruel, inhuman, or degrading treatment is not the only manner of violating the said provision. In addition to harming inmates' health, the prison's poor ventilation and denial of bathroom facilities, combined with a hot and humid climate and overcrowding, amount as well to physical and mental torture. It is also possible, in this context, to interpret Article 5 of the ACHPR, which guarantees the rights to respect for one's dignity and freedom from inhuman or humiliating treatment, including prisoners, as conflicting with the prison's conduct of depriving adults of their proper accommodations.[59]

The prison's act as well of turning (for lack of space within) areas originally served as stock rooms or workshops into dorms, despite non-fulfillment of satisfactory conditions for accommodations,[60] falls below both national and international minimum standards.[61] The prohibition that 'in general no more than 40-50 persons should be accommodated in a room where detainees sleep, and then only when the available space, ventilation and lighting meet specifications', with justification; where this number is exceeded, it becomes increasingly difficult to guarantee for prisoners a minimum amount of privacy as well as access to essential services, like toilets and water, has also been contravened.[62]

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[58] See FDRE Constitution No. 1/1995, Arts.18 (1) & 21(1), the basis of the abovementioned provisions.
[59] See also IACHR, Art.5; ECHR, Art.3.
[60] GPA's Female block's 2nd room attests it.
[61] See, eg ICCPR, art 10; ICESCR, art 11; SMR, rr 12-17; FDRE Constitution, Art. 21; Federal prisons Proclamation No, 1174/2019 etc; meaning that international instruments are clear that there are no circumstances in which this degree of overcrowding can be considered acceptable.
[62] International Committee of the Red Cross (ICRC), *Water, Sanitation, Hygiene and Habitat in Prisons* (Geneva 2005) chapter 16, p.12; apt (n 39). See also SMR, r 13.

2.1.2. Bedding and Clothing (Right to Clothing and Bedding)

Despite specifications by international rules that clean clothes and bedding, in sufficient quantity and adapted to the climate, are essential elements of good personal hygiene and decent living conditions in detention; and clean bedding changed regularly prevents the outbreak of bug and skin disease epidemics,[63] in the GPA, prisoners are not only dozed on stained, wore and torn forms having no mattress covers and pillowcases holding as many as three or more prisoners with no sleeping clothes, especially blankets delivered by the prison commission, they are also forced to rely on their families for bedding and clothing, and are not provided with bedding and clothing, and beds.[64] Further, the prison is overcrowded, with up to 50 prisoners per room, and absences basic amenities, such as lockers or closets, for prisoners to lock their possessions.[65]

The prison's dressing code system is a civilian clothing. Despite this, inmates clothes are shabby and dirty (as they are not regularly washed for lack of water as well as the absent of receiving underwear such as briefs/panties and socks from the same), and mattresses are not inspected regularly to detect damage, stains and wear and tear, and to get rid of bed bugs thereon and on the walls of each room.[66] Apart from these, prisoners shower once a week despite the Gambela's highest temperature in Ethiopia, non-existence of the hangings up of clothes to dry,[67] unreliable electricity—having

[63] SMR, rr 19-21.
[64] Interview with Gemechu Omod, prisoner, Gambela *Prison*, Gambela town, on 23 March 2022. He also amplified that the principal deficiencies in the region's prison noted include: shortage of items such as furniture stretchers, beds and clothes, cleaning materials and other basic materials for providing health care in minimally acceptable condition as well as inadequate medicine and medical supplies and equipment.
[65] ibid Room 14 is an example.
[66] Observations plus testimonies proved that there are no standardized clothes worn by prisoners.
[67] Taidor (n 54) there are 4 block having 14 dorms, each with handful old broken mattresses, holding three(3) to four(4) inmates, with no beds (four inmates sometimes sleep together in one for single torn mattress); and sometimes used mates as blanket or mattress covers as they are not provided with the latter..

only one electric bulb in room 14, absurdly left on all night—and no generator which can furnish light when the Gambella town's city has a power cut.[68]

A Perusal conducted in the form of such observations and interviews demonstrated the prison's non-compliance with, for example, Article 11, paragraph 1 of the ICESCR, which stipulates that everyone has the right to clothing as part of their right to an adequate standard of living, Article 35(3) of the Gambela prison proclamation, which mandates, inter alia, that no limitations can be placed on the use of private underwear, and the SMR's Rule 19 cum Rules 20 and 21, which fiats, in particular, the getting of clothing by the inmates from the facility and access of the same to the appropriate beds and bedding.[69]

A careful reading likewise of Article 34(4) cum Article 50(2)(d) of the Gambela prison proclamation, which requires it to provide each prisoner with a clean bed, mattress, blanket and bed sheet, and prohibits keeping the prisoner in a room with, among other things, no bed, mattress and beddings, reveals its non-compliance. This is because the prison has not been abided by the requirement that beds and mattresses must always be present and that prisoners should be able to lock their authorised personal possessions and papers up in something that is closed.

The prison's act, in addition, of not providing proper washing services, clean wearable clothing or underwear, a situation female inmates find more difficult as they are frequently in need of these items more than men do antithesis the same rules and proclamation.[70]

2.1. 3. Recreational and Other Facilities

Observations and interviews conducted in regard to recreation demonstrated that there are no recreational facilities, such as football, in the GPA except volleyball,

[68] ibid.
[69] See Federal prison regulations No. 138/ 2007), Arts.7 & 8.
[70] For example, the Kampala Declaration calls for improving the situation of women in African prisons & thus contravened.

Mogollas and Damas, and no events have ever been celebrated by prisoners as required by international human rights law and instruments.[71] In addition, the prison does not provide a centrally operated common radio or television to be used at predetermined times.[72] And as per a steered observation, the prison's compound wall is too small with no enough yards to play around, with prisoners further not allowed to use electronic devices, and thus spend most of their time leading worship services or attending spiritual counseling sessions.

Despite the importance of exercise for prisoners' physical health and the opportunity to relieve their stress or mental tension,[73] GPA misses this. Particularly ogled is the lack of compliance with the requirements of provisions (1), (2), and (3) of Article 39 of the Gambela prison proclamation that prisoners, individually or in groups, have the right to engage in physical exercise within the prison compound that is appropriate for their health. Thus, the commission has to arrange a sufficient open space within the prison compound for sports and physical exercises and has also, to the extent possible, and in collaboration with the community outside, prepare cultural, social, sports and other similar events for prisoners due to absence of all these things, and particularly the space necessary for moving about and getting some exercise therein.[74]

The prison has equally acted against cumulative requirements of the said proclamation's Article 43(5) and (6) that prisoners must receive the physical education and exercise they require to maintain their health and that all necessary arrangements must be made to enable them to engage in a variety of rehabilitation and recreational activities, for absence, in particular, of the prison radio and

[71] Interview with Ruach Dey, prisoner, Gambela *Prison*, Gambela town, on 29 March 2022. See, eg, SMR's r 105, which states that recreational and cultural activities must be made available in every prison in order to enhance the mental and physical well-being of convicts.
[72] Interview with Yein Gach, prisoner, Gambella *Prison*, Gambela town, on 1 May 2022.
[73] Esposito M, 'The Right to Physical Activity in Italian Prisons: Critical Considerations on Official Data' (2020)10 SMJ< https://doi.org/10.4236/sm.2020.101003>accessed on 23 May 2022.
[74] BAP, pr 6.

television, as well as books in its reading room that should provide recreation, support education and help with their personal development.[75]

The same logic applies to Article 12(1) of the ICESCR, which recognises the right of everyone to physical and mental health, and the CPT's believes that all prisoners, including those undergoing cellular confinement as punishment, should have at least one hour of exercise outside every day, where there is enough space to exert themselves physically, as it crucial for their mental and physical well-being.[76]

2.1.4. Connection with the Outside World and Notification

It is duly noted in other interviews that visitation is only allowed on Saturday and Sunday and the other days are only permitted for food and water services visitation.[77] The communication is conducted in a common visitation area that is two meter long partitioned by rope or string with 30-50 minutes duration.[78] Prior to the visit, however, visitors are searched by prison staff, and prisoners may also be subject to body search before and after the meeting to check for contrabands.[79] It is also indicated that prisoners have the right to be visited by and correspond with their family members, and it is where visitors can carry a few permissible items to give to the prisoners, and prisoners write letters to their families provided a request has been made for the same.[80] It is also stated that prisoners are allowed to communicate with the outside world, but restrictions on the use of phones and access to information, and lack of respect for confidentiality and privacy—as usual in the prison—exist, notably in the latter as every talk is heard without any limitation.[81] Similarly, lawyers are accessible to their clients and are provided a special place behind prison guard,

[75] Federal prison regulations No. 138/ 2007), Art 24(1) & (2); SMR rr, 105, 64, 91, 92, 104, 105; ICCP, Art 10(3)'s first sentence.
[76] See apt (n 39)'s Extract from the 2nd General Report (CPT/Inf (92)3]-imprisonment, para 48; SMR, r 23.
[77] Interview with Chambetha Ongom, prison officer, Gambela *Prison*, Gambela town, on 22 March 2022.
[78] ibid.
[79] ibid.
[80] ibid.
[81] Interview with Nyaboth Biel, prison officer, Gambella *Prison*, Gambela town, on 23 March 2022.

demonstrating that meetings with lawyers are allowed with no restriction, and if prisoners want to have them, they can do so by requesting prison office tasked with calling and connecting counsels to their clients.[82]

It was revealed in other interviews regarding notification and permission for prisoners that when a death occurs, the deceased prisoner's parents are notified; however, in situations where there are no parents, the corpse is taken to a hospital for an autopsy before being reported back to the Gambela Land Administration for a land plot and descent burial in which prisoners participate.[83] It was similarly revealed that permission is granted under certain conditions, such as a prisoner's family member's death or serious illness, but not when the prisoners are critically ill themselves or a close relative is getting married.[84] It is not necessary as well for agricultural operations such as plowing, sowing, or harvesting, and other sufficient causes to allow inmate to leave.[85] Leaves are equally granted under certain conditions, such as a prisoner being able to be escorted but not handcuffed.

Transfer to and from the prison is often permitted, and while children are allowed to meet their parents, it is not in the private setting that is required, and there is no way further to meet one's couple even when they are in the same prison:

> "Nyajiok Duol Deng,[86] a refugee imprisoned mother with a young child of five (5) years, who was transferred, upon request, from Addis Ababa's Kalti Prison to Gambela prison, and who met only twice in a year with her two refugee children, currently living at Jew Refugee Camp, not in females room but rather at rope where all people meet, illustrates that prison transfer is

[82] Dep (n 49); Pidak (n 47).
[83] ibid.
[84] Interview with Alemayahu Adane, prisoner, Gambela *Prison*, Gambela town, on 28 April 2022.
[85] ibid.
[86] The situation of this South Sudanese co-murder convict (the others being eighteen men, who are yet serving their sentence at the said prison)'s two children deprived of visitation right & her Kalti born prison daughter who has not received education since birth contravened Article 54(3) of the Gambela prisons proclamation which provides for the prison to arrange a separate place where juvenile prisoners can meet their parents and family and sub-Article (2) of the same which require juvenile prisoners to attend educational programs.

> possible, but meeting, even with one's children, is seriously restricted in GPA."
>
> "The other scenario involves Nyagile Toang Deng, who received a 15-year sentence for being a murderer of her husband and transferred from Akobo Woreda to Gambela maximum security prison (the case being her longer prison term) and was denied access to her three (3) children, who are now living with their aunt and are each 15, 13, and 6 years old, respectively." [87]

A further interview on the issue of notification and information signposted that prisoners had no access to information because neither public news agencies nor private newsstand purchases are permitted within GPA.[88] Broadcasters or journalists are, in addition, prohibited from entering the same to bring to the attention of human rights bodies and others the suffering they see.[89] Media or journalists were, in particular, prohibited from visiting the prison in 2010 Ethiopian calendar mainly because some prisoners were imprisoned for political reason.[90] Even the happening of the conflict itself may go unnoticed unless one's parents tell during prison visit, which is regularly on Saturday and Sunday.[91] And in addition to little information about the lives outside is available to them, no re-entry programmes available to them.[92]

Generally, those testimonies and observations desecrate the principle that prisoners should maintain contact with the outside world, especially their families through regular visits (and foreign prisoners should be allowed to communicate with their diplomatic representatives) and prisoners be kept informed of important items of news, particularly by the reading of newspapers, periodicals, or special institutional publications, hearing wireless transmissions, or lectures, or by any similar means as

[87] Adane (n 84).
[88] Interview with Meritinet Alemu, prisoner, Gambella *Prison*, Gambela town, on 30 February 2022.
[89] Dak Koang, business person/retailer, Gambella *Prison Gate*, Gambela town, on 1 March 2022.
[90] ibid.
[91] Interview with Gatbel Reat Gach, prisoner, Gambella *Prison*, Gambela town, on 2 March 2022.
[92] Koang (n 89).

authorised or controlled by the prison administration since imprisonment will frequently sever family ties and links with the community.

In detail, the stipulation by Article 40(1) of the Gambela prison proclamation that prisoners have the right to be visited by, and to correspond with, above all members of their families and be provided adequate opportunity to communicate with the outside world, is fall out from, for denial, in some cases, of prisoners to visitors by the prison authorities. Sub-Article three (3) of the same's statement that a prisoner has the right to receive current information about the community outside prison by, for example, bringing public or private press resources at his own expense, or following up audio and video programs made available at the prison is not adhered to.

There is also a lack of accord by the prison with sub-Article (4) of the forgoing proclamation for not preparing a sufficient place for prisoners to meet and stay with their visitors and for failure to make imprisoned persons' and their legal counsels' consultation to be within sight but not reachable by its prison staff or employees.[93]

By the same token, the respective avowals of Article 41(1) and (2) of the same proclamation that where there are social activities that the prisoner cannot perform through a representative the prison shall establish a system through which the prisoner can get permission as appropriate during public working hours and, in case of the death of a close relative, a prisoner shall be given permission in the town where the prison is located are not adhered to, as do leaves, with the exception of leaves for the death of prisoner's family member or close relative, for others activities.

The SMR's Rule 58(1) (a) and (b), which provide that prisoners have the right to communicate with their families and friends, as well as Rule 62(2) that refugee prisoners shall be allowed similar facilities to communicate with, or be visited by the

[93] BOP, pr 18(4) also states that interviews between (...) imprisoned person and his/her legal counsel may be within sight, but not within the hearing, of a law enforcement official.

state which takes charge of their interests or any national or international authority whose task it is to protect them are not equally followed in GPA:

> "A case in point is Nyabel Pech, who despite her frequent requests and the close proximity of Itang to Gambella, was denied access to her three (3) children. In other words, she has been debarred from seeing those children (who now reside in Itang Special Woreda with their aunt) since the murder."[94]

Finally, the stipulation by the Gambela Constitution's Article 22(2), which is an exact replica of Article 21(2) of the FDRE Constitution, that all persons shall have the opportunity to communicate with, and be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors, and their legal counsel, is not in accord with by the GPA.[95]

2.1.5. Right to Adequate Food and Drinking Water

Interviews conducted as to GPA's prisoners' food and water went succinctly as follow: despite food is a universal need and only eating habits are highly personal and culture specific,[96] the food provided for prisoners is insufficient in both quality and quantity, as the government only budgeted 18 birr per prisoner per day for food, water, and health care, and the prison does not provide any more food than that amount.[97] In addition, water is unclean as it is fetched directly from the Baro River without being treated.[98] Again, there is no sufficient water for food preparation, personal hygiene, cleaning, watering and any other basic requirements. It is such prison water shortage and lack of appropriate sanitary facilities that escalates or serves as source of unhygienic conditions, causing, for example, the outbreak of the skin problem (or Good Yiel in the GPA's language community), which occupied

[94] In an interview, she admitted that she had murdered her husband, a former head of the Wanthoa Woreda in the Gambela Region.
[95] See also BOP, pr 19.
[96] John Germov & Lauren Williams, *Exploring the Social Appetite: A Sociology of Food and Nutrition* (Oxford University Press, 2017), part 1.
[97] Interview with Nyabol Biel, prison police, Gambella *Prison*, Gambella town, on April 2022, added that the daily budget for food per prisoner is in average 18 Birr which in the context of today's cost of living does not afford bread with tea and should have been for normal breakfast only.
[98] Interview with Nyabel Pech, prisoner, Gambella *Prison*, Gambela town, on 2 April 2022.

each and every inmate's body part, starting from fingers, up through chest, armpit, and penis/vaginas, dejectedly with no remedy to it.[99] The most affected room being the prison's largest room (ie, room 14).[100]

From these testimonies and observations, the underlined objective that prisoners must be provided with wholesome food which is adequate to safeguard their health and strength and must also have regular access to drinking water, both of which are indispensable for leading a life in human dignity and prerequisite for the realisation of other human rights,[101] is debased in GPA, as prisoners do not have a good quality food and access to a sufficient quantity of clean water at all times.

Despite the total reliance of prisoners on prison authorities for their basic needs, including adequate clean drinking water at all times, the reality remains in GPA as water and water facilities and services are not accessible by prisoners in accordance with the ICRC's prescription that the strict minimum physiological needs of an individual are estimated at 3-5 litres of drinking water per day and that this minimum requirement may increase if warranted by the climate and the amount of daily work and physical exercise performed.[102]

There is, in particular, a disregard of Article 11(1) cum Article 12(1) of the ICESCR, which ensures the right to adequate food as a component of the right of everyone to an adequate standard of living. The prison has not also committed itself than is customary in the outside world with provisions (1) and (3) of Article 36 of the Gambela prisons proclamation, which provide sequentially that prison shall provide three times a day sufficient and balanced diet for each prisoner adequate to preserve his/her health and physical fitness and that sufficient clean drinking water shall be made available to every prisoner.[103] Its prison food (18 Birr) and water conditions

[99] Omod (n 64).
[100] Dep (n 49).
[101] SMR, r 22(1) & (2).
[102]ICRC (n 62).
[103] See also Federal prison regulations No. 138/ 2007), Art.10 (1) & (3); SMR, r 22(1) & (2).

may also be in opposition to the Special Rapporteur of the Commission on Human Rights to Food's argument that the right to adequate drinking water should be included in the definition of the right to food, as well as the development of the latter by the CESCR in its General Comment 12 (1999) and the right to adequate water by the same in its General Comment 15 (2002).

2.1.6. Sanitation (Personal Hygiene)

It is indicated, as to GPA's hygiene and sanitation, that prisoners are responsible for cleaning their living spaces as well as communal showers and urinal/toilet areas inside using hands in lieu of cleaning products, while cleaning of other common prison areas is undertaken either by the prisoners themselves as part of their prison labour, or its hired sweepers—there are permanently employed cleaners for its offices though.[104]

Sanitation is problematic inside prison as there is no water and sanitary napkin/pads for female prisoners—who rather use hands, and sometimes their clothes, to care for themselves during the period of menstruation.[105] It is added that prisoners can sometimes urinate in buckets and defecate on plastic as sanitation deteriorates.[106] The prison's toilets surfeit, which burst into, and spoils, the surrounding Gambela town dwellers and, ultimately, the Baro River, has been observed too. There is also absence of barbershop to keep men's beard clean and services provided while inside and also support upon release. Non-existent as well are sanitary facilities (for example toilets, showers and washbasins) despite their great importance, especially in a situation where people are deprived of their liberty.[107] It has also been noted that

[104] Alemu (n 88) there is prison administrative division as Kilil and Zonal with an administrative task assigned to each, for example, the prison guardian responsibility is assigned to Prison Zonal police force while supervision responsibility is assigned to Kilil Prison police.
[105] ibid.
[106] Giel Wengbod, prisoner, Gambella *Prison*, Gambela town, on 2 April 2022.
[107] Dep (n 49) inmates are using broken jerry cans or buckets for showering their bodies.

the physical structures of the prison's buildings are too old which were built during the Italian invasion and of poor quality, with small dirty windows, to mention some.

For health as well as personal dignity in accommodation system where large groups of people live close together, inmates should be provided every opportunity to attend to their most basic bodily functions with a proper degree of privacy; and it is also important for the health of the staff who work in a prison and for the prisoners and there should be proper arrangements for hygiene and cleanliness. However, the information provided, and observations carried out, point out the prison's non-conformity, particularly with the need for adequate sanitary installations and washing and bathing facilities as well as the essential principle that all prisoners shall be provided with facilities to meet the needs of nature in a clean and decent manner and to maintain adequately their own cleanliness and good appearance, as basic amenities including toiletries, such as toilet paper; sanitary napkins, such as sanitary supplies for menstruation; and personal items, such as undergarments, towel, shoes and sandals, are not present.

This, no doubt, effects its departure from Rule 18(1) and (2) of the SMR, which states that prisoners shall be provided regularly with enough water and necessary materials for cleanliness as well as toilet facilities,[108] Article 34(3) of the Gambella prison proclamation (a verbatim copy of Article 34 of the 2019 Federal prison proclamation), which provides that the place where prisoners live shall have sufficient and clean personal hygiene, bathing and toilet facilities considering their personal dignity, privacy and health, and the Robben Island Guidelines' assertion that ready access to proper toilet facilities and the maintenance of good standards of hygiene are essential components of a humane environment.[109]

[108] Federal prison regulations No. 138/ 2007), Art. 9.
[109] APT (n 39)'s Extract from the 2nd General Report ([CPT/Inf] 92)3.

Non-compliance with Article 12, paragraph 1, of the ICESCR, which recognises the right of everyone to physical and mental health, was or can be said to have also been observed.

2.1.7. Freedom of Religion and Belief

A query in relation to the practice of religious faith in GPA is that it is allowed with restriction being the deficiency of facilities inside.[110] Even outside people may come and pray in the prison if they wish.[111] Religious services are observed to the maximum and inmates are allowed to have Bibles and other recreational and instructional books.[112] The prison officials take strong interest in the role of religion in the inmates' lives and there are religious volunteers.[113] As for number, each faith has a lot of followers in the prison, on the other hand, with by far more Orthodox, Protestants (especially the 7 Day ones), and Muslims respectively than the rest.[114] There are also followers of pagan (or earth-based religions) and various forms of Protestants as well.[115] Again, almost all adult inmates investigated admitted that they attend religious services more often and all asserted that religious is very important in their lives and more said to have believe in God.[116] Besides, there is no any preference of one religious over the others inside GPA, and religious switching, among inmates, if any, take place freely.[117]

As per these testimonies, the constitutional rights to free exercise of religions has been affirmed and bolstered in the GPA. The prison meets, in this regards, the religious need of the inmates as required, for instance, by the Gambela

[110] Omod (n 64).
[111] ibid.
[112] ibid.
[113] Interview with Obong Achan, prisoner, Gambella *Prison*, Gambela town, on 1 May 2022.
[114] Pidak (n 47).
[115] ibid indicated that an handicapped and a 30 years prison sentenced since 2008 EC for killing and eaten their father with his mother, of which he served 15 years and, by the research time, awaiting Gambella Regional Government's pardon, is a 666 member (Illuminant); Chony (n 51) is, for instance, a Ngundeng Bong (God gift) follower.
[116] Dey (n 71); Omod (n 64); Achan (n 113).
[117] ibid.

Constitution,[118] particularly because outside people are allowed to come and counsel inmates and try to connect them to religious organisations or social services providers that can offer job training, substance abuse treatment, education and other assistance to help adults in custody before and after their release.[119]

And contrary to expectations that the opportunity to practice one's religion, either in private or in public, is restricted by the fact of imprisonment, the most obvious finding to emerge from those testimonies and observations is that prisoners have in the prison the freedom to follow their religion, and keep books, like Bibles, subject to permission from the responsible prison officer. In other words, the GPA's prisoners have the right to freedom of religion and belief and to the observance of the requirements of their faith, with the exception being to carry or use articles that fall under the prohibited category and rituals obstructing prison routine or rules. And had it not been the absence of prison facilities, prisoners may request the officer-in-charge for special considerations, such as having a separate space or special diet in accordance with their religious beliefs, a fact in line with the principle of nondiscrimination, the essential aim of which is that all prisoners have the right to observe the tenets of their religion and to have access to a minister of that religion.

In other words, the prisoners' right to exercise religious freedom during their stay in prison is somewhat observed in the prison, particularly because prisoners are allowed by its authorities to observe their religion by having in their possession the books of religious observance and instruction of their denomination as required, for example, by Article 38(1) of the Gambela prison proclamation that freedom of religion and belief during prison stay should subsist, and that every prisoner should

[118] FDRE Constitution No. 1/1995, Art 22(2) first sentence (religious councilors).
[119]See USA, Pew Center, *State of Recidivism: The Revolving Door of America's Prisons* (2011)<http://www.pewcenteronthestates.org/report_detail.aspx?id=85899358613>accessed 15 March 2022.

be granted access to, and read, spiritual books, magazines and articles as well as to observe religious holidays.[120]

Yet the requirement of access to qualified representatives of any religion to any prisoner by Article 22(2) of the Gambela Constitution is not observed in the prison, basically for allowing access to it only the representatives of the main religion, especially the Orthodox Christianity one in the region.[121] Also there is lack of guarantee to prisoners of minority religions, such as Jehovah Witness, the observance of the requirements of their faith in defiance of Article 23(1) of the same, which provide the right of everyone to freedom of religion, including the freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest his/her religion or belief in worship, observance, practice and teaching.[122]

2.2. The Challenges and Actions taken and/or planned to be taken by the Gambela Regional Authorities for the Realisation of Rights of Prisoners

2.2.1. The Challenges

As to what constitutes the prison's problems, people are increasingly remarking lack of inter-agency coordination between the GPA, Gambela Justice Bureau, Police Commission, Courts, and the EHRC in regard to prisoners' humane treatment, and between them with other pertinent NGOs, like the ICRC.[123] Yet, sporadic investigations are sometimes carried out by the EHRC, Ethiopian Ombudsman, ICRC, Gambela Justice Bureau, etc, on prison's sanitation, among others.[124] For

[120] SMR, rr 65 cum 66.
[121] See r 65(3) of the SMR; pr 2 of the BAP.
[122] ICCPR, Art.18 (1).
[123] Interview with Wondimu Lama, prosecutor, Gambella *Justice Bureau*, Gambela town, on 30 March 2022.
[124] ibid added that inspection is present but weak a procedure (ie among the challenges faced by prison, one is the weak inspection carried out by relevant external and independent bodies).

instance, the visit from the EHRC is at least three times a year,[125] nevertheless media, especially the independent ones are not allowed to enter and gather data from prisoners.[126] Likewise, the prison's visit from the Justice Bureau is every fifteen days (ie two times a month), and from the police commission and station, three times a week (ie Monday, Wednesday and Thursday),[127] in clear break, for such weak oversight mechanisms in overseeing the treatment of prisoners, with Articles 60-63 of the Gambela prisons proclamation on both internal and external inspections and Article 68 of the same on joint cooperation as well.[128]

Lack of adequate funding (competition with other services for funding as the budget allocated for prison service is not substantial) is also cited as a key reason for any restriction placed on inmates' rights.[129] Put otherwise, high levels of crowding or shortage of dormitories and struggling with limited resources is issue facing it. Exist as well are issues regarding research thereon despite the present sparse data collected by the ICRC on its sanitation, and administration of its resources,[130] in this case, due to inadequate salaries of the prison staff/officers, which causes dissatisfaction and corrupt practices,[131] though police are paid well (8000-12000 Birr) while civil service servants are subject to the levels of pay as other employees in the region.[132] The involvement of legal aid clinic is further a challenging issue, as there is yet no operated legal aid clinic inside prison; the clinics' poor working relations with

[125]Jiokow Bidit & Kor Nyatuoch, interview with Abel Adane, Head of Ethiopian Human Rights Commission *Gambella Branch,* Gambela town, on 4 April 2022.
[126] Pidak (n 47); Pathot (n 52).
[127] Lama (n 123).
[128] See Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2005) 2375UNTS 237.
[129] Pidak (n 47); Pathot (n 52) in greater terms, the general description of a situation of adult prisoners at prison is dreadful: no water let alone its cleanliness; no bedding; no enough food; no enough prison compound walls. Too there is less sanguine about efforts to rehabilitate inmates and prepare for reentry into the community, in particular of whether correctional workers have regular, often positive interactions with inmates.
[130] SMR, r 74 state that salaries must be adequate to attract suitable prison staff and the employment benefits and working conditions must be favourable in views of the demanding nature of the work.
[131] SMR, r 57; UNODC (2010) P. 58.
[132] Interview with Jonn Chuol, Finance Officer, Gambella *Prison,* Gambela town, on April 2022.

judicial, prison and other government authorities, with a paucity of fund ranked at the pinnacle, is a general problem in the entire region.[133] A further noted issue in the prison is the absence of sufficient alternatives to imprisonment.[134]

Similarly, despite in some cases, prisoners are mistreated by prison guards, access to ombudspersons to hear and register their complaints is denied—there is inadequate system for receiving and responding to prisoners' grievances and reports by staff about misconduct.[135] Furthermore, higher risks of violence, riots and other disturbances in protest to the conditions in prisons in general, or for lack of water, food, among themselves, and between them, and the prison guards, or administrators, is an unvarying.[136] Improper management and classification practices by staff are also commonly recounted reasons for high rates of prison violence.[137]

Let alone small clinic with no instruments or equipment, medical services are challenging in the prison as there are no facilities, emergency services, drugs, specialised mental health facilities on premises,[138] against the obvious global view that proper health care is a basic right which applies to all human beings and that the conditions of health care in prisons affect public health as well as the recent progress of Article 37(1) and (2) of the Gambela prisons proclamation that prisoners shall have access to free medical services available to all other citizens pursuant to health service laws of the country and that there shall be establishment of a medical center in the prison with qualified medical personnel, sufficient medical facility and medicine supply that can provide medical services to the prisoners for 24 hours.

Education and works are as well challenging issues as there is a school or education from 4 up to 10 grades with enough teachers, but poorly equipped with no

[133] ibid.
[134] ibid.
[135] Interview with Alemu Mulaku, prisoner, Gambella *Prison*, Gambela town, on 23 May 2022.
[136] Interview with Omod Oman, prisoner, Gambella *Prison*, Gambela town, on 24 May 2022.
[137] ibid.
[138] Omod (n 64) prison has no a prison doctor available on site; in cases where specialist care is needed for the prisoner, the supposedly prison doctors send the prisoner to the specialist institution (nearby hospital), with fees mostly paid by the latter's families.

educational materials, for example, books or reading materials in the library; class rooms, workshops, and attendant of the outside in the prison school inconsistent with Article 43(1) of the Gambela prisons proclamation's averring that a prisoner shall have the right to improve his knowledge and skills by participating in educational and training programs based on his interest during his stay in the prison.[139] This is also in contradiction with the requirements that all prisoners should be treated with human dignity and be provided with education and technical training to assist with rehabilitation.[140] Another problem, opposing the same, is the lack of essential services and programs as well as the prison industries, in particular factory or manufacturing units, kitchen, cleaning, security and/or building maintenance work, which left prisoners with no meaningful productive activities that could divert their mind from other mischievous or nefarious activities while they are in (or serving their sentences).

2.2.2. Actions taken and/or planned to be taken by the GPA's/ Gambela Regional Authorities for the Realisation of Rights of Prisoners

The responses or steps taken by the prison and its relevant regional authorities for all the challenges thwarted or impinging on its prisoners' rights,[141] include, inter alia, revising the regional prisons laws/legal instruments, with new prisons proclamation,[142] and issuing regulations with numerous directives thereto, such as orders on education, brawl, discipline, under approval though—and on the way to publish the same; locating new prison compound wall; renting private rooms in case the prison is overfilled; delivering training to prison officers particularly on the SMR; involving inmates in the administration of the prison or making the bureaucracy of correctional services more effective, such as by instituting inmates

[139] Interview with Kong Maluth, Plane Monitor and Evaluation officer, Gambella *Prison*, Gambela town, on 27 March 2022.
[140] ibid.
[141] Dep (n 49).
[142] ibid Gambela Constitution No.27/1995.

committee, and extending special benefits to prisoners with good conduct who are not taught to be dangerous to society by, for instance, allowing them to work outside of the prison and get a better payment for their work, and permitting those with good conduct who are completing their sentence and have no risk of escape to visit their families and return to prison without police escort in accord with Article 66 of its new proclamation; requesting the involvement of the NGOs for funding; increasing prison inspection or coordinating its correctional activities across different agencies (ie improving interagency coordination) in compliance with Articles 60, 61 and 62 of the same new law; referring prisoners from the prison to Gambella General Hospital, Mettu or Jimma, in grave medical issues; and contracting the Gambella University, though yet to come into picture, to deliver various services to prisoners, including professional counseling service or psychosocial support to mental disorderly inmates; strengthening its working relation with the Federal Prison Commission as well as other regional prisons; improving regional correctional service, researching best practices and expanding implementation of such good practices; establishing system for prisoners' statistics and data exchange, regional standard for the selection, training, ranking, uniform, armament of prison police and other related matters; preparing and follow up implementation of standards on security, custody, basic provisions and rehabilitation of prisoners as required by Article 68 of the same proclamation.

Conclusion

This paper on the whole talks about the rights of the adult prisoners and their protection in the GPA and the study found out the latter's non-adherence to the relevant provisions of the international and regional human rights instruments and national legislations as the treatment of the adults inside is not in accord with them for a dreadful confinement conditions, such as lack of food and water, which makes it worst in the entire correctional system, and of not taking into account these basic

needs to constitute cruel, inhumane or degrading treatment, or torture.[143] In particular, the study has identified that the prison buildings are in disrepair and that most were not built for prison purposes. Also identified is that accommodations have poor ventilations as a result of small and cramped windows that allow a little light and air into (ie poor air quality and high temperature which can create new health problems in addition to intensifying the existing one). The prison, likewise, is extremely overcrowded having only four old dirty toilets and except for gender segregation, the separation of prisoners according to age, type of crime and state of health was not found (ie one interesting finding is separation failure for inmates). Another important finding was that beds are absent and the clothes are shabby and degrading, particularly in the latter for lack of regular wash due to non-existence of institutional laundry service, or detainees' washrooms/laundry areas provided for the purpose.

The research has also shown in respect of recreation and other facilities inside prison that there is poor detention for lack of fully-fledged recreational material, such as big exercise yards, a library, and workshops. The finding of research in relation to visitation and notification indicated that there are only two days allowed for visitation, and no other media in which prisoners can communicate with the outside and hence, hear news. Particularly a lack of adherence to both national and international instruments has been seen in this respect as prisoners are in some cases denied visitors by prison authorities. It has also found that food is inadequate (18 Birr), countering stipulation that prisoners are to be provided three meals per day. Also it has found out the absence of proper water supply and the fetching of water directly from the Baro River. Similarly, on the question of sanitation, this study found out poor prison sanitation, among others, for lack of adequate sanitary facilities and/or basic amenities including toiletries and personal items, as well as water, causing inmates getting ill, and the outbreaking of skin problems. And

[143] Gambela Constitution No.27/1995, Art. 19(1).

although the practice of faith is observed by the prison, there still restrictions, such as the denial of some prisoners to qualified religious councilors, or provision of special diet, or adequate place in which to pray, and lack of guarantee, especially for those of minority religions to observe the requirements of their faith. Nonetheless, visitation/more open communication with the outside world and the practice of faith are somewhat observed rights.

Lack of resources and coordination among relevant prison stakeholders with itself and themselves, the absence of involvement of legal aid clinic, denial of prisoners to ombudspersons to hear and register their complaints, regular violence for challenges, such as water, food, sleeping, sanitation, among themselves, and between them and the prison guards or administrators, absence of class rooms, attendant of the outside in prison education, books in its library, prison industries and restaurants, lack or insufficient provision of medical care to prisoners, are, among others, found as challenges facing it. The research findings, however, as to actions taken and/or planned to be taken by the prison and regional authorities, include, inter alia, adapting regional prison laws to federal prison ones by directly copying the latter; finding new prison compound wall; renting private room in case prison is overfilled; delivering training to prison officers; involvement of inmate in the administration of the prison, such as by being a committee, and extending special benefits to prisoners with good conduct who are not taught to be dangerous to society; requesting the involvement of the NGOs for funding; increasing the prison inspection in compliance with relevant national legislations and international legal instruments.

However, to be a humane correction that meets the prisoners' essential needs, or basic human rights available to every man walking on earth,[144] or comply with human rights standards concerning the treatment of prisoners,[145] as well as the assertion that the conviction of a person does not render him a non-human and still

[144] Mahelaka Abrar, 'Rights of prisoners and major judgment on it' (Aligarh Muslim University 2020).
[145] SMR, r 5.

remains a human who should be treated alike,[146] the prison's compliances with relevant national legislations, and regional and international human rights standards and norms that Ethiopia ratified is suggested. Particularly, its law enforcement officers and authorities have a responsibility to ensure that the treatment of the adults inside is in line with the constitutional rights set forth under Articles 19(1) and 22 of the Gambela Constitution, the basis of current and future Gambela prisons laws.[147]

[146] Coyle & others (2016), P. 72; Abrar (n 144); (Trop v Dulles) (1958) 356 US 86.
[147] See also FDRE Constitution No. 1/1995, Arts.18 (1) & 21.

The Marching of New Era for Commercial Arbitration in Ethiopia: Making Ethiopia an Arbitration-friendly Seat?

Abdisa Beriso Dekebo ♣

Abstract

Arbitration has gained prominence as a preferred forum for commercial dispute resolution, prompting nation states to compete for the coveted title of an arbitration-friendly seat. Ensuring the right legal environment is a necessary, though not sufficient, condition in this journey. Unfortunately, Ethiopia has left behind in promoting arbitration, despite the advent of long-lasting arbitration laws. Legal and institutional pitfalls were among the factors frequently signposted as a reason for the underdeveloped arbitral tradition. In a bid to catch up, Ethiopia recently overhauled its hitherto existing arbitration laws with the ordinance of Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021. This paper aims to assess the role of Ethiopia's new law in making the country an arbitration-friendly seat through qualitatively examining its progressions and retrogressions in light of both fundamental and contemporary notions of arbitration. The paper finds that Ethiopia has taken a step towards arbitration friendliness with the new ordinance, but there remain pressing concerns yet to be advanced.

Keywords: Arbitration-friendly, Commercial Arbitration, Arbitration Seat, The New York Convention, The UNCITRAL Model Law

♣ LL.B (Hawassa University), LL.M (Addis Ababa University); Lecturer in Laws at Dire Dawa University and Former Legal Service Officer at East African Lion Brands Manufacturing Share Company Located in Bishoftu Town (EALBM). E-mail Address: abdisaberiso38@gmail.com or abdisazeynebak@gmail.com.

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1. Introduction

Attributed to its venerable virtues of flexibility, relative certainty, promptness and efficiency, ***"arbitration"*** offers the best commercial dispute resolution forum — compared to litigation.[1] Arbitration as a consensual out-of-court dispute resolution mechanism (DRM) has also vitally contributed for the settlement of a plethora of civil matters. Nowadays, arbitration as a private system of adjudication has become the prevalent norm.[2] In an effort to reap all the benefits of arbitration, nation-states are in a stiff competition in the journey of becoming an arbitration-friendly seat. According to the definition of Delos Guide to Arbitration Places (GAP),[3] a ***"safe seat"*** for arbitration is those places where the legal framework and practice of the court support recourse to arbitration as a fair, just and cost-effective DRM. From the stand point of a legal framework, thanks to the paramount importance of the UNCITRAL model law, national states are working towards adopting the right legal environment in line with modern arbitration principles and practices.[4]

In a country like Ethiopia where there is rampant court congestion, the aspiration to become an arbitration-friendly seat could open a room to take advantage in circumventing and/or reducing case congestion by switching their settlement destine to arbitration tribunals. Incontrovertibly, a reduction of case backlogs leave judges with an increased possibility to render efficient and effective judgment. Being an arbitration-friendly seat, in another continuum, results in the proliferation of domestic arbitrations, increment of FDI and cross-border trade. However, Ethiopia, long after the advent of relatively modern arbitration rules through the

[1]Zekarias Keneaa, 'Arbitrability in Ethiopia: Posing the Problem' (1994) 17 Journal of Ethiopian Law 116 <https://www.africabib.org/rec.php?RID=Q00014782> accessed 15 March 2022

[2] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) <https://www.cambridge.org> accessed 14 March 2022

[3] David D Caron and Maxi Scherer, *Delos Guide to Arbitration Places* (Delos Dispute Resolution, [1st] edn 2018) < https://delosdr.org/gap/> accessed 12 March 2022

[4] UN Commission on International Trade Law Secretariat, 'International Commercial Arbitration: Possible Future Work in the Area of International Commercial Arbitration': <https://digitallibrary.un.org/record/1492931> accessed 23 March 2022

instrumentality of the Civil Code and the Civil Procedure Code, remains outside the camp of arbitration-friendly systems.[5] The legal and institutional lacunas are among the factors frequently signposted as a reason for Ethiopia's underdeveloped arbitral tradition. The hitherto existing arbitration laws were criticized for their sketchiness and incomprehensiveness.[6]

Being cognizant of the legal pitfalls, Ethiopia has recently overhauled its arbitration laws to become a hub of international commercial dispute resolution. Undeniably, adoption of an up-to-date and adequate legal framework is not a '***sufficient condition'*** to make a country an arbitration-friendly seat.[7] An independent, competent and efficient judiciary and arbitration lawyers, arbitration minded business community, accessible and secure seat of arbitration and ethical fortitudes, among other factors, are required to bring life to such decorated and ample law.[8] As a result, any effort made to examine the arbitration friendliness of a nation should essentially explore all those determinant factors. Yet, having an adequate law is a '***necessary condition'*** to be labeled and recognized as an arbitration-friendly seat. This article, in an effort to examine the arbitration friendliness of Ethiopia, is confined to (leaving other factors aside) appraisal of the Ethiopian Arbitration and Conciliation Working Procedure Proclamation (**hereinafter,** "The New Arbitration Law").[9] In so doing, not the whole body of the new law is explored. Only those rules and principles, as enshrined under the new arbitration law, professed as

[5] Hailegebriel Feyissa, 'The Role of Ethiopian Courts in Commercial Arbitration' (2010) 4 Mizan Law Review 297 <https://www.ajol.info/index.php/mlr/article/view/63090/50958> accessed 23 Febraury 2022

[6] Alemayehu Yismawu Demamu, 'The Need to Establish a Workable, Modern, and Institutionalized Commercial Arbitration in Ethiopia' (2015) 4 (1) Haramaya Law Review 37, 42-46 <https://www.ajol.info/index.php/hlr/article/view/148617/138119> accessed 23 February 2022

[7] Fabien Gelinas, 'Arbitration and the Global Economy: The Challenges Ahead' (Social Science Research Network 2000) SSRN Scholarly Paper 1342341 <https://papers.ssrn.com/abstract=1342341> accessed 23 March 2022

[8] Caron and Scherer (n 3) 2

[9] Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021, Fed. Neg. Gaz., Year 27, No. 21, 2 April 2021 (hereinafter 'The New Arbitration Law') art 7 (7)

indispensable barometers for the determination of arbitration friendliness by the arbitration community will be addressed.

To attain the purpose of the paper, the author has applied a qualitatively approached doctrinal legal research method and thereby provided a systematic exposition of the rules governing arbitration in the new arbitration law and analysis the relationship between each rules. The work steps further to intensively evaluate the dearth of the new arbitration law and recommend changes to the rules found inadequate. The author's approach is molded after the works of Loon Fuller and Fekadu Petros on a related thematic area. In his theory of adjudication, Loon Fuller identified essential and optimal requirements of institutions of election, contract and adjudication as underlying institutions of dispute resolution.[10] In related work, Fekadu Petros has also made use of these essential and optimal standards to enunciate the difference between election, contract and adjudication as institutions of dispute resolution.[11]

Taking insight from the approach of these authors, this study identifies some standards as indicators of arbitration friendliness by categorizing them into fundamental and optimal standards to be able to measure arbitration friendliness of the new Ethiopian arbitration law. The fundamental standards are those defining concepts and rules of arbitration without which the institution of arbitration could fails in its original purpose of inauguration. The optimal standards are those contemporary rules and concepts of arbitration that raise the institution of arbitration to an ideal (perfect) level of realization. If someone is cynical of the appropriateness and relevance of those barometers of arbitration friendliness, it equally places the validity of the analysis and finding of this paper into question. Nevertheless, as it is articulated in section two of this article, since the rules and principles of arbitration used as standards for determination of arbitration friendliness by the author are those

[10] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 (2) Harvard Law Review 353, 363

[11] Fekadu Petros, 'Underlying Distinctions between ADR, "Shimglina" and Arbitration' (2010) 3 Mizan Law Review 105 <http://www.ajol.info/index.php/mlr/article/view/54008> accessed 23 February 2022

rules and principles which are highly celebrated in the realm of international arbitration, they do not invite questions of appropriateness and relevancy at any cost. To put one necessary footnote for the reader, no reference to national arbitral laws of different states, institutional arbitration rules and model laws in this article have the primary purpose of adopting comparative research approach. They are rather used for the purpose of persuasion and articulation of the subject matter understudy.

Depending on the aforementioned backdrops, part two of this article, which immediately follows the introductory part, contains five subsections destined to the articulation of fundamental standards for the determination of arbitration friendliness and simultaneously juxtaposed them with the rules and principles of arbitration enshrined under the new Ethiopian Arbitration Law to be able to determine whether it is arbitration-friendly or not. The third section examines the notion of multiparty arbitration as an optimal standard for the determination of arbitration friendliness vis-à-vis the progresses and troubles of the new Ethiopian Arbitration law in regulating the subject matter. Concluding remark and suggestion of the way forward makes the fourth and final part of this article.

2. Fundamental Standards for the Determination of Arbitration Friendliness

There are no hard and fast rules on the proper barometers for the determination of arbitration friendliness. However, it is possible to incontrovertibly point out some standards as indicators of arbitration friendliness from practices and principles which have acquired high level of acceptance before arbitration community. These practices and principles can be found in the works done by international working

groups,[12] national arbitration legislations, and arbitration conventions.[13] Such practices and principles can also be discerned from books and articles published by distinguished practitioners and scholars of arbitration. A further source of such concepts and practices can also be found in specific institutional arbitration rules.[14]

In the same vein with international literatures, the majority of literatures written on arbitration in Ethiopia so far pleasantly accept an expanded scope of arbitral matters, optimized party autonomy, increased power of arbitral tribunal, and adoption of minimal court intervention and pro-enforcement approach as an arbitration friendly gesture which needs to be promoted. These pro-arbitration gestures form part of the so called rudimentary pro-arbitration rules and concepts labeled as fundamental standards for the determination of arbitration friendliness by the author of this work.

In his old-aged contribution, Zekarias Keneaa succinctly articulates how the determination of the scope of arbitrable matters remains an ache in Ethiopia. He poses the problem that Ethiopian laws lack adequate guidelines for the determination of arbitrability.[15] On another note, Aron has reached a seemingly erroneous conclusion that portrays inarbitrability as a principle and arbitrability as an exception to be provided by the law after a systematic explanation of arbitrable matters and exposition of their related problems.[16] In one of his work, Seyoum Yohannes very well portrays the necessity of party autonomy in modern arbitration though the work

[12] The works of the International Bar Association (IBA) such as IBA rules on taking of evidence, IBA Guidelines on conflict of interest, IBA Guidelines on party representation and the model laws, notes, guidelines, reports prepared by international organization such as UNCITRAL, ICC, CIArb are good indicators of works done by international working groups which aimed at indicating best practices and principles in international arbitration.

[13] Robin Oldenstam and Kristoffer Löf, *Best Practice in International Arbitration* (Universitetforlaget Oslo 2015) accessed 15 March 2022

[14] ibid

[15] Keneaa (n 1)

[16] Aron Degol, 'Notes on Arbitrability Under Ethiopian Law' (2011) 5 Mizan Law Review 150 <https://www.ajol.info/index.php/mlr/article/view/145484/135011> accessed 23 February 2022

was primarily confined to the examination of the role of party autonomy in determining substantive law applicable to the merit of the dispute.[17]

Haile Gabriel Feyissa, after revealing the supportive role played by Ethiopian courts, concluded that Ethiopian courts generally assume an extended role, especially during the initial two stages of arbitration. He stresses the existence of premature judicial intervention during arbitral proceedings, broader judicial review of arbitral awards in the form of appeal, setting aside, and cassation review, and stringent conditions for enforcement of foreign arbitral awards which technically denies their enforcement in Ethiopia.[18] Other writers such as Alemnewu,[19] Brihanu,[20] and Diguma[21] have also explain the existence of maximal court intervention and quest for the reform of Ethiopian laws in light of modern arbitration frameworks. In related work, Solomon Emiru has remarked that Ethiopian arbitration law excessively restricts the power of arbitral tribunal by failing to fully recognize the principle of competence-competence, remaining silent on the principle of separability, and adopting a restrictive interpretation of problematic arbitration clauses.[22]

Another category of literature written on the subject matter aspires to examine the enforcement aspect of awards, an aspect that plays a crucial role in boosting the

[17] Seyoum Yohannes Tesfay, 'The Normative Basis for Decision on the Merits in Commercial Arbitration: The Extent of Party Autonomy' (2017) 10 Mizan Law Review 341

[18] Feyissa (n 5)

[19] Alemnew Dessie, 'The Extent of Court Intervention in Arbitration Proceedings: Ethiopian Arbitration Law in Focus' (2019) 2 Sch Int J Law Crime Justice 54 <https://www.researchgate.net/publication/340633799> accessed 25 February 2022

[20] Birhanu Beyene, 'Cassation Review of Arbitral Awards: Does the Law Authorize It?' (2013) 2 Oromia Law Journal 112<https://www.ajol.info/index.php/olj/article/view/97100/86406> accessed 25 February 2022 AD. See Also Birhanu Beyene 'The Degree of Courts Control on Arbitration under Ethiopian Law: Is It to the Right Amount?' (2012) 1 (1) <https://www.ajol.info/index.php/olj/article/view/82422/72576> Accessed 25 February 2022

[21] Gellila Haile Duguma, 'Judicial Review of Arbitral Awards by Courts as a Means of Remedy: A Comparative Analysis of the Laws of Ethiopia, The United Kingdom, and The United States' (LLM Short Thesis, Central European University 2018) <http://www.etd.ceu.edu/2018/diguma_gelila.pdf> accessed 25 February 2022

[22] Solomon Emiru Gerese, 'Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960' (LLM Short Thesis, Central European University 2009) <http://www.etd.ceu.edu/2009/gerese_solomon.pdf> accessed 25 February 2022

country's goodwill as an arbitration-friendly. Writers give due regard to enforcement of foreign arbitral awards except for the work of Birhanu that attempts to expound enforcement of domestic awards.[23] Writers like Fekadu[24] and Tecklehagos[25] reveal how much Ethiopia adopted an anti-enforcement approach riddled by a lack of similarity in interpretation and application of grounds for recognition and enforcement of foreign arbitral awards.

To get rid of such backwardness, Ethiopia has recently revitalized its arbitration law. Now, legal practitioners, academicians, and other concerned organs are zealous to know the progresses brought by the new law and its implication on the overall arbitration stance of Ethiopia. So far, slight attempts have been made by bloggers to explain the changes brought by the new law. This work is a new approach to studying the subject matter in two prisms. One, unlike most prevailing works that have attempted to examine a single aspect of the Ethiopian arbitration regime, it strives to analyze all relevant aspects of arbitration law that have an eventual effect on the determination of arbitration friendliness. Two, it is a breakthrough in examining the role of the new Ethiopian arbitration law in making the country an arbitration-friendly seat. Hence, in the following sub-sections the author will scrutinizes the basics of these fundamental standards and simultaneously juxtapose them with the rules and principles of arbitrations enshrined under the new Ethiopian Arbitration Law to be able to determine arbitration friendliness of the new law.

[23]Birhanu Beyene, 'The Homologation of Domestic Arbitral Awards in Ethiopia' <https://www.researchgate.net/publication/256042287>> accessed 26 February 2022

[24] Fekadu Petros, 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Advantages, Disadvantages and Some Remarks on Ethiopia's Course of Action Ahead' (2014) 8 (2) Mizan Law Review 470 <https://www.ajol.info/index.php/mlr/article/view/117556/107114> accessed 25 February 2022

[25] Tecle Hagos Bahta, 'Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia' (2011) 5 Mizan Law Review 105 <ttps://www.ajol.info/index.php/mlr/article/view/68771/56836> accessed 7 May 2022

2.1. Determination of Arbitrability in Modern Arbitration Laws

Arbitrability, in its objective perception, is used to describe disputes amenable to arbitration.[26] Not all disputes are amenable for determination by arbitration due to some public policy reasons. The older justification for inarbitrability was the perception that the referral of some categories of dispute to arbitration, an institution not controlled by the state itself, goes against sovereign dignity. Today, arbitration friendly legal systems have relinquished this view.[27] Nowadays, beneath every restriction on arbitrability there exists one solid justification.[28] The central theme behind non-arbitrability of certain disputes is a perception that only a court could correctly interpret matters involving public concern and give effect to it in accordance with the intention of the national parliament.[29]

So far, states have adopted different approaches in crafting their arbitrability provision in national laws. A close inspection of various national laws reveals the following three dominant approaches for determining arbitrability. Some states employed the "disposal right approach" and accordingly, matters which the parties may freely dispose of are made arbitrable. Other states have adopted the approach of inalienable right for arbitrability and declared inalienable subject matters inarbitable.[30] Inalienable rights, among other rights, relate to questions of personal status and capacity, divorce, or judicial separation that majorly contains non-economic interests.[31] However, according to some state laws that follow the inalienable rights approach, some non-monetary claims can still be arbitrable if

[26] Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academy of Law Journal 874
[27] Beata Kozubovska, 'Trends in Arbitrability' (2014) 1 (2) IALS Student Law Review 20 <https://sas-space.sas.ac.uk/5615/> accessed 23 March 2022
[28] Andrew Rogers, 'Arbitrability' (1992) 1 Asia Pacific Law Review 1 <https://www.tandfonline.com/doi/full/10.1080/18758444.1992.11787959> accessed 23 March 2022
[29] ibid
[30] Sofia Elena Cozac, 'Arbitrability of Disputes and Jurisdiction of Arbitrators'' [2018] Rev Stiinte Juridice 231
[31] ibid

parties are capable of concluding a compromise upon the matter in dispute. Some other states deploy the "listing approach" by enumerating matters which are considered inarbitrable.[32]

In a short, in deciding arbitrability, each state may tail it following its own economic and social policy.[33] Today, the gradual decline of judicial hostility towards arbitration has brought an expansion of the domain of arbitrable matters.[34] Whatever of the aforementioned approaches that the state follows in determining issues of arbitrability, expansion of the domain of arbitrable matters has become the new normal in modern arbitration laws.

The old Ethiopian arbitration regimes were blamed for lack of general guidelines for determination of arbitrability.[35] Even, some scholars argued that only the general principle of public policy laid the ground for determination of arbitrability.[36] The new Ethiopian arbitration law, however, demonstrates relative progress in the determination of arbitrability compared to the old system. Nevertheless, a critical examination of the new law's approach towards determination of arbitrability unveils that the law has not brought a plenary correction to the problem and there still remain issues to be resolved.

The new law has opted for the stipulation of inarbitrable matters rather than providing a general framework as it has promised in the preamble. Accordingly, we may come across some basic exclusionary rules adopted by the new law which

[32] See Italian Rules of Civil Procedure art 806, Switzerland Federal act on Private international law art 177

[33] Blackaby Nigel and others, *Redfern and Hunter on International Arbitration*, vol 1 (Oxford University Press 2015) <http://oxia.ouplaw.com/view/10.1093/law/9780198714248.001.0001/law-9780198714248> accessed 24 March 2022

[34] Harshad Pathak and Pratyush Panjwani, 'Mandatory Rules and the Dwindling Restraint of Arbitrability' (2018) 5 NLUD Student Law Journal 282

[35] Keneaa (n 1) 117

[36] Tilahun Teshome, 'The Legal Regime Governing Arbitration in Ethiopia: A Synopsis' (2007) 1 Ethiopian Bar Review 117, 125

eventually have the effect of creating chaos in the identification of arbitrable matters in Ethiopia.

The first exclusionary rule is the outright subject matter exclusion adopted commencing from sub-articles 1-8 of article 7. The writer is cynical of this outright exclusion of certain subject matters through the listing approach. Some cases like tax disputes, bankruptcy issues, dissolution of business organizations, and trade and consumer protection matters are neither of sheer public interests nor pure economic concerns. They involve both matters of public concern and individual economic interest. Now the argument is, if it is a wise approach to out-rightly and unconditionally exclude these matters from the ambit of arbitration. Other national arbitral laws tackled such issues entangled with both public and private concerns by providing a general framework for arbitrability in terms of either the "Disposal right approach"[37] or "Inalienable right approach"[38] and thereby leaving room for the judiciary or the arbitral tribunal to determine the arbitrability on a case-by-case basis.

Eventually, such an outright exclusion of certain subject matters from the ambit of arbitrability through the listing approach narrows the domain of arbitrable matters. The hitherto existing laws on arbitration in Ethiopia, in this regard, had at least left a possibility for arbitrability of civil matters not explicitly deemed inarbitrable by law. It was argued that under the old saga at least from the point of view of the law, administrative contracts were the only matters explicitly excluded from the ambit of arbitration by Article 315 (2) of the Civil Procedure Code (CPC). This argument is also well corroborated by the silence of the Civil Code (CC) on matters capable of being arbitrated and stipulation for arbitrability of plethora of civil matters here and there in various substantive laws of the country. Hence, it may be concluded that except for the inarbitrability of administrative contracts which has been around for over sixty years, there was a possibility to determine the arbitrability or

[37] Belgium, Italy, Netherlands, and Sweden are among the countries which adopted this approach.
[38] Section 1030ff of the German ZPO and Article 582ff of the Austrian Code on Civil Procedure

inarbitrability of other civil matters on a case-by-case basis for the judiciary. Surprisingly, however, the new proclamation has come up with areas at least not explicitly excluded from the ambit of arbitrable matters for the last over sixty years through adopting the listing approach. This is an indication of retrogression rather than being an indication of progression especially if it is seen in light of the global trend toward increasing the domain of arbitrable matters.

The second exclusionary rule applied by the new law is the legislative exclusion under Article 7 (10). The Proclamation leaves room for other laws to make other matters inarbitrable. This is an open-ended discretion that enables the law-maker to list as many non-arbitrable matters as possible in any law that is going to be issued. The inclusion of this provision may potentially be a threat to the general policy of arbitration by creating uncertainty as to what matters are arbitrable and what matters are not. It leaves a wide room for the government to have long arms on arbitrability of matters.

The other volatility created by the new law is the issue of drawing its relationship with other laws. In Ethiopia, labor matters are arbitrable from the very codification history of labor law. This trend is maintained in the existing labor law too.[39] The Cooperative Societies Proclamation as well allows members of the society to resolve their differences through arbitration.[40]

Now, imagine the misnomer between these laws and the new arbitration law. Assume that parties have agreed to arbitrate their case based on these permissive laws. However, the subject matter under which the parties agreed to arbitrate overtly falls under inarbitrable subject matter by the new law in either of the exclusionary rules discussed above. Now the question is which law prevails and through which

[39] Labor Proclamation No. 1156/2019, Fed. Neg. Gaz., 25th year, No 89, Addis Ababa, 5th September, art 144(1)

[40] Cooperative societies proclamation No. 985/2016, Fed. Neg. gaz., 23th year, No 2, Addis Ababa, art 62-67

law does the arbitral tribunal/courts determine the arbitrability or otherwise of the dispute.

To add a more concrete illustration, Article 42 (3) of the E-Transaction law permitted settlement of E-Commerce disputes through arbitration in cases of failure of its settlement via an internal compliant mechanism. Now let's assume that a dispute arises between E-Commerce Operator and a consumer and the parties require settlement through arbitration. On the other side of the continuum, consumer protection disputes are out-rightly excluded from arbitrability by the new arbitration law. So, which law is going to be applied to determine arbitrability?

The same paradox was to be created with disputes emanating from administrative contracts. The Ethiopian Roads Authority, the Ethiopian Civil Aviation Agency, and the Ethiopian Privatization Agency are among the administrative bodies that can resolve disputes through arbitration.[41] Similarly, the Public-Private Partnership Proclamation empowers government agencies to enter into arbitration agreements for resolution of disputes.[42]

Conversely, administrative contracts are made inarbitrable under the new law. Had it not been for the exceptional rule under the new arbitration law that recognizes the arbitrability of administrative contracts in cases provided by the law, we may encounter the same problem raised above with labor, cooperative societies, and consumer dispute scenarios.[43] However, the arbitration law succinctly responded to such potential deadlock concerning the arbitrability of administrative contracts by inserting an exception which allows arbitrability of administrative contracts in cases provided by other laws. Again the question is, can we use the same panacea for the other cases enunciated above? At this juncture, it is vital to spotlight on the

[41] Yohannes W/Gebriel, 'Institutional Commercial Arbitration under Ethiopian Law: The Case of Chamber Arbitration Institute' (2009) 5 Business law series AAU school of law 78
[42] Public-private partnership proclamation 1076/2018, Fed. Neg. Gaz., 24th Year No. 28, Addis Ababa, 22nd February, 2018, Art. 59
[43] The New Arbitration Law (n 9) Art. 7 (7)

discrepancy between the wordings of the Amharic and English version of the proclamation. Hence, we need to read article 7 (7) of the English version circumventing the word "***Not***" so as to take the right essence of the article.

All these stalemates tell us that the issue of arbitrability is not settled yet by the new law and is fraught with controversy. A law that hosts controversy in the determination of arbitrability is not an arbitration-friendly law at least in this respect.

The early draft provision of arbitration rules prepared by Professor Tilahun Teshome under the auspices of the then Ethiopian Arbitration and Conciliation Center, in brief, had by far adopted a better approach to the determination of arbitrability. The draft had a provision that reads: '…unless mandatorily provided by other laws, any dispute involving economic interest is arbitrable".[44] Apart from this explicit stipulation, the draft stipulates that '…any form of disagreement which may be settled through agreement and negotiation can also be arbitrable'.[45] In such a way the said draft law has provided a general guideline for determination of arbitrability while the new law has failed to do so. Whatever the motive behind it, the technique for crafting arbitrability adopted by the new law is one of the brawny failures where buries efficacy of the new arbitration law is highly unveiled.

2.2. The Extent of Party Autonomy in Arbitration-friendly Systems

Party autonomy is a ***sin qua non*** for arbitration and an arbitration agreement is an instrument majorly used to exercise party autonomy. Through this agreement, parties can exclude courts from their dispute and regulate arbitral procedures.[46] Nevertheless, like every right, party autonomy is not an unlimited prerogative.

[44] Tilahun Teshome and Zekarias keneaa, የግልግል ዳኝነት ህግ ረቂቅ አዋጅ: Ethiopian Arbitration and Conciliation Center Unofficial model law document art 6 (1)
[45] ibid art 6 (1) in tandem with art 6(2)
[46] Şeyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent' [2012] Yalova Üniversitesi Hukuk Fakültesi Dergisi 161

Hence, justifiable limitations can be imposed based on public policy grounds and the requisites of natural justice.[47]

One of the major aspects of arbitration to be chosen by parties in their arbitration agreement is the so called lex arbitri or the law of arbitration. When choosing the lex arbitri that governs the dispute, the parties consider the suitability of the lex arbitri.[48] To be an opted place of arbitration, states strive to come up with a suitable law of arbitration.[49] Arbitration-friendly laws are those laws that impose modest validity requirements for arbitral agreements, that allow minimal intervention in the arbitration proceedings, and that bestow a greater extent of freedom on the parties, among other virtues.[50]

The principle of party autonomy has been recognized in a plethora of international instruments[51] and national legislation,[52] and institutional rules[53] to varying extent. National arbitration laws reinforce the principle of party autonomy by stipulating do's and don'ts. However, there also exist other complementary rules of arbitration that bring life to the principle of party autonomy. The doctrine of separability preserves the autonomy of the parties by escaping the invalidation of arbitration agreements due to the invalidation of the main contracts. Overambitious scholars of

[47] Moses Oruaze Dickson, 'Party Autonomy and Justice in International Commercial Arbitration' (2018) 60 (1) International Journal of Law and Management 114

[48] Sunday A. Fagbemi, 'the Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2016) 6 (1) Journal of Sustainable Development Law and Policy 202, 231 <http://www.ajol.info/index.php/jsdlp/article/view/128033> accessed 14 May 2022

[49] Alex Mawaniki, 'The Role of Legislation in Developing and Sustaining an Arbitration Friendly Seat' (2015) <https://ncia.or.ke/wp-content/uploads/2021/03/The-Role-Of-Legislation-In-Developing-And-Sustaining-An-Arbitration-Friendly-Seat.pdf> accessed 14 May 2022

[50] Dursun (n 46)

[51] The UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments as adopted in 2006), (hereinafter 'The UNCITRAL Model Law') art 28, 19 (1), 5 (1) and art VI (a) and art V 1(d) of the New York Convention.

[52] For instance, the principle of party autonomy is reflected in the 1996 English arbitration act by allowing parties to agree on manner of settlement of their dispute subject to public interest exception under S 1 (b)

[53] The rules of international chamber of commerce have also embedded such principle here and there among which the right to choose the applicable law is one

arbitration used to call this principle the principle of autonomy of arbitration clause.[54] Restricted judicial review and finality of arbitral awards will also enhance party autonomy by limiting court intervention to the proper extent and enforcing the rendered award. An interpretation of doubtful arbitration agreements as to their existence, validity, scope, and inconsistent and uncertain arbitral agreements in favor of arbitration is also taken as pro-arbitration approach which reinforces party autonomy.[55]

As stated above under this section, an arbitration agreement is the main tool through which parties exercise their freedom to arbitrate. Whatever restrictions imposed on the manner of making, form, extent, and other aspects of this agreement will have a direct effect of limiting party's autonomy.

The new Ethiopian arbitration law begins to regulate this agreement by rectifying the blurry usage of the term "arbitral submission" under the CC to indicate, while it suggests otherwise, both arbitration clauses (***Clouse Compromissoire***) and arbitral submission (***act de Compromise***). Now, the nomenclature of this fundamental contract in arbitration is replaced by an inclusive term called "arbitration agreement" under the new law.[56]

Among the areas through which unwarranted restrictions can be imposed on party autonomy is the issue of validity requirement and interpretation of arbitration agreements. To begin with the first, the CC and CPC (Civil Procedure Code) require, in addition to the general contract requirement, the capacity to dispose the right

[54] Phillip Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' (2013) 30 Journal of International Arbitration 511 https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/30.5/JOIA2013033> accessed 15 March 2022

[55] Hossein Fazilatfar, 'Adjudicating "Arbitrability" in the Fourth Circuit' (2020) 71 South Carolina Law Review 741

[56] The New Arbitration Law (n 9) art 2 (1)

without consideration to enter into an arbitration agreement. This requirement of special capacity is now given a mortal blow by the new proclamation.

The old Ethiopian arbitration laws also impose stringent requirements on the form required for an arbitration agreement. The civil code requires contracts made with respect to immovable property, guarantees, insurance, and administrative contracts to be made in written form, being supported by special document signed by all parties and attested by two witnesses.

These stringent conditions are also given a mortal blow by the new Proclamation. Under the new law, making written agreement will only suffice to have a valid arbitration agreement. A more liberal model law approach is adopted by considering agreements made orally, through conduct, and any other means as satisfying written requirement if they are recorded, signed by all parties, and two witnesses later on. The same holds for electronic agreements as long as they are accessible for future use (adoption of the principle of functional equivalence for electronic contracts).[57] In short, parties are at more liberty to conclude an arbitration agreement under the new law.

The CC had implied effect of limiting party autonomy by providing a restrictive interpretation of arbitration agreements.[58] Under the CC, any doubt regarding the existence, validity, and scope of the arbitration agreement was to be resolved in favor of judicial adjudication rather than arbitration. This would be like re-inviting consensually ousted courts to the disputes of the parties. Such rules are not part of the new law.

The place of party autonomy can also be weighed against proscription or permission of the law to insert finality clauses or contractually extended grounds of review. These two concepts have contrasting effects in the sense that while the finality clause

[57] Ibid Art 6

[58] Civil Code of the Empire of Ethiopia, Proclamation No 165 of 1960, Neg. Gaz. year 19, No. 25, May 1960 (herein after "Ethiopian Civil Code") Art. 3329

brings finality of the award once and for all, contractual extension of grounds of review subjects the award for further review.

In the old Ethiopian laws, the freedom of parties to insert finality clauses and their impacts on restraining review of judgments has been a contentious issue both in-laws and the court cases of the country.[59] One cannot also find an easy answer for the question as to whether the law permits contractual expansion of grounds of review under the old laws. In this respect, the new law, however, has demonstrated a progress by bestowing on the parties the right to insert a finality clause which would avoid the possibility of review of the award by the cassation bench of the Supreme Court.[60] The new law is generously liberal in that it allows the insertion of finality clauses that restrict the right of parties to set aside the award.[61] Parties are also given the right to expand avenues of review through an agreement to appeal.[62]

The other avenue for the recognition of the principle of party autonomy is the permissive and mandatory rules of the new law. The new Ethiopian arbitration law is more liberal as it grants wide discretionary power to parties. These discretionary powers are usually stipulated through the use of phrases like "unless otherwise agreed" or "may" throughout the body of the Proclamation. Accordingly, parties are granted the discretionary right to determine the number of arbitrators, procedures of appointment, procedures of objection against appointments, and quest for interim measures. They are also endowed with the right to object to the appointment of arbitrators with certain procedural prerequisites.

Furthermore, they have the right to remove arbitrators and agree on the procedures for the appointment of a substitute arbitrator. They can potentially restrict the power

[59] *National Motors Corporation vs. General Business Development* (2009) Federal Supreme Court Cassation Bench File No.21849 Ethiopian Bar Review report (2009) 3 (1) 149. See also *Beherawi Maeden Corporation vs Danee Driling* (2011) 10 Federal Supreme Court Cassation Bench 350
[60] The New Arbitration Law (n 9) Art. 49 (2)
[61] ibid Art. 50 (1)
[62] ibid Art. 49 (1) and (3)

of the tribunal to issue orders of interim measures. They have the right to request the court to order interim measures. Parties can also determine the rules of procedure to be applied by the tribunal. The right of parties to choose the place and language of arbitration is also duly recognized by the new law. They can also determine the form of proceedings whether to be made orally or with written arguments.

Apart from prescribing those permissive rules, the new law has also contained certain mandatory rules. In domestic arbitration, parties do not have the right to choose the substantive law to be applied to the case.[63] Furthermore, though the law prescribes the right to choose the law applicable to the arbitration agreement and the proceedings, their choice cannot be enforced if the chosen law is impossible on its own or violates the mandatory provisions of the new law.[64]

Besides those do's and don'ts enunciated in the above discussion, the new law has incorporated other rules of arbitration which reinforces the principle of party autonomy one way or another. The doctrine of competence-competence, separability, non-restrictive interpretation, limited judicial review, and pro-enforcement approach adopted by the new law, would have a big impact on realization of the principle of party autonomy.

2.3. The Power of Arbitral Tribunals in Modern Arbitration Systems

The principle of competence-competence, separability, and approaches to the interpretation of arbitration agreements are the main mirrors that reflects the extent of power granted to arbitral tribunals.

2.3.1. Separability and Competence-Competence

Separability and Competence-Competence originated as a response to state indifference and hostility towards arbitration at the early time.[65] These principles

[63] ibid Art. 41 (4)
[64] ibid Art. 10
[65] Landolt (n 54) 512

ensure arbitration efficiency by prohibiting parties from engaging in dilatory behavior of taking cases to court to delay the arbitration proceeding despite the existence of an agreement to arbitrate[66]and reduce early state interference in the arbitration proceedings.

Per the principle of separability, an arbitration clause is deemed to have a separate existence from the main contract in which it is contained. Accordingly, since the fate of the arbitration clause does not depend upon the fate of the main contract, it may survive the invalidity of the underlying contract.[67] Had it not been for this principle, an arbitration clause will not survive the invalidation of the main contract and the arbitrators will lose their source of power. The ordinance of this principle in national arbitral laws will endow the arbitrator with the power to hear any dispute concerning the main contract including a dispute on the very existence, validity, and termination of the main contract without the risk of losing their jurisdiction in case they ruled for invalidation of the main contract.[68] Separability has attained universal acceptance as a pro-arbitration policy and is included in the UNCITRAL model law and other national legislations.[69]

Ethiopia has fully overhauled its anti-arbitration stance concerning the principles of Separability, Competence-Competence, and interpretation of arbitration agreements

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[66] Giulia Carbone, 'Interference of the Court of the Seat with International Arbitration, The Symposium' (2012) 2012 Journal of Dispute Resolution 217 <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1128&context=jdr> accessed 14 March 2022

[67] Jack Tsen-Ta LEE, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' (1995) 7 Singapore Academy of Law Journal 421 <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1574&context=sol_research> accessed 14 March 2022

[68] After deciding for invalidation of the main contract arbitrators will still have the jurisdiction to decide on the consequence of invalidity of the main contract per the principle of Separability

[69] Ilias Bantekas and others, *UNCITRAL Model Law on International Commercial Arbitration (a Commentary)// Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/uncitral-model-law-on-international-commercial-arbitration/competence-of-arbitral-tribunal-to-rule-on-its-own-jurisdiction/5F8AC21C368EBD1D10F1D6B01BD03929>accessed 15 May 2022

which have had a serious effect in determining the scope of the power of arbitral tribunals. In relation to the principle of separability, the old Ethiopian law is silent on the principle of Separability. The new arbitration law has avoided all the uncertainty on the doctrine of Separability by clearly recognizing the principle under Article19 (1). Currently, per the new law, an arbitral tribunal has a secured power of ruling on the objection directed towards the validity of the main contract without fear of losing its jurisdiction.

While Separability maintains the jurisdiction of the tribunal by rescuing from an attack due to the invalidity of the main contract, the doctrine of Competence-Competence in its turn serves the same purpose by conferring the tribunal with the power to rule on any challenges made to the arbitration agreement itself.[70] As a result, it is said that the doctrine of Competence-Competence perches at the vanishing point of Separability.[71]

Owing to the principle of competence-competence, an arbitrator who performs in an arbitration-friendly environment will have the power to rule on the existence and validity of the arbitration agreement, the scope of the arbitration agreement and queries relating to waiver, lapse of time and constitution of the arbitral tribunal.[72] Objections on these points may be raised either before the arbitral tribunal or regular courts. Based on the place where the objection to jurisdiction is raised and the responses to the objections, the principle of competence-competence has two aspects i.e., positive competence-competence and negative competence-competence.[73]

[70] LEE (n 67) 422

[71] Seda Özmumcu, 'The Principle of Separability and Competence – Competence in Turkish Civil Procedure Code No. 6100' (2013) 45 Annales XLV 263 263 <https://dergipark.org.tr/en/pub/iuafdi/issue/726/7824> accessed 13 March 2022

[72] John J Barceló, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 Vanderbilt Journal of Transnational Law 1115 <https://is.muni.cz/el/law/jaro2008/SOC026/um/5444470/Clanek.pdf> accessed 14 March 2022

[73] ibid

If the objection is raised before a tribunal and the law endorses the principle of Positive competence-competence, the arbitrators will have the power to continue with the proceedings to rule on their jurisdiction including the objections relating to the validity and existence of an arbitration agreement.[74] Conversely, if the objection is raised before the tribunal and the law has not endorsed the principle of Positive Competence-Competence, the arbitrator shall discontinue the proceeding and refer the objection to the court for lack of jurisdiction to rule on its jurisdiction.[75]

If the objection is raised before ordinary courts, the response of the court depends on the extent of negative competence-competence recognized. If the law endorses the highest form of negative Competence-Competence, the court shall decline jurisdiction and refer the matter to arbitrators for determination without making any assessment of the validity of the objection.[76] The highest form of negative Competence-Competence is adopted by countries like France that are well known for their pro-arbitration policy.[77] If the law endorses the slightest form of negative Competence-Competence, the court shall decline jurisdiction and refer the matter to arbitrators after making a minimal (prima facie) scrutiny of the validity of the objection.[78] Thus, it should be noted that, in the absence of the doctrine of negative competence-competence in the law, the court is empowered to make a full investigation of the validity of the objection without referring the matter to the tribunal.

In brief, the recognition of Competence-Competence in its dual aspect is seen as a rule of convenience designed to reduce unmeritorious challenges to an arbitrator's jurisdiction.[79] It is an anti-sabotage mechanism that saves arbitration from being

[74] Gerese (n 22) 29-30
[75] ibid
[76] ibid
[77] Barceló (n 72) 1124
[78] Gerese (n 22)
[79] LEE (n 67) 424

derailed before it begins.[80] Today, the right of arbitrators to rule on their own jurisdiction is incontrovertibly made part of the well-established doctrine and practice in international arbitration.[81]

As it is mentioned above in this section, Ethiopia has fully overhauled its anti-arbitration stance in relation to the principle of Competence-Competence. The regulation of positive competence-competence in the old Ethiopian laws claimed to be defective on three counts. First and foremost, the power of the tribunal to rule on its jurisdiction depends on the authorization of parties.[82] Second, even the authorization shall not grant the tribunal, the power to decide on the existence and validity of arbitration clauses.[83] The third and the strange approach was that the provisions of arbitral submission relating to the jurisdiction of arbitrators need to be construed narrowly.[84]

The new Proclamation repairs this defect by allowing the tribunal to rule on its jurisdiction including the existence and validity of the arbitration agreement irrespective of the consent of the parties. The power of the tribunal also includes the power to rule on the objection raised on the scope of the agreement.[85] The ruling of the tribunal on its jurisdiction is not final as it can validly be objected to the First Instance Court within one month from the date of the ruling. In the meantime, parallel proceeding will be held since the law allows the tribunal to continue proceeding and render an award.[86] In this instance, allowing courts to review the decision of the tribunal on its own jurisdiction is an essential intervention that reduces the tendency of the tribunal to assume jurisdiction on each dispute submitted

[80] William W Park, 'The Arbitrability Dicta in First Options vs. Kalpan: What Sort of Kompetenz-Kompelenz Has Crossed the Aliamic?' (1996) 12 Arbitration International 137

[81] Alan Uzelac, 'Jurisdiction of The Arbitral Tribunal: Current Jurisprudence and Problem Areas Under The UNCITRAL Model Law' (2005) 8 International Arbitration Law Review 154 <http://www.academia.edu/910696/> accessed 15 May 2022

[82] Ethiopian Civil Code (n 58) art 3330 (1 and 2)

[83] ibid art 3330 (3)

[84] ibid art 3329

[85] The New Arbitration Law (n 9) Art. 19 (1 and 3)

[86] ibid Art. 19 (5 and 6)

to them. Nevertheless, the possibility of parallel proceeding will have the effect of costing arbitrators and the parties if the court finally rules against the jurisdiction of the tribunal. The author insists that the more efficient option is to allow courts to order a stay of arbitral proceeding to avoid unnecessary cost, labor, and time for arbitrators and the parties.

Furthermore, there was not notion of negative Competence-Competence under the CC concerning objection to the existence and validity of the arbitration agreement. Hence, under the old law, the court shall make full scrutiny of the objection with no parallel proceeding by the tribunal. The same holds, under the old system, for objections other than the validity and existence of arbitration agreement so long as the parties do not authorize the tribunal with the power to rule on its own jurisdiction.

The new law, however, distilled this anti-arbitration stance by introducing negative competence-Competence through imposing on the court the duty to refer to arbitration, upon request of one of the parties, whenever cases covered by an arbitration agreement are brought to it. However, the court can still review the objection if the agreement is void and becomes ineffective.[87] In short, the new law has bestowed an arbitral tribunal with increased power by fully recognizing Competence-Competence in its dual aspects and the principle of Separability.

2.3.2. Interpretation of Arbitration Agreements

Different approaches are adopted by different legal systems in interpreting defective arbitration agreements. Some states follow the restrictive interpretation of arbitration clauses compared to other contractual provisions and resolve any doubt in an arbitration clause against the jurisdiction of arbitrators. This in turn will have the effect of ousting arbitrators from assuming jurisdiction. Others follow the neutral interpretation of arbitration clauses like any other contractual clause following fundamental rules of interpretation. Some others adopt the principle of liberal

[87] ibid Art. 8 (1 and 2)

interpretation. Liberal interpretation provides for a more liberal interpretation of arbitration clauses than other contractual clauses to resolve any doubt in favor of the arbitrator's jurisdiction. Liberal interpretation rescues the arbitral tribunal from losing jurisdiction on the subject matter objected to.

One area of the old Ethiopian arbitration law that unduly restricted the power of the arbitral tribunal was the requirement of restrictive interpretation that seeks for resolution of doubtful arbitration clauses against the jurisdiction of arbitrators. Such a call for application of restrictive interpretation cannot be found under the new law. Hence, even if the new law doesn't stipulate any provision on the interpretation of arbitral agreements, the liberal interpretation approach seems to be the logical way we are left with. This can be inferred from the deliberate abolition of restrictive interpretation ordained by the old law and the pro-arbitral tribunal stance of the new law manifested in the recognition of the principle of competence-competence, separability, and the general principle of nonintervention of courts adopted under article five.

A further area that demonstrates the extent of power granted to the tribunal in addition to liberal interpretation, separability and competence-competence principles is the normative basis through which the tribunal is allowed to decide on the merit of the case. The CC and CPC authorized the arbitrators to rule according to "principle of law" and "law" respectively.[88] Though deciding which law, the CC or the CPC, prevails is not the concern of this article, settlement of dispute based on the "principle of law" empowers the arbitrator with wide power than settlement per a certain "law".[89] The CC grants very liberal power for arbitrators to decide based on principle of law without the need for prior authorization of parties.

[88] Ethiopian Civil Code (n 58) art 3325 (1) and The Civil Procedure Code of the Empire of Ethiopia, Decree No. 52 of 1965, Neg. Gaz. Extraordinary issue No. 3 of 1965 Addis Ababa 1965 (herein after "Ethiopian Civil Procedure Code"), Art. 317 (2)

[89] Tesfay 'Normative Basis' (n 17) 341

Coming to the new law, it requires arbitrators to rule on the merit of the case following the substantive law chosen by the parties. In this respect, the new law reduces power of the tribunal in two prisms compared to the CC. On one hand, the applicable normative base is reduced from "a national general principles of law" to a certain "substantive national law" chosen by the parties. This confines the tribunal's decision only to those principles incorporated in the substantive law of the chosen country and doesn't allow it to go beyond and apply principles of laws that are not incorporated in that chosen law. On the other hand, the application of substantive law is subject to the choice of parties, unlike the CC which allows application of principles of laws irrespective of choice of the parties. In default of choice of parties, article 41 (3) of the new law allows the tribunal to apply a substantive law close or relevant to the subject matter of the dispute. In case the normative base is chosen by the parties, that specific choice refers to the substantive law of that country not the conflict of laws rule.[90] A more limitative stand of the new law can also be discerned from the fact that neither the tribunal nor the parties are allowed to choose the normative basis for decision in cases of domestic arbitration and accordingly the Ethiopian laws apply out rightly.

On the other side of the spectrum, the new law increases the power of the tribunal through permitting decision in accordance with equity or known commercial practice upon authorization of the parties or applicable law.[91] This assertion remains intact if the decision in accordance with equity is perceived in the stronger sense of equity. As per the stronger perception of equity, arbitrators are allowed to correct the injustice created by the rigid nature of the general and abstract rules when they are applied to a concrete factual situation in disregard to the law. Conversely, in the weaker perception of equity, the judge is directed to employ equity when the law is silent or vague concerning some aspects of the concrete case without ignoring the

[90] The New Arbitration Law (n 9) Arrt. 41 (2)
[91] ibid

principles set by the law.[92] Thus, an arbitrator that has been empowered to decide based on equity perceived in the stronger sense wields wider power than an arbitrator who is empowered to decide based on "principles of law" or "law".[93]

At this point, this article emphasizes on the following queries: What does authorization to rule in accordance with equity imply in the new law? Does the authorization refer to equity in the stronger perception or weaker perception? In other words, does it mean power to act as an ***amiable compositeur*** or ***ex aequo et bono*** or both?

2.4. Minimal Court Intervention as a Pool Factor for being an Arbitration-friendly Seat

Though arbitration is required to be independent and liberal, some judicial oversight is unavoidable due to plenty of public policy grounds and the inability of an arbitration institution to stand alone by and of itself. Courts usually assist the implementation of the arbitration agreement via appointing, removing, or replacing an arbitrator, to order an injunction on proceedings brought in breach of an agreement to arbitrate, to issue interim measures, and to review and enforce the award.[94]

These days, court intervention is appropriate and justified almost in all jurisdictions in different degrees and contexts. Nevertheless, to avoid unwarranted intervention, national arbitration laws stipulate the extents and instances of court intervention.[95]

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[92] António Sampaio Caramelo, 'Arbitration in Equity and Amiable Composition Under Portuguese Law' (2008) 25 Journal of International Arbitration 569 <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/25.5/JOIA2008044> accessed 13 14 March 2022

[93] Seyoum Yohannes Tesfaye, *International Commercial Arbitration: Legal and Institutional Infrastructure in Ethiopia* (1st edition, European Year Book of International Economic Law Monographs 2021) 12, 93-116

[94] Carbone (n 66)

[95] Dessie (n 19)

Usually, arbitration statutes provide a prohibitive nonintervention principle that seeks to limit court intervention only to cases explicitly provided by the law.[96]

Modern arbitration laws are skeptical of wide court intervention in general and unrestricted judicial review of awards in particular, as it defeats the initial purposes of arbitration. Wide judicial review of arbitral awards blatantly runs the risk of impinging upon arbitration as an effective DRM.[97] The limited extent of judicial review of an award is one of the strongest virtues which make France a favorable place for arbitration.[98]

In the same vein with modern arbitration laws, the new Ethiopian arbitration law has adopted a prohibitive nonintervention principle which seeks to confine court intervention only to cases explicitly provided for by the law.[99] What differentiates the Proclamation from the UNCITRAL model law is that the nonintervention prohibition under the UNCITRAL Model Law applies only to matters governed by the model law. However, the nonintervention principle under the new proclamation extends to all arbitrable matters as it is governed by the Proclamation and other laws.

In the new Proclamation, courts play their supportive role before the commencement of arbitral proceedings, during the arbitral proceeding, and after the rendition of awards. To begin from the first, Ethiopian courts take part in appointment,[100] removal,[101] and substitution of arbitrators,[102] priority being given to party autonomy subject to consideration of conditions listed under the law to maintain efficiency and impartiality of arbitrators. They also play their supportive role in enforcing valid arbitration agreements. Accordingly, under article 8 courts are obliged to refer to

[96] The UNCITRAL Model Law (n 51) art 5 and section 1 (c) of the English Arbitration Act of 1996
[97] Aparna D. Jujjavarapu, 'Judicial Review of International Commercial Arbitral Awards by National Courts in the United States and India' (LL.M Thesis and essays, University of Georgia, 2007)
[98] Kenneth-Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64 Defense Counsel Journal 271
[99] Common article 5 of the New Ethiopian Arbitration Law and the UNCITRAL Model Law
[100] The New Arbitration Law (n 9) Art. 12 (3) (b)
[101] ibid Art. 16 (2)
[102] ibid Art. 17 (2) in tandem with Art. 12 (3) (b)

arbitration where one of the parties' brought matters covered by arbitration to court.[103]

The same supportive role is felt during arbitration proceedings by Ethiopian courts through assisting the tribunal in taking evidence,[104] recognizing and enforcing interim measures issued by arbitral tribunals[105] and issuing court interim measures.[106] Ethiopian courts are also obliged to bring life to arbitral awards by recognizing and enforcing the award after exercising their supervisory power on it.

The supervisory role of courts is one area where the old Ethiopian arbitration laws are blamed for inviting premature judicial intervention and stretching wider judicial review power in the form of appeal and cassation review.[107] In this section, we will try to uncover the progresses brought by the new law in limiting court intervention and judicial review avenues.

Alike the CC, interlocutory judicial review of the tribunal's decision on the application objecting an arbitrator is possible in the new law. Accordingly, the decision of the tribunal on the objection submitted against an arbitrator is appealable to the First Instance Court.[108] Furthermore, the court is empowered to order suspension of arbitral proceedings until it renders decision on the objection.[109] Such an interlocutory judicial review has the risk of inviting dilatory appeal and court intervention.[110]

Ethiopian scholars were also skeptical of the recognition of appeal as an avenue for reviewing awards as it compromises the finality of awards by re-inviting courts to

[103] ibid Art. 8 (1)
[104] ibid Art. 37
[105] ibid Art. 25 (2 and 3)
[106] ibid Art. 9 in tandem with art 27
[107]Beyene 'Degree of Court's Control' (n 20). See also Feyissa (n 5)
[108] The New Arbitration Law (n 9) Art. 15 (4)
[109] The New Arbitration Law (n 9) Art. 15 (5)
[110] Feyissa (n 5)

review the award on merit.[111] Furthermore, the grounds of review listed under article 351 (c-d) of CPC extend up to turning the appellate court into a trial court.[112] The new Ethiopian arbitration law seems to have been drafted in a way to respond to this skepticism. Appeal as a form of review is abolished by the new Proclamation unless it is introduced by agreement of the parties.[113] Abolishing appeal as an avenue of review is a pro-party-autonomy and pro-finality measure taken by the new law. The new law, however, is not brave as such to fully abolish appeal mechanism as it permits contractual extension of review through appeal. Hence, parties can lodge an appeal from the award if they have an agreement to that effect. But still, we can pose the following questions concerning appeal via agreement of the parties. On what already known grounds can parties agree to appeal? Or can they list as many grounds of appeal as they wish?

A further avenue of judicial review that has been critiqued for a long under the preceding Ethiopian arbitration laws was the cassation review of awards.[114] Though there was a difficulty in establishing legal basis both in the laws of arbitral submission under the CC and CPC and the laws that establishes cassation power of the Federal Supreme Court,[115] the Federal Supreme Court Cassation Bench has been reviewing awards under the elusive notion of basic error of law even when arbitration agreements contained finality clauses.[116] Albeit the benefits and the drawbacks of retaining cassation review of award is a debatable concern, the new law has at least demonstrated progress in two respects. For one thing, it establishes a legal basis by allowing review of awards by the cassation bench. For another thing, it has made cassation review a waivable judicial review mechanism through permitting the parties to avoid it if they thought cassation review is an unnecessary intervention. In

[111] Beyene 'Degree of Court's Control' (n 20)
[112] ibid
[113] The New Arbitration Law (n 9) Art. 49 (1)
[114] Beyene 'Cassation Review' (n 20)
[115] ibid
[116] *National Mining Corporation vs Danny Driling PLC* (Federal Supreme Court Cassation Bench)

the opinion of the author, the involvement of the Federal Supreme Court's cassation bench in arbitration via review of arbitral awards will diminish hereafter in Ethiopia as the parties who have initially agreed to arbitrate to get rid of stringent court procedure will have no perceivable reason to retain the avenue of cassation review.

Setting aside is a method thought as a proper avenue that strikes a balance between parties' wish to avoid courts and permits courts' regulatory power by supervising any violation of fundamental notion of procedural justice.[117] Nevertheless, the old system failed to achieve this by inserting most of the grounds that amount to procedural irregularities under appeal while they should have been included under setting aside.[118]

The new law, however, has repaired this dysfunctional approach of the old law by swapping grounds previously enumerated for appeal to grounds for setting aside. Accordingly, the grounds listed under Article 50 (2) (c, d, and f) of the Proclamation that relates to either procedural irregularities, misconduct of arbitrators, or violation of arbitration agreement previously made grounds of appeal under Article 351 of the CPC, are now made grounds of setting aside. On the other hand, lack of capacity to conclude arbitration agreements, nullity, and voidness of arbitration agreement, expiry of the agreement, ultra-virus awards, and awards rendered in lack of jurisdiction are made grounds for setting aside under article 50 (2) (a, b, and e) of the Proclamation alike article 356 the CPC. In this way, the avenue of setting aside has now given courts the right amount of intervention and sufficient grounds for control of arbitration.

The other avenue through which Ethiopian courts exercise their supervisory role over arbitration is the procedure of objection. An objection can be made either against the award itself or against the execution of the award.[119] While objection against the

[117] Beyene 'Degree of Court's Control' (n 20) and Feyissa (n 5)
[118] Ethiopian Civil Procedure Code (n 88) Art. 351 in tandem with Art. 356
[119] The New Arbitration Law (n 9) Art. 48 in tandem with Art. 52

award comes before an application for setting aside, objection against execution of the award appears to be invoked once an application for setting aside is dismissed.[120]

The contracting party or a third party who should have been party to the arbitral proceeding and whose interest is affected by the award can object to the award.[121] If the objection is raised by the parties, the court shall remand the award to the tribunal for amendment.[122] Conversely, if the objection is raised by third parties the court may reverse or modify the award partly or wholly.[123] This response to be made for the third-party objection appears to allow courts to be intrusive and review the award on merit. Accordingly, courts will correct the award if there is a mistake in it and what will be, finally, available is the reversed or amended judgment of the court, not the award of an arbitral tribunal.

The final avenue for review by the court is a refusal to execute/enforce the award. Such refusal may be made by the court in response to objections made against execution of the award or an application for recognition and enforcement of arbitral awards. Ethiopian courts may refuse to execute domestic awards if and only if the grounds listed under Article 52 are fulfilled. The same grounds of objection with that of the grounds for setting aside are provided under article 52 except for the grounds under article 52 (2) (f). Effect-wise, both an application for setting aside and an objection against execution results in setting aside of the award and lefts the parties with an outstanding dispute yet to be resolved. Finally, Ethiopian courts may refuse to enforce foreign arbitral awards on the grounds listed under Article 53.

2.5. Pro-enforcement Approach of Modern Arbitral Rules

The basic and by far the most important objective of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter The New

[120] ibid Art. 48 in tandem with Art. 52 (1)
[121] ibid Art. 48 (1) and (2)
[122] ibid Art. 48 (3)
[123] ibid Art. 48 (4)

York Convention) is to ease the enforcement of foreign arbitral awards.[124] The New York Convention is praised for landing a collective pro-enforcement approach by limiting grounds of review for refusal of enforcement. The grounds listed under the Convention are maximum grounds for refusal of enforcement and no other grounds can be raised as a defense for refusal. Conversely, the Convention allows the contracting states the freedom to apply more liberal rules for refusal of recognition and enforcement.[125] Furthermore, the Convention is reputed for making the following basic pro-enforcement changes;

The Convention has created the presumption as to the binding nature of awards. It has also required each contracting states to recognize arbitral awards as binding and enforce them.[126] Based on this obligation, it is claimed that foreign arbitral awards are entitled to *prima facie* right to recognition and enforcement.[127] Another groundbreaking achievement of the New York Convention is the change it has brought by avoiding double exequatur. Before the Convention, as per the double exequatur requirement, an award has to be rubber-stamped by courts of the seat of arbitration before it is enforced elsewhere.[128] The Convention has also endowed courts of enforcement with discretionary power to recognize and enforce awards even in instances where the grounds for refusal are established.[129]

[124] Petros 'The Convention on the Recognition and Enforcement' (n 24)
[125] Emmanuel Gaillard, Gordon E Kaiser and Bejamin Siino (eds), *The Guide to Challenging and Enforcing Arbitration* (Publisher David Samuels, 2nd edn 2021) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition> accessed 23 May 2022
[126] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Adopted 10 June 1958, Entered into force 7 June 1959 United Nations, hereinafter 'New York Convention') 330 UNTS 3, Art. III
[127] Gaillard, Kaiser and Siino (eds) (n 125)
[128] LEE (n 67)
[129] Fifi- Junita, 'Pro Enforcement Bias' Under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview' (2015) 5 Indonesia Law Review 141 <https://scholarhub.ui.ac.id/ilrev/vol5/iss2/3> accessed 10 March 2022

In principle, recognition and enforcement is refused only at the request of the party against whom the enforcement is sought except in certain cases in which the court may refuse enforcement by its own initiative.[130]

The more favorable right concept inculcated under Article VII of the Convention is also another indicator of pro-enforcement bias of the Convention. Per the more favorable right provision, enforcement-seeking party may rely on a more favorable domestic law or treaty in addition to what the Convention stipulates. As contracting states continue to modernize their arbitration laws to make their jurisdictions more arbitration-friendly, an increasing reliance by national courts on this more favorable notion is to be expected.[131]

Regarding the enforcement of arbitral awards in Ethiopia, with the ratification of the New York Convention[132] and the issuance of the new arbitral law, currently, there are multiple rules governing the enforcement regime. To begin from enforcement of domestic awards and international awards rendered in Ethiopia, unless the enforcement is objected on grounds listed under article 52 of the proclamation, the awards are given first-hand right for enforcement by article 51 upon application for execution. Thus, under the new law unlike its older counterpart, it is not necessary to homologate domestic awards before their enforcement for the reason that the new law requires only an application for execution of awards as opposed to an application for homologation under Article 51 of the new proclamation.

The multiplicity of enforcement regimes is felt more when it comes to foreign arbitral awards as opposed to domestic awards due to the ramifications of the commercial reservation made by Ethiopia while acceding to the New York Convention. One critical issue at this point is that though the substantive scope of application of the new law is limited to commercial arbitration and the term

[130] New York Convention (n 126) Art. v (1) and (2)
[131] Gaillard, Kaiser and Siino (eds) (n 125)
[132] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No. 1184/2020, *Federal Negarit Gazeta*, 26th Year No. 21

"Commercial" is given a broader definition as it is referred by the footnote to Article one of the UNCITRAL model law,[133] this does not render other domestic civil matters inarbitrable unless expressly excluded under Art 7 of the proclamation. A shallow understanding of Article three of the proclamation may lead someone to conclude that the new law's application is confined to 'commercial' arbitration of both domestic and international nature. Nevertheless, the limitation of 'commercial related' criterion under the new law refers only to international arbitrations as opposed to domestic arbitrations. The term "Commercial" is used under Article three and the definitional article of the new law only to give effect to commercial reservation adopted by Ethiopia.

Accordingly, a foreign award creditor can opt for a more favorable regime between Article 53 of the proclamation or the New York convention for enforcement. However, this holds only for enforcement of commercial-related foreign arbitral awards as the application of the terms of the new proclamation is limited to only international commercial arbitration due to commercial reservation.

Now, the unsettled issue is the fate of enforcement of foreign non-commercial arbitral awards. The perceivable way out in this regard is only to resort to article 461 of the CPC as it applies to both commercial and civil arbitral awards even though it is repealed by the new proclamation. Less of that, the recognition and enforcement of foreign arbitral awards on civil matters will remain up in the air unless the conditions for their enforcement are set out by legislative dispensation in the foreseeable future.

The other avenue that multiplies the enforcement regime of a foreign award in Ethiopia is the reciprocity reservation. As the application of the New York convention is limited only to commercial awards rendered in countries of contracting states, foreign arbitral awards made in non-convention (non-contracting) states

[133] ibid Art. 1 (1) and Art. 2 (7), in tandem with the footnote number two of the UNCITRAL model law

cannot be enforced through the New York Convention. The way out for the enforcement of such non convention award is two-fold. One is to resort to article 53 (2) of the new proclamation for enforcement of non-convention foreign commercial awards. The other is to resort to article 461 of the CPC for enforcement of non-convention foreign civil awards. The variation in the date of entry into force of the New York Convention in Ethiopia has also opened a room for application of different enforcement regimes of foreign arbitral awards.[134]

Yet, without making difference between domestic and foreign awards, arbitral awards in Ethiopia have now prima facie entitlement to enforcement as opposed to the old laws. Article 51 (1) of the Proclamation recognizes the binding nature of both domestic and foreign awards and yells for their enforcement subject to the fulfillment of certain conditions stipulated under the law. Thus, now in Ethiopia awards are enforceable in principle not as an exception as it was under the old laws.

To say a few words on the grounds for recognition and enforcement under the new proclamation, courts shall enforce awards except for the existence of conditions listed under Article 53 (2) of the Proclamation. The said article has enumerated exhaustive tests of non-enforceability. Despite their similarity in some respects, the tests of non-enforceability under the new Proclamation are not coextensive with the tests of non-enforceability listed under the UNCITRAL model law. The test of existence of valid arbitration agreement under the new law is comparable with article 36 (1) (a) (I) of the Model Law which speaks about the incapacity of parties and invalid arbitration agreement. Paragraph two of Article 53 (1) (b) of the new law is also comparable with Article 36 (1) (a) (IV) of the Model Law. However, the difference between the two in this regard is the fact that the propriety of the constitution of the arbitral tribunal under the Model Law is measured against the law

[134] For detailed understanding on the multiplicity of the current Ethiopian enforcement regime please see Tecle Hagos Bahta, 'The Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths' (2021) 15, 2 Mizan Law Review 493 <http://dx.doi.org/10.4314/mlr.v15i2.6> accessed 26 July 2022

of the seat of arbitration subject to party autonomy. Party autonomy takes precedence over the law of the seat of arbitration. Conversely, under the new Proclamation, while parties are given the freedom to tail the tribunal per their whim, that choice of parties is not prioritized here to determine the propriety of the constitution of an arbitral tribunal, instead, reference is made directly to the law of the seat of arbitration.

Article 53 (1) (c) of the new law which speaks about the unenforceability of awards has no comparable grounds under the Model law. Article 53 (1) (d) of the Proclamation is also comparable to Article 36 (1) (a) (II) of the Model law except for use of different language regarding equal treatment of parties. The requirement of arbitrability as a test for non-enforcement is also consonant with the Model law in this regard. The requirement of public policy, morality, and security under the Proclamation can also be subsumed under the public policy ground of the Model law. The author cannot see the logic for treating public policy, morality, and security separately here under the new law while the very nature of public policy may very well contain public security and public morality.

To step into convention awards, their enforcement shall be regulated by the New York Convention.[135] Before directly gauging to Convention awards, we need to dwell on the declarations and reservations made by Ethiopia while acceding to the Convention. Through reciprocity and commercial declaration made according to Article I (3) of the New York Convention, Ethiopia restricted its duty under the Convention only to the recognition and enforcement of awards made in the territory of a contracting state and to differences arising out of contractual or legal relationship deemed commercial in Ethiopia.[136] Accordingly, Ethiopia has no obligation to recognize and enforce awards made in countries that have not ratified the convention. Consequently, awards rendered in some countries with which Ethiopia has a significant economic relationship like Eritrea, Somalia, and South Sudan will not be

[135] The New Arbitration Law (n 9) Art. 53 (1)
[136] The Ratification Proclamation (n 132) Art.2 and 3

enforced under the convention.[137] Furthermore, the application of the convention is limited only to commercial-related matters enunciated under the definitional article of the new Proclamation. A further restriction is imposed on the Convention award as the Convention applies only to arbitration agreements and arbitral awards made after the accession of Ethiopia to the Convention.[138] Finally, the prima facie right to enforcement of the convention award is subject to exceptional grounds of refusal listed under article V of the Convention which is compatible with the grounds under the Model Law discussed above.

A pro-enforcement bias of the new Proclamation is manifested in absence of the requirement of ***double exequatur*** commencing from articles 51 – 53 as well. Accordingly, an award creditor who seeks to enforce the award in Ethiopia is required to present only the arbitration agreement, the original award/authenticated copy of it, and a translated award where it is given in a language different from the language of the court.[139] Hence, an award need not be rubber-stamped by courts of the seat of arbitration before it is enforced in Ethiopia. Furthermore, since awards are enforceable in principle the burden of proof of the existence of any of the grounds of refusal lies on the award debtor who opposed the enforcement.

In the end, the query of whether the new law applies only to matters concerning recognition and enforcement to the exclusion of an application for recognition alone remains unsettled yet. Despite the improvements made by addressing recognition together with enforcement under the headings of section eight, there is no specific provision in the new Proclamation governing recognition of awards alone. What is the fate of defensive awards which demand only recognition?[140] Can courts simply

[137] Tesfaye 'International Commercial Arbitration' (n 93) 205-230
[138] New York Convention (n 126) Art. 3
[139] The New Arbitration Law (n 9) Art. 51
[140] Defensive awards are those awards in which the award creditor seeks only their recognition so as to block any attempt to initiate fresh proceedings on issue already decided by the award.

extend the grounds for refusal or grant of recognition and enforcement to cases involving recognition alone?

3. The Contemporary Notion of Multiparty Arbitration as an Optimal Barometer for Arbitration Friendliness

The task of addressing the entire contemporary notions of arbitration and assessing the adequacy of their incorporation in the Ethiopia's new arbitration law is not within the scope of this article as it requires a separate study. However, in this section of the article, the author attempts to give glimpses of the concept of multiparty arbitration as a contemporary notion. This particular notion constitutes part of the rules and concepts of arbitration labeled as the optimal standards of arbitration friendliness by the author. The justification for such a separate assessment of multiparty arbitration amongst several other contemporary notions, in this study, lies on its paramount importance for the current Ethiopia's economic, political and social realities.

The proliferation of happenings in Ethiopia's construction industry, the recently adopted measures for total and partial privatization of state-owned companies, as well as the unavoidability of multiparty disputes and multiparty arbitration owing to the interdependence of international commerce and globalization has strongly influenced the author's choice for the separate scrutiny of the challenges and prospects of multiparty arbitration under the new law. All those underscored Ethiopia's reality would inevitably invite multiparty disputes which call for the facilitation of full implementation of multiparty arbitration,[141] inspiring this particular write-up in contribution for the facilitation.

Intervention and/or joinder, consolidation and appointment of arbitrator/s are the basic '***instruments'*** (emphasis added) recognized in the realm of international

[141] Alemu Balcha, 'The Place of Multiparty Commercial Arbitration under Ethiopian Arbitration Law' (2020) 9 Oromia Law Journal 114, 144 – 148 <https://www.ajol.info/index.php/olj/article/view/202838> accessed 23 February 2022

arbitration so as to provide a panacea for the complexities of multiparty arbitration. The upcoming few paragraphs of this article attempts to unveil the progresses and the troubles of the new Ethiopian arbitration law in regulating the above mentioned instruments of multiparty arbitration.

Multi-party arbitration as a contemporary notion adjoining complex commercial transaction was not given proper attention under the old Ethiopian arbitration laws.[142] Seen in light of the above mentioned basic instruments of multi-party arbitration, the new arbitration law too does not comprehensively and fully addresses the conundrums encircling the subject matter.

Joinder and interventions are a seemingly different mechanism both dealing with participation of non-signatory third parties to the existing arbitration proceedings. The necessity of intervention arises incases when non signatory third party seeks to intervene in arbitral proceedings to assert its right vis-à-vis one or all of the other parties that are signatories to the arbitration agreement. Whereas, the issue of joinder arises in cases when one of the signatory party to the arbitration agreement seeks to add a non-signatory third party either raising an indemnity claim in connection with the claimants claim or raising any other claim against such third party. Once it's firmly established that intervention and joinder of third parties has become a matter of necessity, the fundamental query relates to when and how to introduce third parties in an already commenced arbitration proceedings.

To commence with intervention as a first instrument, a third party whose interest could be affected by the award may intervene in the proceeding before an award is rendered upon submission of application to that effect and consent of the contracting parties.[143] The submission of application for intervention and consent of the parties are made conditions for authorizing intervention. Now the plight arises with respect

[142] ibid 136 - 142
[143] The New Arbitration Law (n 9) Art. 40 (1)

to the '***consent requirement'*** (emphasis added) and the ***'temporal limitation'*** (emphasis added) within which the authorization for intervention would be possible under the new law.

As to the requirement of consent, sub-article (3) of Article 40 of the proclamation erodes the intended protection of the rights of third parties to intervene in arbitration proceedings by predicating intervention upon the consent of the contracting parties. Any attempt to obtain such consent of the contracting parties is a fruitless task as parties to proceedings are usually unwilling to give their consent for intervention of third parties and this denies third parties a procedural fairness and equal treatment opportunity. Thus, under the new arbitration law, while the de-jure right to intervention is ascribed to non-signatory third parties, the de facto power rests with the principal contracting parties to the arbitration agreement. With respect to the temporal limitation for intervention, Article 40 (1) of the new Proclamation permits intervention at any time as long as the award is not rendered. This is a calamitous approach as intervention of a third party after the appointment or confirmation of the appointment of arbitrators undermines his right to equal participation in the appointment of arbitrators and thereby affects the validity and enforceability of the arbitral award.

Delving into the second instrument, Article 40 (2) of the proclamation regulates joinder of third parties albeit the usage of the term intervention. Here again, an application requesting joinder and consent of the third party are the two requirements to allow joinder. In the same vein with the instrument of intervention, the consent requirement and the temporal limitation of joinder poses an impediment to realization of the right. Alike the intervening party, it is difficult (though not impossible) for the contracting parties to obtain the consent of the third party to join the arbitration proceeding, due to the very purpose of intervention in any court or

arbitral proceedings.[144] On the other side, astonishingly, the new law has given a deaf ear to the quest of the temporal limitation within which an application for joinder can be made, while the time of joinder has a bearing effect on the overall efficacy of the arbitral award. Importantly, it determines the propriety of the appointment procedure as permitting joinder after the appointment or confirmation of arbitrator/s would hamper the joining party's right to equal participation in the appointment of arbitrator/s. Any impropriety in the appointment procedure, eventually, retards the recognition and enforceability of the award. .

At this juncture, this article seeks to spotlight on the fact that authorization of third party participation in arbitration proceedings, via intervention and/or joinder, irrespective of the consent of contracting parties goes against the consensual nature of arbitration, while its denial would harm the interest of the third parties. The 'ought to be' jurisprudential solution in this regard is a solution which strikes a balance between these two competing interests. The International Chamber of Commerce (ICC) rules of 2021 have adopted a mesmerizing balanced panacea in this regard. Article 7(5) of the 2021 ICC rules has adopted mandatory third party mechanism in the form of joinder upon order of the arbitral tribunal irrespective of the time of joinder and the consent of contracting parties. It gives the arbitral tribunal the discretion to grant a request for joinder even without unanimous consent of the parties, provided that the additional party accepts the constitution of the arbitral tribunal and agrees to the terms of reference. In exercising its discretion, the arbitral tribunal must consider all relevant circumstances prescribed under the said article.

While the new Article 7 (5) of 2021 ICC Rules could potentially be regarded as violating the principle of party autonomy insofar as it substitutes the consent of the parties with a decision of the arbitral tribunal, the factors to be considered by an

[144] The content of the New Ethiopian Arbitration Law is self-evident for the said impediment since it crystal-clearly provides 'the claim of compensation' and 'intention to hold the third party liable' as major purposes for the request of joinder under sub-article two of Article 40.

arbitral tribunal in granting a request for joinder under the same article, however, appears sufficient to ensure procedural fairness and equal treatment opportunity.

Coming to the final instruments of consolidation and appointment, the new Ethiopian arbitration Law is ignorant of both mechanisms. Article 40 and all other provisions of the new law say nothing about consolidation of parallel arbitration proceedings and hence, the only way out is to resort to article 11 of the CPC that regulates consolidation of suits based on the call for ***mutatis-mutandis*** application of CPC provisions insisted on article 79 of the new proclamation or waiting for the agreement of parties on consolidation.

The new proclamation, once more, has remained silent on the appointment of arbitrators in case of multiparty arbitration. Yet still, it has introduced a beneficial rule of joint appointment which was absent under the old regimes. Hence, it may be analogically possible to apply the Proclamation's rule on joint appointment and its default rule for the appointment of arbitrators in conventional arbitration to multiparty arbitration scenarios. Accordingly, if the dispute is purely bipolar where the parties can normally be divided into a claimant and respondent camp, it is possible to easily apply the rule of joint appointment. In the case of a multipolar multiparty dispute where the parties cannot be divided into two camps because of their divergent interest, we may analogically apply the default rule of court appointment provided under Article 12 (3) (b) of the proclamation.

4. Concluding Remarks and the Ways Forward

Owing to the proliferation of usage of arbitration as an effective commercial DRM, states are competing to avail robust arbitration law to be preferred as an arbitration-friendly seat. Ethiopia has also overhauled its arbitration rules with the view to fill the dearths of the hitherto existing laws on arbitration. The new Ethiopian arbitration law has come up with numerous arbitration-friendly gestures by increasing party autonomy and power of arbitral tribunal, reinforcing limited judicial intervention,

and a pro-enforcement approach. Despite bringing those signs of progress, some aspects of the new arbitration law have remained problematic and they seek either legal reform or strong judicial activism in their application.

The new law has contained some rules which may result in an anti-arbitration-friendly trend unless regulated and applied with caution. The interlocutory judicial review of the arbitral tribunal's decision on the application objecting an arbitrator is one plight which invites dilatory appeal. Court review of the ruling of the tribunals on its jurisdiction with a parallel arbitral proceeding may also bring dys-functionalism unless it is handled systematically. Ethiopian courts should employ a liberal interpretation of controversies relating to the arbitration agreement to avoid unnecessary court intervention despite the silence of the law in this regard. Arbitral tribunals and courts should take caution in their application of authorization to rule in accordance with equity. Both courts and tribunals should work in a way that ensures consistency while interpreting the real meaning of authorization to rule in accordance with equity. The slippery concept of public policy and reciprocity for refusal of enforcement of an award are also some of the areas which require strong judicial activism to put them to use as arbitration-friendly.

The new law has also failed to provide a general framework for the determination of arbitrable cases as it has promised. Due to this, the question how arbitrability is regulated remains contentious in many respects and severely limits the domain of arbitrable disputes. In this regard, we need a legislative solution to avoid the mess encircling the determination of arbitrable cases rather than judicial activism. The law maker must amend Article 7 of the new Proclamation in light of modern techniques of drafting rules on arbitrability. The new law has also failed to fully regulate essential instruments of multi-party arbitration as well. Especially, the consent requirement for joinder and intervention provided by the law, the incorrect temporal limitation within which an application for intervention can be made, the failure to provide the time limit within which an application for joinder can be made and the

law's failure to regulate consolidation and appointment aspect of multiparty arbitration has left the regulation of multiparty dispute yet to be overhauled. The multiplicity of enforcement regimes also requires caution so as to avoid divergent paths in application.

At the end of the day, the progresses brought by the new law will boost the place of Ethiopia as an arbitration-friendly seat. Being mesmerized by those progresses we may have an increased number of arbitration cases, a reduction of court congestion, an increase in FDI, and transnational trades among other things in the future. The vast majority of those signs of progress brought by the new law are indicators of legal advancements toward building an arbitration-friendly regime. Conversely, the quandaries of the new law presented in the paper may result in a diminishing return of arbitration friendliness though the actual effects of the progressions and retrogressions of the new law in making Ethiopia an arbitration-friendly seat is something yet to be tested in factual application of the law during the coming few years.

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በግጠር መሬት የመጠቀም መብትን ለብድር ዋስትና ስለማስያዝ እና የኢትዮጵያ ሕጎች

በአበባው አበበ በላይ♣

ንብረትን ዋስትና በማድረግ ብድር መውሰድና ይህንኑ በተለያዩ የኢንቨስትመንት ተግባራት ላይ ማዋል ለአንድ ሀገር ኢኮኖሚ እድገት ዋነኛ መሳሪያ እንደሆነ የመዋእለ-ነዋይ ተንታኞች በአጽንዖት ያስቀምጣሉ። ሁሉም ንብረቶች በዋስትና ሊያዙ የሚችሉ ቢሆንም ይህ ግን በሀገራት ሕግጋት ላይ የተመሰረተ ነው። የግጠርም ሆነ የከተማ መሬት በሽያጭ ለሌላ ወገን ሊተላለፍ የማይችል ንብረት እንደሆነ በኢ.ፌ.ዲ.ሪ ህገ-መንግስት አንቀጽ 40 ላይ በግልጽ ተደንግጎ እናገኘዋልን። በዚህ ድንጋጌ መሰረት መሬትን በራሱ (Land Per se) ማስያዣ ማድረግ እንደማይቻል መገንዘብ ይቻላል። ይህም ማለት ባለመሬቱ ብድሩን መክፈል ባይችል አበዳሪው መሬቱን በመሸጥ ብድሩን የማስመለስ መብት አይኖረውም ማለት ነው። ይህ እንዳለ ሆኖ በኢትዮጵያ ሕግ መሰረት የግጠር መሬት ባለይዞታ በመሬቱ ላይ ካለው ብዙ መብቶች (Bundle of rights) መካከል አንዱን (ለምሳሌ የመጠቀም መብት) በጊዜያዊነት፣ በጊዜ በተገደበ ውል በማስያዣነት ለማስያዝ የሚከለክል የሕግ ማዕቀፍ የለም።

ይህንን መነሻ በማድረግ የአማራ ብሄራዊ ክልላዊ መንግስት ጥቅምት 20 ቀን 2010 ዓ/ም በም/ቤቱ ባጸደቀው የግጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 251/2010 አንቀጽ 19 መሰረት በመሬት የመጠቀም መብትን የብድር ዋስትና አድርጎ ማስያዝን ፈቅዷል። ይህ አዋጅ የሚከተሉትን ዝርዝር ድንጋጌዎች ይዟል። ማንኛውም የግጠር መሬት ባለይዞታ ከ30 ዓመት ላልበለጠ ጊዜ የመጠቀም መብቱን በሀገሪቱ ብሔራዊ ባንክ ዕውቅና ለተሰጠው ሕጋዊ የገንዘብ ተቋም የብድር ዋስትና አድርጎ ማስያዝ እንደሚቻል ተደንግጓል። "...በሀገሪቱ ብሔራዊ ባንክ ዕውቅና ለተሰጠው ሕጋዊ የገንዘብ ተቋም..." የሚለው ድንጋጌ በትግበራ ወቅት ሰፊ ክፍተት ሲፈጥር የነበረ ነው። ይኸውም በየአካባቢው በህብረተሰቡ የተቋቋሙት የብድርና ቁጠባ ኅብረት ሥራ ማህበራት በብሔራዊ ባንክ እውቅና የተሰጣቸው ናቸው ወይ የሚለው ነው። በዚህም ምክንያት በአሁኑ ወቅት እነዚህ የብድር ኅብረት ሥራ ማህበራት የግጠር መሬት የመጠቀም መብትን በማስያዝ ብድር እየሰጡ እንዳልሆኑ ከግብርና ሚኒስቴር ሪፖርት መረዳት ይቻላል። ተበዳሪው በብድር ውሉ ውስጥ በተጠቀሰው የጊዜ ገደብ ዕዳውን ያልከፈለ እንደሆነ አበዳሪው በብድር ውሉ ለተጠቀሰው ጊዜ በመሬቱ የመጠቀም መብት የሚኖረው ሆኖ የተገኘ

♣ ጸሐፊው የመሬት ሕግ ባለሙያ ሲሆኑ በኢሜይል አድራሻቸው abebawabebek@gmail.com ማግኘት ይቻላል። ጽሑፉ የጸሐፊውን የግል አመለካከት ብቻ የሚያንጸባርቅ ነው።

እንደሆነ የዚሁ መብቱ ወሰን በመሬቱ ላይ ከተሰጠው የመጠቀም መብት ያለፉ ሊሆን አይችልም። ይህም ማለት የመሬቱ የመጠቀም መብቱ የብድር ዋጋውን ለማስመለስ የማያስችለው ቢሆን እንኳን የተበዳሪዉን ሌሎች ንብረቶችን ለብድሩ ማስከበሪያነት ለማዋል አይቻልም። አበዳሪው መሬቱን ራሱ የማያለማውና ከዚሁ የተነሳ ለሶስተኛ ወገን በኪራይ የሚያስተላልፈው ከሆነ መሬቱን ከአበዳሪው በውል ለመውሰድ እስከ ተስማማ ድረስ ተበዳሪው ቅድሚያ ይሰጠዋል። በግጠር መሬት የመጠቀም መብት መያዣ የተደረገበት ማንኛውም ውል ባበዳሪዉ ተቋም መመዝገብ አለበት፤ ይኸው የተመዘገበው የኪራይ ውል አንድ ቅጅ መሬቱ ለሚገኝበት ወረዳ ገጠር መሬት አስተዳደርና አጠቃቀም ጽህፈት ቤት ቀርቦ ከባለይዞታው የግል ማህደር ጋር መያያዝ ይኖርበታል። ከአዋጁ በተጨማሪ ደንቡ ተጨማረ ድንጋጌዎችን ይዟል። ባለይዞታው በመሬቱ የመጠቀም መብቱን የብድር ዋስትና አድርጎ ለማስያዝ ማሳው የሁለተኛ ደረጃ የይዞታ ማረጋገጫ ደብተርና ካርታ እንዲኖረው ያስፈልጋል። ከአማራ ክልል ህግ በተጨማሪ የቤንሻንጉል ጉሙዝ ክልል ህግ የገጠር መሬት በሊዝ የተከራየ ባለሃብት፣ የገጠር ሥራ አጥ ኢንተርፕራይዝ/ ማኅበራት ወይም አርሶ አደር መንግስት እዉቅና ለሰጣቸዉ የገንዘብ ተቋማት የመጠቀም መብቱን ወይም በመሬቱ ለይ በጉልበቱና በገንዘቡ ያፈራዉን ንብረት እንደዋስትና ለማስያዝ እንደሚችል ይደነግጋል። ይህ ድንጋጌ ቢደነገግም በክልሉ እስካሁን ድረስ ወደ ተግባር አልተቀየረም። ይህንን አዋጅ ለማስፈጸም በቅርቡ ደንብ ተዘጋጅቶለት ፀድቋል። ደንቡ በኪራይ ወይም በሊዝ ሥርዓት የተገኘ የገጠር መሬት የመጠቀም መብቱ ወይም በጉልበትና በገንዘብ የተፈራን ንብረት በእዳ ዋስትና አድርጎ ስለማስዝ ቢደነግግም የባለይዞታዎችን የመጠቀም መብት ለብድር ዋስትና ስለማስያዝ በአዋጁ የተደነገገውን ለአፈጻጸም በዝርዝር ሳያስቀምጥ አልፎታል።

ይህንን መነሻ በማድረግ በተንቀሳቃሽ ንብረት ላይ የሚመሰረት የዋስትና መብት አዋጅ ቁጥር 1147/2011 በትርጉም ክፍሉ አንቀጽ 2(27) የገጠር መሬት የመጠቀም መብትን ተንቀሳቃሽ ንብረት ሆኖ እንደሚቆጠር ያስቀምጣል። ይህም ማለት የገጠር መሬት የመጠቀም መብትን ማስያዣ አድርጎ ብድር መውሰድ እንደሚቻል ይደነግጋል።

ይህ አዋጅ በብሔራዊ ባንክ አርቃቂነት በሕዝብ ተወካዮች ምክር ቤት በ 2011 ዓ/ም በጸደቀው በተንቀሳቃሽ ንብረት ላይ የሚመሰረት የዋስትና መብት አዋጅ ቁጥር 1147/2011 መሰረት የገጠር መሬት የመጠቀም መብትን በማስያዝ ብድር መበደር እንደሚቻል በግልጽ በሕጉ ተደንግጎ ይገኛል። በአዋጁ መግቢያ ላይ በግልጽ ዓላማው ተደንግጎ የሚገኝ ሲሆን ይህም ዋስትናውን የጠበቀ ዘመናዊ የብድር ሥርዓት እንዲኖር እና ግለሰቦችና ተቋማት ተንቀሳቃሽ ንብረታቸውን በማስያዝ ሥራ ላይ የሚውል አዲስ ካፒታል ማግኘት እንዲችሉ፣ በሂደትም በየደረጃው ኢንቨስትመንትን ለማስፋፋት፣ ተጨማሪ የስራ ዕድሎችን ለመፍጠር፣ ምርትና ምርታማትን

ለማሳደግ፣ የፋይናንስ ተደራሽነትንና ተጠቃሚነትን ለማስፋፋት፣ በዋናነት በከተሞች ላይ ብቻ ውስን ሆኖ የቆየውን የባንክ አገልግሎትን ተደራሽነት ወደ ገጠሩ ማህበረሰብ ለማስፋፋትና ለማሳደግ ምቹ ሁኔታን ለመፍጠር እንደሆነ በግልጽ ተመላክቷል። በአዋጁ አንቀጽ 2 ንዑስ ቁጥር 27 ላይ ተንቀሳቃሽ ንብረት ማለት ምን ማለት እንደሆነ በትርጉም የቀረበ ሲሆን ይህም በሕግ ካልተከለከለ በስተቀር መሬት የመጠቀም መብትን እንደሚያጠቃልል ተደንግጓል። በየትኛውም ሕግ ቢሆን የገጠር መሬት የመጠቀም መብትን በማስያዝ ማበደርን የሚከለክል ሕግ የሌለ ከመሆኑ ጋር ተያይዞ ይህ የተፈቀደ ተግባር ነው። የገጠር መሬትን መሸጥ የተከለከለ ከመሆኑ ጋር ተያይዞ የይዞታ መብትን (Holding Right) ማስያዝ የተከለከለ ነው ተብሎ ከተደነገገው ውጭ የመጠቀም መብትን (Use Right) ማስያዝን የሚከለክል ሕግ የለም (በገጠር መሬት የይዞታ መብት እና የመጠቀም መብት መካከል ሰፊ ልዩነቶች ያሉ ስለሆነ)። ይህንን በመረዳት ብሔራዊ ባንክ የዚህን አዋጅ ድንጋጌ ወደ መሬት ለማውረድ "Codification, Valuation, and Registration of Movable Properties as Collateral for Credit Directive Number 186/2020" የሚል መመሪያ አዘጋጅቶ ወደ ስራ ተገብቷል። በዚህ መመሪያ አንቀጽ 7 ላይ በግልጽ የገጠር መሬት የመጠቀም መብት (የይዞታ ማረጋገጫ ደብተርና ካርታ) ለብድር ዋስትና ስለሚያዝበት አግባብ፣ የገጠር መሬቶች ልዩ የማሳ መለያ ቁጥር እንዴት ጥቅም ላይ እንደሚውል፣ ዋጋ ስለሚተመንበት፣ ከግብርና ሚኒስቴር ጋር ስለሚኖረው መስተጋብር፣ ዋስትናው እንዴት እንደሚመዘገብ፣ የአበዳሪና ተበዳሪ መብቶችና ግዴታዎች፣ እንዲሁም ተበዳሪ ብድሩን በውሉ መሰረት ባይከፍል አበዳሪ መብቱን ስለሚያስከብርበት አግባብ በግልጽ ተደንግጓል። ከዚህም አልፎ እነዚህ ለብድር ዋስትና የሚያዙ የማይንቀሳቀሱ ንብረቶች (የገጠር መሬት የመጠቀም መብትን ጨምሮ) ስለሚመዘገቡበት ሁኔታ ብሔራዊ ባንክ "Operationalization of Movable Collateral Registry Directive Number. MCR/01/2020" የሚል መመሪያ በማዘጋጀት ወደ ስራ ተገብቷል። በዚህ ሂደትም ከግብርና ሚኒስቴር በተገኘ መረጃ አነስተኛ የብድር ተቋማት እና ባንኮች የገጠር መሬት የመጠቀም መብትን ማስያዣ በማድረግ በአማራ፣ ኦሮሚያ እና ደቡብ ክልሎች ከ 2.6 ቢሊዮን ብር በላይ ብድር እንደተሰጠ እና ጤናማ በሆነ ሁኔታ ብድሮች እየተመለሱ እንዳሉ ያሳያል።

ባለይዞታዎች በማስያዣ የሚሰጡት በመሬት የመጠቀም መብታቸውን ነው። ባለይዞታዎች በመሬት የመጠቀም መብታቸውን በማስያዝ እንደ ዘመናዊ የእርሻ መሳሪያዎችና ግብአቶች የሚያገኙበትን ሁኔታ ማመቻቸት የመሬት ተጠቃሚዎች መሬታቸውን በሚገባ ለማልማት በአሁኑ ጊዜ እየገጠማቸው ያለውን የብድር ፍላጎትና አቅርቦት በማጣጣም ረገድ ከፍተኛ አስተዋጽኦ ይኖረዋል። የፋይናንስ እጥረት በመቅረፍ ባለይዞታዎች መሬታቸውን በኪራይ ወይም መሰል የመብት ማስተላለፊያ መንገዶች ለሌላ ሰው መስጠት ሳያስፈልጋቸውና

በመሬታቸው በዚሁ ምክንያት ሊደርስ የሚችለውን ጉዳት አስወግደው ካፒታል አግኝተው በአግባቡ እንዲያለሙ በማድረግ የምግብ ዋስትና ከማረጋገጥና የመሬት ምርታማነትን ከመጨመር አንፃርም በጎ ተፅዕኖ ይኖረዋል።

ከላይ የተጠቀሰው አዋጅ እና መመሪያዎች የገጠር መሬት የመጠቀም መብትን ማስያዣ ማድረግ ህጋዊነትን የደነገጉና አበዳሪና ተበዳሪን እንዲገናኙ በማድረግ ረገድ ጉልህ አስተዋጽኦ እያበረከቱ ያሉ ቢሆንም አሁንም ቢሆን በገጠር መሬት አስተዳደር ሕጎች በግልጽ መደንገግ ያለባቸው ሰፊ ጉዳዮች አሉ። በመሰረቱ የገጠር መሬት የመጠቀም መብትን በማስያዣነት በመጠቀም ብድር መበደር እንደሚቻል የአማራ፣ የቤኒሻንጉል ጉሙዝ፣ የኦሮሚያ እና የሲዳማ ክልሎች የገጠር መሬት አስተዳደርና አጠቃቀም ሕጎች የደነገጉ ቢሆንም ይህ ጠቅላላ ከመሆኑ በተጨማሪ ተመሳሳይ ድንጋጌ በፊደራሉ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ላይ በግልጽ አልተመላከተም። የፊደራልና የክልል የገጠር መሬት አስተዳደርና አጠቃቀም ሕጎች በዝርዝር መያዝ ካሉባቸው ጉዳዮች መካከል፦

የመጀመሪያው- የገጠር መሬት የመጠቀም መብትን በማስያዣ በሚያዝበት ጊዜ የጊዜ ገደብ እና የመሬት መጠን በሕግጋት መወሰን አለባቸው። አዋጅ ቁጥር 1147/2011 በዚህ ረገድ ምንም ያስቀመጠው ነገር የለም። የገጠር መሬት የመጠቀም መብትን በማስያዝ ብድር ማግኘትና የባለይዞታዎችን ከመሬታቸው ያለመፈናቀል ህገ-መንግስታዊ መብታቸውን ማጣጣም አስፈላጊ በመሆኑ ምክንያት ጉዳዩ ጥንቃቄ በተሞላበት መንገድ መደንገግ አስፈላጊ ነው። ይህ ለማድረግም ባለይዞታው ብድሩን መመለስ ባይችል ሊደርስ የሚችለውን ጉዳት ለመቀነስ አበዳሪው በመሬቱ የሚጠቀምበት የጊዜ ጣሪያ በሕግ መደንገግ አለበት። ይህንን ጣሪያ ለተዋዋይ ወገኖች መተው መሬት አይሸጥም የሚለውን የህገ-መንግስት ድንጋጌ በዝምታ መቃረን ይሆናል። በተጨማሪም ተዋዋይ ወገኖች የሚኖራቸው የመደራደር አቅም ተመሳሳይ ደረጃ ላይ ላይሆን ስለሚችል ህጉ ይህንን ሚዛን ማስጠበቅ አለበት።

በሁለተኛ ደረጃ፦ ባለይዞታዎች ለሌላ መሬት አልባ ለሆነ ሰው በመሬት የመጠቀም መብታቸውን በማስያዣነት በመስጠት ዋስ መሆን የሚችሉበትን አሰራር ሕግጋት መፍቀድ አለባቸው። በሀገራችን በመሬት አስተዳደር ስርዓቱ ውስጥ ከሚነሱ ችግሮች መካከል መሬት አልባነት በግንባር ቀደምትነት የሚጠቀስ ነው። በዚህ ዙሪያ የተደረጉ ብዙ ጥናቶች እንደሚያሳዩት መሬት አልባ የሆኑ የገጠር ነዋሪዎች ቁጥር አስፈሪ ደረጃ ላይ ደርሷል። ስለሆነም እነዚህ መሬት አልባ የህበረተሰብ ክፍሎች በተለያዩ የስራ መስኮች ለመሳተፍ ብድር ማግኘት ቢፈልጉ ለዚህ ዋስትና የሚሆን መሬት ስለማይኖራቸው የሌላ ሰውን የመሬት የመጠቀም መብት (በባለይዞታው ሙሉ ፈቃድ) እንደ ዋስትና እንዲያስይዙ ሕጎች መፍቀድ አለባቸው። በዚህ አኳኋን ብዙ ስራ አጥ ወጣቶች የወላጆቻቸውን ወይም የሌላ የቅርብ ሰው በመሬት የመጠቀም መብትን እንደ ማስያዣ በመጠቀም ብድር

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በማግኘት በተለያዩ የስራ መስኮች እንዲሳተፉ እድል ስለሚፈጥር በስራ ዕድል ፈጠራ ረገድ የሚኖረው ሚና ከፍተኛ ይሆናል።

ሦስተኛ፦ ህጉ ሌላው መያዝ ያለበት ነጥብ ተበዳሪ ብድሩን ካልከፈለ ውጤቱ በውሉ ለተጠቀሰው ጊዜ ያህል ብቻ አበዳሪ በመሬቱ የመጠቀም መብት እንዲኖረው መፍቀድ ነው። በዚህ ጊዜ አበዳሪው ካበደረው በላይ ጥቅም ቢያገኝ ተበዳሪው የተገኘውን ትርፍ መልስልኝ ብሎ የመጠየቅ መብት ሊኖረው አይገባም። ይህም አበዳሪው መሬቱን በአግባቡ ተንከባክቦ በማልማት የበለጠ ጥቅም እንዲያገኝ ያበረታታዋል። በተመሳሳይ አበዳሪው በተለያየ ምክንያት (ለምሳሌ ድርቅ) በተጠቀሰው ጊዜ ውስጥ መሬቱን በመጠቀም ያበደረውን ገንዘብ የሚመልስ ጥቅም ማግኘት ካልቻለ ኪሳራው የአበዳሪው እንዲሆን መደንገግ እንጂ በመሬቱ የመጠቀም መብቱ እንዲራዘምለት የመጠየቅ ወይም የተበዳሪውን ሌላ ንብረት ለብድር አፈፃፀም የመያዝ መብት ሊኖረው አይገባም። ይህ ድንጋጌ ከዚህ በፊት ከሚታወቀው የብድር ዋስትና የተለየ ሲሆን ይህም የመሬትን ልዩ የንብረት ባህሪ ግምት ውስጥ በማስገባት ባለይዞታዎች እንዳይፈናቀሉና እንዳይጎዱ ለማድረግ ታሳቢ በማድረግ መሆን አለበት። መሬቱ ሊሸጥ ስለማይችል አበዳሪ ከመሬቱ ምን ያህል ገቢ አገኘ፣ ምን ያህልስ ወጭ አወጣ በሚል ክትትል የሚያደርግ ተቋምም ስለሌለ፤ ይህንን መከታተልም ግጭት ከመፍጠር የዘለለ ሚና ስለማይኖረው በመጀመሪያ ውል ሲመሰርቱ ተዋዋይ ወገኖች ይህንን አውቀው በስሌት ውላቸውን እንዲያደርጉ ያስገድዳቸዋል።

አራተኛ፦ ይህንን ማስያዣ ውል የሚገቡት ገንዘብ ተበድረው በብድር ውሉ በተመለከተው የጊዜ ገደብ መሰረት መመለስ ባይችሉ ገንዘብ ጠያቂው የባለ ዕዳውን መሬት በውሉ ለተመለከተው ጊዜ ያህል ብቻ (በውሉ የሚቀመጠው የጊዜ ገደብ በህጉ ከሚቀመጠው ያነሰ መሆን አለበት) በማረስ ወይም በማከራየት ተጠቅሞ መሬቱን ለባለ ይዞታው መመለስ እንዳለበት ህጉ መደንገግ አለበት። አበዳሪው መሬቱን ሊጠቀምበት የሚችለው ተበዳሪው በውሉ መሰረት ገንዘቡን መመለስ ሳይችል ሲቀር ብቻ ነው።

አምስተኛ፦ አበዳሪዎች የሚሆኑት ህጋዊ የፋይናንስ ተቋማት ብቻ መሆን ያለባቸው ሲሆን አራጣ አበዳሪነትን ለመከላከል ግለሰቦች በህጉ አበዳሪ ሆነው በመሬት የመጠቀም መብቱን እንደ ማስያዣነት እንዲይዙ ሊፈቀድላቸው አይገባም። በመሆኑም ባለይዞታዎች ግብዓት ለመግዛት የገንዘብ እጥረት በማጋጠሙ ምክንያት መሬታቸውን ያከራዩ የነበሩት ወይም ደግሞ ያስጠምዱ የነበሩት ይህ ድንጋጌ በመቀመጡ በመሬቱ የመጠቀም መብታቸውን በማስያዝ ብድር ወስደው መሬታቸውን አልምተው ብድራቸውን እንዲመልሱ የሚያስችል መብት ይሆናል። ይሁንና ይህ ድንጋጌ ከዚህ በፊት ብድርና ቁጠባ ተቋማት በቡድን ዋስትና የሚሰጡትን ብድር የሚተካ ሳይሆን አማራጭ እንደሆነ መደንገግ ይኖርበታል። በመሆኑም መሬት የሌላቸው ሰዎች ወይም

በመሬታቸው የመጠቀም መብታቸውን በማስያዣ መስጠት የማይፈልጉ ከዚህ በፊት እንደነበረው በቡድን ከብድርና ቁጠባ ተቋማት ብድር የማግኘት አማራጫቸው የተጠበቀ መሆን አለበት።

በአጠቃላይ የግጠር መሬትን የመጠቀም ዋስትና አድርጎ ማስያዝን በሚመለከት በተንቀሳቃሽ ንብረት ላይ የሚመሰረት የዋስትና መብት አዋጅ ቁጥር 1147/2011 ላይ የተደነገገ ቢሆንም አዋጁ ዝርዝር ድንጋጌዎችን ያልያዘ በመሆኑ ለአፈጻጸም አስቸጋሪ አድርጎታል። ስለሆነም ግልጽ እና ዝርዝር ድንጋጌዎች ያሉት ሕግ መኖር ገንዘብ የሌላቸው ባለይዞታዎች ለስራቸው ግብዓት የሚሆን ገንዘብ ከብድር መልክ እንዲያገኙ በማድረግ የእርሻ ስራቸውን እንዲሁም ከእርሻ ስራቸው በተጓዳኝ ሌሌች ገቢ የሚያስገኙ ስራዎችን እንዲያከናውኑ ስለሚረዳ ድሃ ባለይዞታዎች በግብዓት እጥረት ምክንያት የእርሻ ስራቸውን ትተው የሚያደርጉትን ፍልሰት ይቀንሳል። በመሆኑም ከላይ በተገለጸው አዋጅ ላይ የተፈቀደውን የግጠር መሬት የመጠቀም መብት ማስያዣ አድርጎ ብድር ማግኘት መቻልን በአግባቡ ለማስተዳደር የግጠር መሬት አስተዳደርና አጠቃቀም ሕጎች በዚህ ረገድ ዝርዝር ድንጋጌዎችን ይዘው መምጣት አለባቸው።

An Unconstitutional Judicial Power of State Courts over Federal Matters: A Comment on Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen

Yenew B Taddele ♣

Abstract

Although it had delegation power, Awi Zone High Court provided a judgment on a dispute between Fekadu Azmeraw and Tesfa Fetene vs. Bitewush Mekonnen as if it had inherent judicial power; and Amhara National Regional State Supreme Court confirmed the former's decision. However, Amhara National Regional State Supreme Court, Cassation Division heard the petition and reversed the lower courts' decision stating that such courts lack jurisdiction to hear the case since it is a federal matter because one of the litigating parties-Nile Insurance S.C. is a federally registered business organ. Thus, the Ethiopian Federal Democratic Republic Supreme Court Cassation Division confirmed the decision made by the Amhara National Regional State Supreme Court, Cassation Division. The author has concluded that the Federal Cassation Division failed to appreciate two procedural issues: (1) it is not because Awi Zonal High Court and Amhara Regional State Supreme Court have inherent judicial power but it is because they have a delegation power they heard the case; and (2) Amhara Regional State Supreme Court, Cassation Division has no judicial power over federal matters. The Federal Cassation Division relied on the justification that regional supreme courts cassation divisions have judicial power to amend or order otherwise regional courts under them – which has not explained how it works on federal judicial power yet. The division of judicial power in Ethiopia between federal and state courts is not subject to the shifting needs of time and circumstance,rather it is well allocated. The allocation of judicial powers avoids the overlapping of jurisdictions. Unless such allocation is kept and respected, state and federal judiciaries do not resolve disputes well but, with their overlapping jurisdictions, themselves engage in inter-system power struggle.

Keywords: Delegation, Jurisdiction, Judiciary Power, Federal Matter, State Matter

♣ Lecturer in Laws, Bahir dar University School of Law. The author can be reached at yenew.taddele@gmail.com

1. Introduction

The Federal Democratic Republic of Ethiopia Constitution (hereinafter, FDRE Constitution) provides for the establishment of an independent judicial system both at federal and state levels, which is "one of the fundamental institutions of any democratic constitutional system"[1]. This shows that the Ethiopian judicial system is designed with parallel court systems in which regional states and the federal government have their own set of independent court structures and administrations[2]. Division of adjudicative responsibility is a fundamental component of Ethiopia's federal system. The FDRE Constitution establishes tiers of federal and state courts and gives an overview of their jurisdiction leaving the details to be determined through legislation[3]. These courts have specified jurisdiction in different subject matters and applicable laws in their judicial competence. Federal courts are authorized to see cases of federal matters while state courts are entitled to handle regional matters.

In addition to state matters, regional state courts handle federal matters through delegation by applying federal laws[4] where as state supreme courts and high courts have delegation to see judicial power of the federal high court and state Supreme Court respectively over federal maters[5], and decisions rendered by a state high court exercising the jurisdiction of the federal first instance court are appealable to the state supreme court[6].

[1]Semahagn Gashu, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology, and Democracy in Ethiopia,* Ashgate Publishing Limited, USA, 2014, P. 218 [here in after, Semahagn Gashu, *The Last Post-Cold War Socialist Federation*].

[2]Assefa Fiseha, 'Separation of powers and its implications for the judiciary in Ethiopia', *Journal of Eastern African Studies,* 2011, Vol. 5, No. 4, PP. 702-715, P .704[Assefa Fiseha, Separation of powers and its implications for the judiciary in Ethiopia].

[3]Federal Constitution of Ethiopia, 1994, Federal Negarit gaz., Proc. No. 1, 1st year, No. 1, Art. 78/ 2 and 3 [Here in after FDRE Constitution, 1994].

[4]Ibid

[5]Id, sub-Art. 2

[6]Id, Sub-Art.4

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The state Supreme Court has the power of cassation over any final court decision on state matters which contain a basic error of law[7]. Similarly a decision of any court (including the state Supreme Court cassation division) in Ethiopia can be reviewed by the Cassation Division of the Federal Supreme Court (hereinafter named Federal Cassation Division) if it manifests 'prima facie case' and it is a final decision[8].

A case, Fekadu Azmeraw and Tesfa Fetene vs. Bitewush Mekonnen[9] sought the author's attention to write this comment. This case comment examines an issue of whether the cassation divisions of regional state supreme courts have adjudicative power to make "*void ab initio*" or order otherwise lower courts' decision with a justification of lack of jurisdiction to have such case though the latter heard in their delegation power- over federal matters.

The case Comment is divided into four sections. The first section is the introduction part through which preliminary remark depicts, the one being discussed here ; The second part is summary of facts of the case-that narrated what happened; the third part is analysis through which the comments are provided in; and the last part is conclusion which brings the paper to an end by making some general remarks.

2. Summary Facts of the Case

W/ro Bitewush Mekonnen (hereinafter named Plaintiff) sustained a bodily injury while she was traveling from Mankusa to Bahir Dar by a vehicle owned by Ato Fekadu Azemeraw and Ato Tesfa Fetene on Yekatit 17, 2006 E.C. The Respondent instituted a tort suit and claimed 720,600 Ethiopian Birr at Awi Zonal High Court in Amhara Regional State against Ato Fekadu Azemeraw and Ato Tesfa Fetene and

[7]Id, Art. 80/3/b

[8]FDRE Constitution, 1994, *supra*-4, Sub-Art.3/a. See also Murado Abdo, 'Review of Decisions of State Courts over State Matters by the Federal Supreme Court', *Mizan Law Review*, 2007, Vol.1, No 1, PP.60-74, P.1[Here in after, Murado Abdo, Review of Decisions of State Courts over State Matters by Federal Supreme Court].

[9]*Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen*, Federal Supreme Court, Cassation Division, 2010, Civil Case No' 145175[unpublished] [Herein after, Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen, Federal Supreme Court, Cassation Division)

Nile Insurance S.C. (which gave vehicle insurance against a 3rd party insurance coverage) (hereinafter named Defendants).

The Defendants appeared before the Awi Zone High Court and submitted their statement of defense in which they argued that the dispute has been settled through mediation; however, neither of them objected to the material jurisdiction of the court. Awi Zonal High Court pronounced its decision in favor of the defendants stating that the dispute between them has been already settled through mediation made by the plaintiff and defendants.

The plaintiff had appealed to Amhara National Regional State Supreme Court and sought relief from such court to reverse the lower-Awi Zonal High Court's decision. The Appellate Court rejected the appeal justifying that it finds the lower court's decision as not appealable.

The plaintiff took the case before Amhara National Regional State Supreme Court, Cassation Division, and sought relief from such Cassation Division to reverse and correct the basic error of law that lower courts have made while they were pronouncing their decision. Amhara National Regional State Supreme Court, Cassation Division found the lower courts' decisions containing basic error of law and ordered Defendants including Nile insurance S.C. to defend.

One of the Defendants, Nile Insurance S.C. brought, inter alia, a preliminary objection alleging that Amhara National Regional State Supreme Court Cassation Division lacks material jurisdiction over federal matters. However, The Cassation Division rejected the objection and continued to listen to the cassation petition. It later pronounced its judgment and declared lower courts' decisions as "*void ab initio*". It detailed that Awi Zonal High Court and Amhara National Regional State Supreme Court lack material jurisdiction to hear the case in their first instance and appellate jurisdiction respectively. Because the Cassation Division reasoned out that the claimed amount is ETB 720,600 and one of the litigants is "a business

organization registered and formed under the jurisdiction of a federal government organ" it stated that these courts should have rejected the suit.

Defendants (herein after named Applicants) lodged a cassation petition before Federal Cassation Division, cassation over cassation, and sought a relief from the Federal Cassation Division to reverse and correct the basic error of law that Amhara National Regional State Supreme Court, Cassation Division committed. The applicants claimed that as Nile insurance S.C. is a federally registered business organ, the material jurisdiction over the case is for federal courts. Consequently, the Amhara National Regional State Supreme Court Cassation Division lacks the power to adjudicate federal matters entertained by lower courts in their delegation power.

However, the Federal Cassation Division confirmed the Amhara National Regional State Supreme Court, Cassation Division's decision by reasoning Regional Supreme Courts Cassation Division has judicial power to reverse and correct all decisions made by lower courts, including cases of federal matters.

3. Analysis and Comments

Federal courts can receive cases of federal matters and cases originating from Addis Ababa and Dire Dawa City Administrations where they are physically located in Addis Ababa, the capital, and Dire Dawa.[10] Regional state supreme and high courts can also receive cases of federal matters, in their delegation of judicial power, from regions where such courts are located.[11]

FDRE Constitution reserved the highest judicial power over state matters to state courts.[12] To guarantee the right of appeal of the parties in a case, decisions rendered by state high courts exercising the jurisdiction of the federal first instance court are appealable to the state supreme court where as decisions rendered by a state supreme

[10]FDRE Constitution, 1994, *supra* 4, Art. 3/3
[11] FDRE Constitution, 1994, *supra* 4
[12]Id, Art. 80/2

court on federal matters are appealable to the federal supreme court.[13] The Federal Courts Proclamation allocates subject-matter jurisdiction to federal courts based on three principles: laws, parties, and places. It stipulates that federal courts shall have jurisdiction over, first, ―cases arising under the Constitution, federal laws, and international treaties; and second, over parties specified in federal laws. Article 3(3) of the Federal Courts Proclamation states that federal courts shall have judicial power in places specified in the FDRE Constitution or federal laws.[14] Proclamation No' 25 of 1996 was the most important legislation regulating the federal judiciary and determining its powers. Under this legislation, federal courts are given original and appellate jurisdiction over cases arising under the Constitution, international treaties, and federal laws. They also have jurisdiction over parties and places specified in the Constitution or federal laws.

Federal courts are generally said to have *"federal questions"* [15] jurisdiction, which means that federal courts will hear cases that involve issues touching on the Constitution or other federal laws. The source of "federal question" jurisdiction can be found in Article 3 of Federal Courts Proclamation 25/1996.[16] Article 5/6 also states that the "judicial power shall extend to all cases, in federal law and business organizations established and registered by such laws.[17]

[13]Id, Sub-Art. 4 and 5

[14]Federal Courts Proclamation, 1996, Federal Negarit gaz., Proc. No. 25, 2nd year, No 13, Art. 3 [Here in after, Federal Courts Proclamation, 1996]. This proclamation is repealed by Federal Courts Proclamation, 1234/2021, Federal Negarit gaz., Proc. 1234, 27th, No. 26. However, the Proclamation has been enacted with no change about the subject matter and issues of this case comment. It is because the judgment had been pronounced before Proclamation 25/1996 was repealed the author cited provision of Proclamation 25/1996.

[15]"Federal question" jurisdiction is one of the two ways for a federal court to gain subject-matter jurisdiction over a case (the other way is through diversity jurisdiction). Generally, for federal question jurisdiction to exist, the cause of action must arise under federal law. More specifically, however, both constitutional and statutory requirements must be met before jurisdiction can be found. Thus, it may be an equivalent phrase to "A jurisdiction over the federal subject matter.

[16]Federal Courts Proclamation, 1996, *supra* 15, Art.3

[17]Id, Art.5/6

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In Fekadu Azemeraw and Ato Tesfa Fetene vs. Bitewush Mekonnen[18], one of the defendants _Nile Insurance S.C. at Awi Zonal High Court is a business organization that has been established by federal laws. When the Insurance Company had litigated, the court's jurisdiction was automatically changed from regional courts' jurisdiction to federal courts' jurisdiction and Awi Zonal High Court heard the case as if it is a federal first instant court.

The Respondent appealed to Amhara Regional State Supreme Court. Here,the appellate court heard the case not in its inherent jurisdiction but in its delegation jurisdiction as if it is a federal high court, and the court confirmed the lower court's decision. The only option of the respondent to appraise hereafter would have been appearing before Federal Court Cassation Division.[19] The respondent appealed against the applicants before Amhara Regional State Supreme Court Cassation Division. It has "power of cassation over any final court decision on state matters which contain a basic error of law"[20] but not over the final decision of lower courts' that they have rendered in their delegation power. Thus, the cassation division of the regional supreme court shall have a jurisdiction to entertain and decide only on the following regional cases providing there is a fundamental error of law; "cases that have been given a final decision, in appeal, by the woreda court; regional cases that have been given a final judgment by the high court; and regional cases that have been given a final judgment, by a regular bench of the supreme court" in their inherent judicial power.[21]

However, coming to the case at hand, Amhara regional State Supreme Court Cassation Division should have rejected the case because it doesn't have either

[18]Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen, Federal Supreme Court, Cassation Division, *supra*- 1.
[19]Federal Courts Proclamation, 1996, *supra* 15, Art. 10/1.
[20]FDRE Constitution, 1994, *supra* 4, Art. 80(3/6)
[21]Amhara National Regional State Courts Establishment Revised Proclamation, 2015, Proc.No.223, 20th, No. 4, Art. 17/2 [Here in after, Amhara National Regional State Courts Establishment Revised Proclamation, 2015].

inherent or delegated constitutional judicial power over federal matters. Regional state supreme courts have not inherent or delegated constitutional judicial power over federal matters.Unfortunately, the Federal Supreme Court, Cassation Division also failed to correct this error. It confirmed the Amhara Regional State Supreme Court, Cassation Division decision. In its decision, it stated that the latter has judicial power and responsibility to correct decisions pronounced by lower courts.

> *የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎትም ጉዳዩ በዚህ ሁኔታ ከቀረበለት በኃላ የፌደራል ፍ/ቤቶች ስልጣን መሆኑን አዉቆታል። በስሩ ያሉት ፍ/ቤቶች የክልል ፍ/ቤቶች ስልጣን እንደሆነ በመዉሰድ በክልል ፍ/ቤቶች ስልጣን ክርክር ሲደረግበት ቆይቶ አቤቱታ የቀረበለትን ጉዳይ ተቀብሎ በስር ፍ/ቤቶች የተፈፀሙትን ስህተቶች በማረም ክርክሩ ስልጣኑ ለሆነዉ ፍ/ቤት እንዲቀርብ ማዘዙ ስህተት የተፈፀመበት ዉሳኔ አይደለም።*[22]

In this case, the Federal Supreme Court, Cassation Division failed to appreciate two procedural issues, (1) it is not because Awi Zonal High Court and Amhara Regional State Supreme Court have inherent judicial power, though they mistakenly assumed as if they have material jurisdiction, by forgetting their delegation power they heard the case[23] and (2) Amhara Regional State Supreme Court, Cassation Division has no judicial power over federal matters.[24] Irrespective of regional courts' assumption of having material jurisdiction over federal matters mistakenly, a qualified reading of Article 3 and 5(6) of the Federal Courts Proclamation, "which works out the details of Article 80 of the Constitution under consideration by (inter alia) vesting in" the federal courts' judicial power over federal matters.

Amhara Regional Supreme Court, Cassation Division, one may argue, has judicial power to confirm, reverse, or otherwise correct lower courts' decisions that they pronounced by their delegation judicial power only to review whether the latter has

[22] Fekadu Azemeraw and Tesfa Fetene vs. Bitewush Mekonnen, Federal Supreme Court, Cassation Division, *Supra*- 1.
[23] FDRE Constitution, 1994, *Supra* 4, Art.80(3/6).
[24] Amhara National Regional State Courts Establishment Revised Proclamation, 2015, *supra*-22

jurisdiction to have the case.[25] In vertical judicial power division, the highest judicial organ i.e. Amhara Regional Supreme Court, Cassation Division, shall oversee lower courts' decisions whether they rendered it in their jurisdictional competence,[26] so what Amhara Regional Supreme Court, Cassation Division provided is not to touch upon the merits of the case that the lower courts decided but make the case "*void ab initio*" as if no judgment has been pronounced and leave the parties to institute a fresh suit before competent courts.[27]

However, the above justification can't escape criticism. Because (1) when Awi Zonal High Court heard such case, it should have assumed federal first instance court jurisdictional power and the appellate court-Amhara Regional Supreme Court should have received the appeal through its delegation judicial power, not with their inherent judicial powerbecause a legal/judicial note is easily taken that regional zone high courts and supreme courts acted as a delegate of federal first instance and high court respectively. The fact that they were not aware of and just proceeding on the assumption that they are dealing with state matters can't grant them inherent judicial power over federal matters. Thus, Amhara Regional Supreme Court, Cassation Division has no constitutional judicial power to make "*void ab initio*", reverse, confirm, amend, remand or order otherwise against decisions rendered by lower courts in their delegation power; (2) Amhara Regional Supreme Court, Cassation Division has already learned that the claimed amount is ETB 720, 600 and Awi Zonal High Court had no delegation material jurisdiction to have such case. But the former made the latter's decision "*void ab initio*" knowing that Awi Zonal High Court had such case in its delegation of judicial power and the judicial power to make "*void ab initio*" Awi Zonal High Court's decision is vested in Federal Supreme Court Cassation Division.

[25]Interview with Tajebe Getaneh, Lecturer in Law at Bahir Dar University, School of Law, on Constitutional Judicial Power of Regional States Supreme Court, Cassation Divisions over Federal Matters, July 22, 2021[Here in after, Tajebe Getaneh, Lecturer in Law].
[26]Ibid
[27]Ibid

The justification may be sound only if disputants would have argued that Awi Zonal High Court has material jurisdiction to have a case. Then the issue framed by Amhara Regional Supreme Court, Cassation Division would have been whether Awi Zonal High Court has an inherent judicial power to hear a case at hand. But, in the meantime it received a cassation appeal, Amhara Regional Supreme Court, Cassation Division knew that Awi Zonal High Court lacks material jurisdiction to hear such case, because it is the federal high court's material jurisdiction.

In a federal government structure, the federal government and regional states have a horizontal division of judicial power. Save delegation/concurrent power given to the regional high and supreme courts, they should respect each other's autonomous judicial power. Thus, any cassation petition (including an issue of material jurisdiction) against federal lower courts or regional courts' (only for decisions rendered by their delegation power) decisions shall be submitted and lodged before Federal Cassation Division.

If the regional Supreme Court cassation division can hear cases arising over federal matters, it may result from jurisdictional overlaps between federal and regional state adjudicative bodies.[28] Jurisdictional overlaps can result from competing for jurisdiction between [federal] courts and [regional states] courts if they hear any subject matter irrespective of their perspective judicial competence and share the same personal jurisdiction.[29] To avoid duplicative or parallel proceedings involving the same (or essentially the same) parties on the same (or essentially the same) issues by federal and regional state courts, the FDRE Constitution and Courts Establishing Proclamations delineate both jurisdiction and merits judicial power of federal and

[28]Chiara Giorgetti, 'Horizontal and Vertical Relation of International Courts and Tribunals-How Do we Address Their Competing Jurisdiction?', *ICSID Review,* 2015, Vol. 30, No. 1, PP .98-117, P.104 [here in after, Chiara Giorgetti, Horizontal and Vertical Relation of International Courts and Tribunals-How Do we Address Their Competing Jurisdiction?]

[29]Chiara Giorgetti, Horizontal and Vertical Relation of International Courts and Tribunals-How Do we Address Their Competing Jurisdiction?, *supra 29,* P.105

state courts. Thus, either court can only deal with a dispute when it has personal and subject matter jurisdiction.

Division of judicial power among different courts in Ethiopia is not subject to the shifting needs of time and circumstance. At different times and for different purposes, the respective judicial power of federal courts and regional states courts have not changed unless the governing law is amended.[30] Surely Federal Cassation Division's tendency is without relevance to the effective organization of the judicial systems of Ethiopia. Rather it is an unconstitutional and arbitrary assignment of judicial power for regional courts over federal matters.

Therefore, the Federal Cassation Division should have reversed a decision by Amhara Regional State Supreme Court, Cassation Division. Because the latter lacks jurisdiction to hear cases that should have been instituted before the former. Although Awi Zonal High Court and Amhara Regional State Supreme Court entertained the case as if it is a state matter, it is a federal matter rather, irrespective of their wrong assumption, they heard such case in their delegation power so it is the Federal Cassation Division that should have reversed or order otherwise such lower courts' decision.

4. Conclusion

In Fekadu Azmeraw and Tesfa Fetene vs. Bitewush Mekonnen case, the Federal Cassation Division set an unfortunate precedent that hampers judicial powers vested in Ethiopian Courts. It has done this in complete disregard for Art. 5(6) of Federal Courts Proclamation No' 25/1996, Art. 17(2) of Amhara Regional State Courts Establishment Revised Proclamation No' 223/ 2015 and Art. 80(3)/a and b of FDRE Constitution. Thus, it has worked in favor of the validity of ultra-judicial power of regional courts cassation divisions to assume jurisdiction over federal matters.

[30] Id, P.107.

In an 'unconvincing fashion', the Federal Cassation Division relied on the justification that regional supreme courts cassation divisions have judicial power to amend or order, otherwise regional state courts under it – which it has not explained how it works on federal judicial powers yet.

Since the basic principle of federalism is to form a dual government, the power should also be based on the federal principle that there must be judicial bodies in both federal government and regional states including claimed or objected jurisdictions. Not only should such a division exist, but also power should be exercised according to such division where the federal courts decide federal matters and state courts decide state matters.

Sometimes, the indispensability of the Federal Cassation Division in the federal judicial system to the maintenance of our federal scheme may be taken as a political postulatebut the case at hand shall not be taken as a political postulate. In such cases, the Cassation Division's specific functions ought to submit to the judgment of appropriateness to the needs and sentiments of the disputants, and course to lawsespecially, it should be saved from an excess of responsibility-ultra judicial power which may seriously impair judicial powers vested in federal courts.

The allocation of judicial powers avoids the overlapping of jurisdictions. Unless such allocation is kept and respected, "state and federal judiciaries not to resolve disputes well but, with their overlapping jurisdictions, themselves engage in intersystem power struggles". Thus, federal courts in Ethiopia adjudicate federal matters while regional state courts adjudicate regional matters in their independent court structures and administrations, and only in their delegation of judicial power.

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ጣምራ የሥራ ውል ሕጋዊነት ላይ በተሰጡ የፌዴራል ጠቅላይ ፍርድ ቤት የሰበር ፍርዶች ላይ የቀረበ ትችት

በጌታሁን ወርቁ♣

1. መግቢያ

ኑሮ ለተቀጣሪ ፈተና በሆነበት በዚህ ዘመን አንድ ሥራ ላይ ሙጥኝ ማለት የሚያዋጣ አይመስልም። እንኳን ባላደገችው ሃገራችን ባደጉትና ሰፋ ያለ የማኅበራዊ ዋስትና ዐቅድ (Social Security Scheme) ባለባቸው ሃገራት ኑሮ በሁለት ወይም ሦስት ሥራ ካልተደገፈ አይቆምም። በሃገራችን የተቀጣሪ ደመወዝ ማነስ፣ የተቀጣሪው ጥቅማ ጥቅሞች ላይ ያለው የመደራደር መብት ጠንካራ አለመሆን፣ አሠሪው ለትርፉ መጨመር ምክንያት የሆነውን ሠራተኛውን ለመጥቀም ያለው ዝንባሌ ደካማ መሆኑ ሠራተኛው ጣምራ የሥራ ውል እንዲፈጽም ያስገድዱታል። ሌሎችም ለጣምራ ውል መመስረት ምክንያቶችን ማንሳት እንችላለን። ሰራተኛው የሁለት እና ከዚያ በላይ የተለያዩ ሙያ ባለቤቶች መሆን፣ በግል ንግድ ወይም በቤተሰብ የጋራ ሥራ የመሳተፍ ሁኔታ ወ.ዘ.ተ. ሊጠቀስ ይችላል። አሰሪዎች አተረፍን ብለው ሲያስቡ፣ ወይም ሰራተኞቻቸው ሲጠይቁ፣ ኑሮ ሲከብዳቸው፣ ወይም እንዳይለቁባቸው ተወዳዳሪ ሆነው ለመቀጠል አልፎ አልፎ የደመወዝ ጭማሪ ቢያደርጉም ጣምራ የሥራ ውሉን የሚያስቀረው አይመስልም። ያም ሆኖ በሃገራችን ከአንድ አሠሪ በተጨማሪ ለሌሎችም ጭምር የሚሠራ ወይም የግሉን ሥራ የሚሠራው ሰው ከሌሎች አገሮች አንፃር እጅጉን አነስተኛ ነው። ሠራተኛው እየሠራ በተገኘም ሰዓት አሠሪው ርህራሄ የሌለው የሥራ ውል መቋረጥ ያስከትልበታል። በዚህ ጽሑፍ ይህንን የሰራተኛውን ጣምራ የሥራ ውል መመሥረት በሕግ ፊት ያለውን ተቀባይነት፣ መብት ስለመሆኑ አለመሆኑ፣ በሕግ ሊኖርበት ስለሚችለው/ስለሚገባው ገደብ እንዲሁም ተግባራዊ አፈጻጸሙን ለመመልከት እንሞክራለን። ጣምራ የሥራ ውል (Double or dual employment)[1] የሚለው ቃልም ሆነ ጽንሰሃሳብ በየትኛውም የሃገራችን የሰራተኛ አሰሪ ሕግ

♣ በአዲስ አበባ ዩኒቨርስቲ፣ የሰብዓዊ መብቶች ማዕከል የፒኤችዲ ተማሪ ሲሆኑ በፌዴራል ፍ/ቤቶች የሕግ ጠበቃና አማካሪም ናቸው። የኢሜይል አድራሻቸው getukow@gmail.com ነው።

[1] እንደዚህ አይነት ሥራ የተለያዩ ሥያሜዎች የሚሰጡት ሲሆን Double Employment, Dual employment, multiple jobholding, እና moonlighting የተለመዱት ናቸው። Stoughton (2017) revealed that law enforcement officers who do job during their official duty are also moonlighting. See: Stoughton,

ላይ ተጠቅሶ አናገኝም::[2] በርእሱ ላይ ከተጻፉ ምንጮች በመነሳት ግን ለጽንሰሃሳቡ ትርጉም መስጠት እንችላለን። **ጣምራ የሥራ ውል የምንለው አንድ ሠራተኛ በቋሚነት ተቀጥሮ ከሚሠራበት አሠሪ ውጭ ለሌላ አሠሪ ሥራ ለመሥራት የሚስማማበትን የሥራ ውል ሲሆን እንደአስፈላጊነቱ ከአንድ በላይ የሥራ ውል መመሥረትን ይጨምራል።** ጣምራ የሥራ ውልን በተመለከተ የሃገራት ተሞክሮ የተለያየ ነው። አንዳንዶች የሚፈቅድ ወይም የሚከለክል ሕግ ያላቸው ሲሆን ኢትዮጵያን የመሰሉት ሃገራት ደግሞ ጉዳዩን በዝምታ አልፈዉታል።[3] ጣምራ የሥራ ውል በአንድ ኤጀንሲ ተቀጥሮ ከሌላ ኤጀንሲ ጋር በሚደረግ ስምምነት (Joint Employment) ለሁለተኛው የሚሠራበትን የሕግ አግባብንም የሚያጠቃልል ቢሆንም በዚህ ጽሑፍ በዚህ አረዳድ አንመለከተውም።

2. <u>መነሻ ነገር</u>

ለዚህ ጽሑፍ መነሻ ይሆነን ዘንድ ለፍርድ ቤት የቀረቡ ጉዳዮችን እንመልከት። ሁለቱ ጉዳዮች በፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አስገዳጅ የሕግ ትርጉም የተሰጠባቸው ሲሆኑ አንዱ ደግሞ በተግባር ጸሐፊው ያጋጠመው ጉዳይ ነው።

S.W. (2017). Moonlighting: The private employment of off-duty officers. University Illinois Law Review. 1847-1900.

[2] በከፍተኛ ትምህርት ተቋማት በሁለት ተቋም የመስራት ልማድ የዳበረ ቢሆንም ይህንን የተመለከተ ግልጽ ሕግ ወይም መመሪያ ስለመኖሩ ጸሐፊው ማግኘት አልቻለም። ሆኖም እንዲህ አይነት አሰራር በሌሎች ሃገራት ዩኒቨርስቲዮችም የተለመደ ሲሆን በአንድ ጉዳይ ላይ ሰፊ ምርምር የሰሩና የተለየ እውቀት ያላቸው ምሁራን ልምዳቸውን ለማጋራት ክፍተቱንም ለመሸፈን ተግባራዊ ይደረጋል። የሕግ መምህራን ጠበቃ፣ የጤና ባለሙያዎችም ከመምህርነት ባለፈ ተቀጣሪ የሚሆኑበትም አሰራር መኖሩን ጸሐፊው ያውቃል። እነዚህ ሙያዎች ካለባቸው የባለሙያዎች እጥረት አንጻር አሰራሩ ተግባራዊ የተደረገው ሰፊ ልምድ ያላቸውን ባለሙያዎች ላለማጣት እንደሆነ ይታመናል።

[3] አሜሪካ በሕገመንግስቷም በክልሎች በወጡ ዝርዝር ሕጎችም የጣምራ ውል የምትፈቅድ ሲሆን እ.ኤ.አ በ2020 ወደ 13 ሚሊዮን የሚሆኑ ዜጎች የጣምራ የሥራ ውል ፈጽመዋል፣ ከዚህ ውስጥ 6.9%(በመቶ) የሚሆኑት ከሁለት በላይ ቀጣሪ አላቸው። ሕንድ ሁለት እና ከዚያ በላይ ሥራ መሥራትን የሚከለክሉ የተለያዩ ሕግጋት ቢኖራትም አልፎ አልፎ አሰሪው ሲፈቅድና የጥቅም ግጭት ከሌለ የሚፈቀድበት አሰራር አለ። ማሌዥያ ፈቃጅም ከልካይም ሕግ ባይኖራትም ፍ/ቤቶች ጉዳዩን ከወካይ እና ተወካይ ግንኙነት ጋር በማያያዝ በማንኛውም ሰዓት ከአሰሪው ውጭ ሥራ መስራት መሰረታዊ የመታመን (fiduciary) ግዴታን መጣስ ነው ሲሉ ፍርድ ሰጥተዋል። ከልካይ ሃገራት ከሚሰጧቸው ምክንያቶች ውስጥ የአለም ዓቀፍ የሥራ ድርጅት ከወሰነው 9 የሥራ ሰዓት በተጨማሪ ማሰራት የሰራተኛውን ጤና ያቃውሳል እና የሌላውን ሥራ እድል መውሰድ ያስከትላል የሚል ይገኝበታል። See: Asiah Bidin and et al(2020), Legal Position of Double Employment in Malaysia, Psychology and Education (2021) 58(2): 1611-1617 ሆኖም በቂ የመኖሪያ ገንዘብ በማይገኝባቸው ኢትዮጵያን የመሰሉ ሃገራት ጤናን የሚያቃውሰው ብዙ ሰዓት መሥራት ነው ወይስ ያለሥራ በድህነት ተቀምጦ በየቢሮው ስልክ እየደወሉ ጠረንጴዛ ታቅፎ መኖር የሚለው ለንጽጽር መቅረብ የለበትም።

ጉዳይ አንድ[4]

ሙለታ ገዳ በአቢሲኒያ ባንክ በቋሚነት ተቀጥሮ የሚሠራ ሠራተኛ ነው። የባንኩ ደመወዝ ኑሮውን ለመግፋት ዳገት ስለሆነበት ሌላ ተጨማሪ ሥራ ለመሥራት አሰበ። በአንድ የግል ድርጅት በትርፍ ሰዓት ሥራውን መሥራት ጀመረ። አሠሪው የሚያገኘው ገቢ በተወሰነ ደረጃ ኑሮውን እንዳገዘው ቢያምንም ሙለታ አሠሪው የሰማ ቀን ያሰናበተኛል የሚለው ሥጋት አስጨንቆታል፡ ፡ ያሰቡት ይደርሳል፣ የጠሉት ይወርሳል እንዲሉ የፈራው አልቀረም። ሁለት ቦታ መሥራቱን አሠሪው ደረሰበት። አሠሪው ያለ እኔ ፈቃድና ዕውቅና በሌላ መሥሪያ ቤት ተቀጥረህ በመገኘትህ የሥራ ውልህ ተቋርጧል በሚል አሰናበተው። ሙለታ መብቱን ለማስከበር ወደ ፍርድ ቤት ያመራ ሲሆን ከብዙ ውጣ ውረድ በኋላ ጉዳዩ የመጨረሻ ፍርድ አግኝቷል። የሙለታ ጉዳይ በሰበር መዝገብ ቁጥር 42818 ፍርድ ያገኘ ሲሆን የፍርዱን ይዘት በጽሑፉ ቀጣይ ክፍሎች እንመለስበታለን።

ጉዳይ ሁለት[5]

ሁለተኛው አቶ አድማስ የተባሉ ግለሰብን የሚመለከት ነው። ግለሰቡ በአዲስ አበባ ውኃና ፍሳሽ አገልግሎት በጉዳይ አስፈጻሚነት ሲሠሩ ቆይተዋል። ሆኖም ኑሮአቸውን ለማገዝ በቋሚነት ከሚሠሩበት ውኃና ፍሳሽ በተጨማሪ በሌላ መሥሪያ ቤት ተቀጠሩ። ይህን ሥራ ይሠሩ የነበረው የአሠሪውን ሥራ በሚሠሩበት በተመሳሳይ ጊዜና ያለአሠሪው ዕውቅናና ፈቃድ መሆኑ በመዝገቡ ተመልክቷል። አሠሪው የሠራተኛውን ድርጊት ባወቀ ጊዜ ዕርምጃ ለመውሰድ አሰበ። በዚሁ መሠረት ያለ እኔ ዕውቅናና ፈቃድ በሌላ መሥሪያ ቤት መሥራትህ የማታለል ድርጊት በመሆኑ ከሥራህ ያለማስጠንቀቂያ ተሰናብተሃል በሚል አሠሪው ሠራተኛውን አሰናበተው። ጉዳዩ ለፍርድ ቤት ቀርቦ ሙግቱ እስከ ሰበር ችሎት ደርሶ የመጨረሻ ፍርድ አግኝቷል። የሰበር ችሎቱ ምን ፍርድ ሰጠ? የሰበር መዝገብ ቁጥር 41767 ኅዳር 8 ቀን 2002 ዓ.ም. ችሎቱ የሰጠውን ፍርድ ወደ ኋላ እንመለስበታለን።

[4] የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ፍርዶች ቅጽ 9፣ ገጽ 189፣ የመዝገብ ቁጥር 42818፣ ጥር 10 ቀን 2002 ዓ.ም፣ አመልካች አቢሲኒያ ባንክ አክሲዮን ማህበር፣ ተጠሪ ወ/ር ሙለታ ገዳ

[5] የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ፍርዶች ቮልዩም 9፣ ገጽ 190፣ የመዝገብ ቁጥር 41767፣ ሕዳር 8 ቀን 2002 ዓ.ም፣ አመልካች የአዲስ አበባ ውሃና ፍሳሽ ባለሥልጣን፣ ተጠሪ አቶ አድማስ ደምሳቸው

ጉዳይ ሦስት

ሦስተኛው ጉዳይ ከመጀመርያዎቹ ሁለቱ የሚለየው ሰበር ሰሚ ችሎት ድረስ ሙግት ያልተደረገበት መሆኑ ላይ ነው። ቁምላቸው (ስሙ ለጽሑፉ የተቀየረ) ከ15 ዓመታት በላይ በአንድ በአክሲዮን ማኅበር የተደራጀ የፋይናንስ ተቋም በተለያዩ የሥራ መደቦች ይሠራ ነበር። በመጨረሻ ይሠራበት የነበረው የሥራ አስኪያጅነት የሥራ መደብ ሲሆን የሥራ ቦታውም መቀሌ ከተማ ነበር። ከአሠሪው ጋር ባለው ግንኙነት በብቃቱ የተመሠከረለት፣ ታማኝና ቅን መሆኑ ይነገርለታል። የቅጥር ሥራ በዘላቂነት ራስን ወደተሻለ ደረጃ አያደርስም ብሎ ያመነው ቁምላቸው ጎንደር ከሚገኙት ቤተሰቦቹ ጋር አንድ የንግድ ሥራ መሥራት አሰበ። ጎንደር በአካል ባይገኝም ገንዘቡን በመላክ ኃላፊነቱ የተወሰነ የግል ማኅበር በማቋቋም የማኅበሩ ሥራ አስኪያጅ ሆነ። ማኅበሩ የንግድ ምዝገባ ቢያከናውንም ሥራ አልጀመረም። የሠራተኛውን የንግድ ሥራ የተረዳው አሠሪው ሠራተኛው በአካልም ባይሆን በርቀት ሊጀምር ያሰበው ንግድ አልተዋጠለትም። በመሆኑም ከተለያዩ ተቋማት ስለ ንግዱ የደረሰውን ማስረጃ መሠረት አድርጎ ለዘመናት ካገለገለበት ተቋም ያለማስጠንቀቂያ አሰናበተው።

3. **ጣምራ የሥራ ውል መብት አይደለምን?**

ከላይ ከተመለከትናቸው ጉዳዮች የምንረዳቸው ሁለት ነጥቦች አሉ። የመጀመሪያው ከሠራተኛው በኩል ኑሮውን ለማገዝ፣ ሁለት ሙያ ባለቤት ሲሆን የማይሠራበትን ሙያ ለማሻሻል፣ ወይም ለሌላ ምክንያት የጣምራ የሥራ ውል የሚፈጽምበትን ሁኔታ ነው። ሁለተኛው ከአሠሪው አንፃር የሚታይ ሲሆን ሁሉም አሠሪዎች ሠራተኛው ጣምራ ሥራ በመሥራቱ ብቻ እና ሥራውን ያለአሠሪው ዕውቅናና ፈቃድ በመሥራቱ ያለማስጠንቀቂያ ከሥራ የማሰናበታቸው ነገር ነው። የአሠሪውና የሠራተኛው ጥቅሞች ሚዛናዊ በሆነ መልኩ መፍትሔ እንዲያገኙ ሕግን መሠረት አድርጎ ሠራተኛው ጣምራ ሥራ የመሥራት መብት እንዳለውና እንደሌለው መመርመር ተገቢ ነው። ጣምራ ሥራው በጉዳዮቹ እንደተመለከትናቸው ለሌላ አሠሪ ተቀጥሮ መሥራት ወይም የራስን የግል ንግድን ማከናወን ሊሆን ይችላል።

የመሥራት መብት ሕገ መንግሥታዊ ዋስትና የተሰጠው የሰብዓዊ መብት መሆኑን የአገራችንን ሕገ መንግሥት አንቀጽ 41 እና 42 በመመልከት መረዳት ይቻላል። ማንኛውም ኢትዮጵያዊ በሃገሪቱ ውስጥ በማንኛውም የኢኮኖሚ እንቅስቃሴ የመሰማራትና ለመተዳደሪያው

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የመረጠውን ሥራ የመሥራት መብት አለው። /አንቀጽ 41(1)/ በተጨማሪም ሁሉም ኢትዮጵያዊ መተዳደሪያው፣ ሥራውንና ሙያውን የመምረጥ መብት አለው። /አንቀጽ 41(2)/ ከእነዚህ ሕገ መንግሥታዊ ድንጋጌዎች መገንዘብ የሚቻለው ማንኛውም ኢትዮጵያዊ የሚተዳደርበትንና የሚሠራውን ሥራ የሚወስነው ራሱ ነው። መተዳደሪያውን መምረጥ የሠራተኛው መብት ነው። ሕገ መንግሥቱ ለመተዳደሪያነት ወይም ለሥራ ወይም ለሙያ የሚመረጠው መስክ ላይ የቁጥር ገደብ ያላስቀመጠ በመሆኑ ብዙ መተዳደሪያን፣ ብዙ ሥራን ወይም የተለያዩ የሙያ መስኮችን ማግኘት ወይም ባለቤት መሆን ክልከላ የለውም። አንድ ሰው ከአሠሪው ጋር የቅጥር ወይም የሥራ ውል ከገባ በኋላ ግን ሊኖረው የሚችለው መብት በተጨማሪ ሕግ የሚገዛ ነው። በአሠሪና ሠራተኛ መካከል የሚኖረው ግንኙነት ከሕገ መንግሥቱ ድንጋጌዎች በተጨማሪ በአዋጅ ቁጥር 1156/2011 ይዘት መቃኘት ይኖርበታል።

የአሠሪና ሠራተኛ ጉዳይ አዋጅ ቁጥር 1156/2011 ጣምራ የሥራ ውል መመስረት የሚቻልበትን ሁኔታ በግልጽ አያመለክትም፤ ጣምራ የሥራ ውልንም የሚከለክል ድንጋጌ የለውም። ይሁን እንጂ ጣምራ የሥራ ውል መፈቀድ አለመፈቀዱን በሕጉ ከተመለከቱት የተለያዩ ድንጋጌዎች ለመረዳት አያስቸግርም። በአዋጁ መሠረት የሥራ ውል ሁለት ዓይነት መልክ ይኖረዋል። የመጀመሪያው ለተወሰነ ሥራ ወይም ለተወሰነ ጊዜ የሚደረግ የሥራ ውል ነው። ይህ ዓይነት የሥራ ውል በሕጉ በግልጽ በተመለከቱ ወቅታዊ ወይም ድንገተኛ ጉዳዮች ሠራተኛው ለተወሰነ ጊዜ ከአሠሪው ጋር የሥራ ውል የሚመሠርትበት፣ ሥራው ወይም የዉሉ ዘመን ሲጠናቀቅ የሥራ ግንኙነቱ የሚቋረጥበት ነው። በእንዲህ ዓይነት የሥራ ውል ሠራተኛው የተወሰነው ሥራ ወይም የተወሰነው ጊዜ ሲጠናቀቅ ከሌላ አሠሪ ጋር የሥራ ውል መመሥረት መቻሉ ሕጋዊም ምክንያታዊም ነው። ከአሠሪው ጋር ግንኙነቱ ባለበት ወቅት ጣምራ ሥራ የመሥራት መብቱ ግን በቋሚነት እንደተቀጠረው ሠራተኛ የሚታይ ይሆናል። በሕጉ የተቀመጠው ሁለተኛው የሥራ ግንኙነት ዓይነት ላልተወሰነ ጊዜ የሚደረግ ወይም በተለምዶ ቋሚ የሥራ ውል የምንለው ነው። በእንደዚህ ዓይነት የሥራ ውልም ቢሆን ጣምራ የሥራ ውልን የሚከለክልም ሆነ የሚፈቅድ ግልጽ ድንጋጌ የለም። እንዲህ በሆነ ጊዜ 'በሕግ በግልጽ ያልተከለከለ ድርጊት እንደተፈቀደ ይቆጠራል' በሚለው መርህ ጣምራ የሥራ ውል የሠራተኛው መብት ነው ለማለት እንችላለን። ስለዚህ ማንኛውም ሠራተኛ ጣምራ የሥራ ውል ስላለው ወይም ከአንድ በላይ አሠሪ ጋር መሥራቱ

በራሱ የሥራ ዋስትናውን ለማሳጣት ምክንያት አይሆንም። ይሁን እንጂ ማንኛውም መብት ፍጹም ባለመሆኑ አንፃራዊ ግዴታ ሠራተኛው ላይ እንደሚጣል መዘንጋት የለበትም። የሠራተኛው ግዴታ የሚመነጨው ከመጀመሪያው አሠሪ ጋር በገባው የሥራ ውል ጋር ተያይዞ የሚታይ ሲሆን በዋናነት ሠራተኛው ለአሠሪው በሕግ፣ በሥራ ውል ወይም በጎበረት ስምምነት ያለበትን ግዴታ የሚጥስ ከሆነ ጣምራ የሥራ ውል የሚከለከልበት ወይም ለስንብት ምክንያት የሚሆንበት አጋጣሚ አለ። እነዚህን ገደቦች ከሰበር ሰሚ ችሎቱ ፍርድ ተነስተን ለመመልከት እንሞክር።

4. **<u>የጣምራ የሥራ ውል ገደብ</u>**

በመነሻ ጉዳዩ በተመለከትናቸው የመጀመርያዎቹ ሁለት የሰበር ፍርዶች ሁለት መርሆችን እናገኛለን። በሰበር መዝገብ ቁጥር 42818 ሙለታ ከአቢሲኒያ ባንክ ውጭ የሚሠራው ሥራ በትርፍ ሰዓቱ የሚሠራ በመሆኑ የአሠሪውን ዕውቅናና ፈቃድ አይፈልግም፤ ስለዚህም ሰበር ችሎቱ አሰሪው በትርፍ ሰዓትህ መሥራትህ ማታለል ነው በሚል ሰራተኛውን ማሰናበት ያለአግባብ ነው ሲል ወስኗል። እንደ ሰበር ችሎቱ አነጋገር «በትርፍ ሰዓት ሌላ መሥሪያ ቤት መሥራቱ ሠራተኛውን ያለማስጠንቀቂያ ለማሰናበት የሚያስችል ጥፋት ስለመሆኑ የሠራተኛ መተዳደሪያ ደንብ ውስጥ ያልተደነገገ በመሆኑ…» ማሰናበቱ ሕገ ወጥ ነው። ስለዚህ ከፍርዱ ለመረዳት እንደምንችለው ሠራተኛው በትርፍ ሰዓቱ ከሌላ አሠሪ ጋር የቅጥር ግንኙነት መሥርቶ የሚሠራው ሥራ በሕግ የተፈቀደና አሠሪው ባወቀ ጊዜ ሠራተኛውን ለማሰናበት በቂ ምክንያት እንደማይሆነው ነው። ይሁን እንጂ የሰበር ችሎቱ የትንተና አካሄድ አሠሪው በሠራተኛ መተዳደሪያ ደንብ በትርፍ ሰዓት ለሌላ አሠሪ መሥራት ለስንብት ምክንያት መሆኑን ካስቀመጠ ለማሰናበት የሚችል መሆኑን ያሳያል። ይህ የችሎቱ ትንተና የሠራተኛው በትርፍ ሰዓት የመሥራት መብቱ በአሠሪው ፍላጎት ብቻ እንዲወሰን የሚያደርገው በመሆኑ ወዳልተፈለገ መደምደሚያ ያደርሳል። አሠሪው በሠራተኛ መተዳደሪያ ላይ (በአብዛኛው በአሠሪው የሚቀረጹ መሆኑን ልብ ይሏል።) በትርፍ ሰዓት መሥራትን ቢከለክል እንኳን ድንጋጌው ተፈጻሚ የሚሆነው ሠራተኛው በሥራ ውሉ ካለበት ሌሎች ግዴታዎች አንፃር ነው። ሠራተኛው የሚሠራው ሥራ ከአሠሪው ድርጅት ጋር ተመሳሳይ ከሆነ፣ ተመሳሳይም ሆኖ አሠሪው ሳይፈቅድለት ከሠራ፣ የጥቅም ግጭት የሚያስከትል ከሆነ፣ ሥራውን መሥራቱ የሠራተኛውን

ምርታማነት እጅጉን የሚቀንስ ከሆነ በትርፍ ሰዓትም ቢሆን ጣምራ የሥራ ውል ሊከለከል ይገባል። የገደቡን የተወሰኑ ማሳያዎችን ማመልከት ይቻላል። በመደበኛ ሥራው ለአንድ ቢራ አምራች ድርጅት፣ በትርፍ ሰዓቱ ለሌላ ቢራ ፋብሪካ የሚጠምቅ ኬሚስት፣ ወይም ሒሳብ የሚሠራ የሒሳብ ባለሙያ፤ የባንክ የብድር መኰንን ሆኖ በትርፍ ሰዓቱ የባንኩን ተበዳሪ ሒሳብ የሚሠራ፣ የኮንስትራክሽን አማካሪው ተቀጣሪ ሆኖ በትርፍ ሰዓቱ ኮንስትራክሽኑን በሚሠራው ኮንትራክተር ውስጥ የሚሠራ ሠራተኛ የመሠረተው ጣምራ የሥራ ውል ሊቋረጥበት መቻሉ ፍትኃዊ ነው። ከዚህ በመነሳት አሠሪው በመተዳደሪያ ደንቡ ሠራተኛው የትርፍ ሰዓት ሥራ እንዳይሠራ ቢከለክል እንኳን ጣምራ ሥራው መከልከል ያለበት ወይም ለመጀመሪያው የሥራ ውል መቋረጥ ምክንያት መሆን ያለበት የጥቅም ግጭትን የመሰለ መሠረታዊ የአሠሪውን ጥቅም የሚጎዳ ሆኖ ሲገኝ ብቻ ነው።

ሰበር ችሎቱ በሰበር መዝገብ ቁጥር 41767 የሰጠው ፍርድ ግልጽ ሁኔታዎችን የሚመለከት ነው፡ ፡ በዚህ ፍርድ ችሎቱ አቶ አድማስ ጉዳይ የማስፈጸም ሥራቸውን የሚሠሩት ከአሠሪው ጋር የነበራቸው የሥራ ውል በሚፈጸምበት የሥራ ጊዜ በመሆኑ ስንብቱ ሕጋዊ ነው ሲል ፈርዷል። እንደ ሰበር ችሎቱ ትንተና «አሠሪ ግልጽ የሆነ ፈቃድ እስካልሰጠ ድረስ ሠራተኛው በሁለት ቦታ በተመሳሳይ ጊዜ መሥራቱ ከታወቀ አድራጎቱ በሥራ ላይ የተፈጸመ የማታለል ተግባር…» በመሆኑ ሠራተኛውን በአዋጅ ቁጥር 377/96 አንቀጽ 27/1/ሐ/ መሠረት ያለማስጠንቀቂያ የሚያሰናብተው ነው። ማንኛውም ሠራተኛ በተቀጠረበት የሥራ ውል መሠረት የሥራ ሰዓቱን ለአሠሪው ጥቅም ማዋል ያለበት ሲሆን ይህንን ጊዜውን ከአሠሪው «እየሰረቀ» ለሌላ የሚጠቀም ከሆነ የሥራ ዋስትናውን የሚያሳጣው ይሆናል። ይህ ፍርድ የመጀመሪያው ፍርድ አካል ሊሆንም ይችላል። የመጀመርያው ፍርድ በትርፍ ሰዓት ሥራ እንዲሠራ ከፈቀደ በመደበኛው ሰዓት ለሌላ መሥራት ይከለከላል ማለት ነው። ከሁለቱ ፍርዶች አንጻር የሰበር ችሎቱ ፍርድ ዘርዘር ያለ ትንተና ባይኖረውም ወጥነት ያለው መሆኑን መረዳት አያስቸግርም።

ከሁለቱ የሰበር ገዥ ትርጉሞች አንፃር በመነሻ ጉዳይ በሥስተኝነት ደረጃ የተቀመጠውን ካስተዋልነው ለመዳኘት አስቸጋሪ አይሆንም። ቁምላቸው የሚሠራው ሥራ ከሌሎች ጋር በመሆን የግል ንግድ ሲሆን የሥራ ቦታውም በቋሚነት ከተቀጠረበት ድርጅት የሥራ ቦታ የተለየ ነው። መነገድ በሕገ መንግሥቱ የተፈቀደ ማንኛውም ኢትዮጵያዊ ለመተዳደሪያነት ሊመርጠው

የሚችለው የሥራ መስክ በመሆኑ ሕግ ወጥ አይደለም። ንግዱም የሚሠራው በአሠሪው የሥራ ሰዓት አይደለም፤ ከቦታው ርቀት አንፃርም የጥቅም ግጭት ማምጣቱን ማረጋገጥ አስቸጋሪ ነው፣ የሠራተኛውንም ምርታማነት የሚቀንስ አይሆንም። ከሁሉ በላይ ደግሞ ሥራ ያልጀመረ ኃላፊነቱ የተወሰነ የግል ማኅበር መሆኑ ተፅዕኖውን እንኳን ለመመርመር አያስችልም። በዚህ መነሻነት አሠሪው ሠራተኛው የንግድ ሥራ ይሠራል በሚል (የአሠሪውን የሥራ ሰዓት ሳይሻማ፣ የጥቅም ግጭት ሳያስከትል እንዲሁም ትርፋማነትን ሳይጎዳ) ማሰናበት አግባብ አይሆንም። አንዳንድ ጊዜ በአንድ ግለሰብ ስም የንግድ ፈቃዱ ወጥቶ ወኪል፣ ቤተሰብ ወይም ሌላ ቅጥረኛ የሚሠራበት አግባብ ይኖራል። ከዚህ አንፃር በጣምራ የሥራ ውል ምክንያት የሠራተኛውን የሥራ ዋስትና ከመገደብ በፊት አሠሪዎች ሊመለከቷቸው የሚገቡ ነጥቦች መኖራቸው ቸል ሊባል አይገባም።

5. <u>ማጠቃለያ</u>

የሥራ አጥ ቁጥር በበዛበት አገር ስለ ጣምራ የሥራ ውል ማንሳት አግባብነት የለውም ሊባል ይችላል። ሆኖም ጽሑፉ ዓላማ አድርጎ የተነሳው አዲስ ምሩቃን ሥራ ስለሚያገኙት ወይም ያለሥራ የተቀመጡ ሥራ ስለሚጀምሩበት ባለመሆኑ ተጠቃሹን ጉዳዩ አልነካካነውም። በዚህ ጽሑፍ ለመመልከት የተሞከረው አንድ ሰው ከሚሠራበት ድርጅት ውጭ በሌላ ቀጣሪ መሥሪያ ቤት የሥራ ውል ግንኙነት ሊመሠረት ስለሚችልበት የሕግ አግባብ ነው። ጣምራ የቅጥር ወይም የሥራ ውል በብዛት በአገራችን የተለመደ ባይሆንም አሁን አሁን አስገዳጅ ሁኔታዎች መከሰታቸውን ሁሉም ያምናል ተብሎ ይታሰባል። የኑሮ ውድነቱ፣ የፍላጎት መብዛቱ፣ የአገሪቱ የኢኮኖሚ ዕድገት ምቹ ሁኔታዎችን ለመፍጠር መቻላቸው፣ በዘመነ ሉላዊነት (Globalization) የሃገሮች በኢንቨስትመንት መተሳሰርና የሥራ ባህል ሽግግር ወዘተ ለጣምራ የሥራ ውል መፈጠር ምክንያት መሆናቸው አይቀርም። ጣምራ የሥራ ውል የራሱ የሆነ ጥቅም እንዳለውም መዘንጋት የለበትም። ባለሙያ ለሃገሩ ሊሠራ በሚችልበት ዘመን የራሱን አስተዋጽኦ ለማድረግ ያስችለዋል፣ የዜጎችን የዕለት ገቢ ያሳድጋል፣ የባለሙያ እጥረት ባለባቸው የሥራ መስኮች አሠሪዎች ቁልፍ ባለሙያዎችን በመቅጠር ትርፋማነታቸውን ይጨምራሉ።

በሃገራችን ሕግጋት ጣምራ የሥራ ውል መመሥረትን የሚከለክል ሕግ ባለመኖሩ ጣምራ የሥራ ውል መመሥረት የሠራተኛው መብት መሆኑ አከራካሪ አይደለም። መብቱ ግን ያለምንም ገደብ የሚፈጸም ባለመሆኑ ጥንቃቄ ይፈልጋል። ሠራተኛው ጣምራ ሥራውን ሊሠራ የሚችለው ሌላኛው ሥራ በመጀመሪያው ድርጅት የሥራ ሰዓት የማይሠራ ሲሆን፣ የጥቅም ግጭት በሌለበት ሁኔታና አሠሪውን ከሠራተኛው የሚያገኘውን ትርፋማነት በማይቀንስ መልኩ ሊሆን ይገባል። ይህንን በመገንዘብ አሠሪዎችም ያለምንም በቂ መነሻ ሠራተኛው ሌላ ሥራ ስለሚሠራ ብቻ ከሥራ ማሰናበት ተገቢ ያልሆነና ለተጨማሪ ወጪ የሚዳርግ መሆኑን በመገንዘብ ጥንቃቄ ማድረግ ይጠበቅባቸዋል። በዚህ ጽሑፍ የተመለከትናቸው ሁለት የሰበር ፍርዶች ከዚህ ሃሳብ ጋር የሚጣጣሙ ሲሆን ሰራተኛው በትርፍ ሰዓቱ በሌላ ሥራ እንዲሰማራ፣ አሰሪው ከፈቀደለትም በተመሳሳይ የሥራ ሰዓትም ቢሆን በሌላ ድርጅት የመስራት መብቱ የተጠበቀ ነው። በተቃራኒው ሰበር ችሎቱ በገለጻቸው መስፈርቶች መሰረት በሥራ ሰዓት አሰሪው ካልፈቀደ፣ በትርፍ ሰዓትም ቢሆን በሕብረት ሥምምነት ከልካይ ድንጋጌ ከሰፈረ ሰራተኛው ጣምራ ውል የመመሥረት መብት የለውም። ሆኖም ይህ ጸሐፊ በሕብረት ሥምምነት የሰፈረም ከልካይ ድንጋጌ ቢሆን ከሰራተኛው የመስራት መብት፣ ከሚሰራው ስራ ጠባይ እንዲሁም ከዋና አሰሪው ሥራ ጋር ከሚፈጥረው የጥቅም ግጭት አንጻር ሊመረመር እንደሚገባ ያምናል። ሠራተኛው ጣምራ ሥራ ሲሠራ ስለሚተዳደርበት ሁኔታ፣ ስለ ግብርና ጡረታ አቀናነስ፣ እና ሌሎች መብቶች የሰራተኛና ማኅበራዊ ጉዳይ ሚኒስቴርን ዝርዝር መመሪያ የሚፈልጉ ቢሆንም ቀጣሪዎች በጥንቃቄ ሊመለከቷቸው የሚገቡ ነጥቦች መሆናቸው ሊታወቅ ይገባል።

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