

Viability of Private Prison Policy in Ethiopia

Bereket Eshetu[•] & Belayineh Admasu[♦]

Abstract

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

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

Introduction

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

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

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

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

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

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

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

⁹² Interview with Dessie, *supra* note 71.

⁹³ *Id.*

⁹⁴ Interview with, Tsegaye and Dessie, *supra* note 71.

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

3.3.2 Risk of Transparency, Accountability, and Corruption

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

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

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

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

⁹⁷ *Id.*

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

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

3.4 Potential Public Benefits of Private Prison Policy

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

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

⁶ *Id.*

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

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

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

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

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

1. Overview of Private Prison Policy

1.1 History

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

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

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

¹¹ *Id.*

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

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

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

¹³ *Id.*

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

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

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

1.2 The Need

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

The need for correctional privatization can also be traced back to the conservative government of the UK in the 1980s when a concerted attack was launched against the institutional structures and ideology of the welfare state. Private firms were said to be more efficient as they were not mired in the "*red tape*" that encumbers public agencies, especially in procurement and labor relations since public agencies had monopolies on services, and few incentives existed to discover and implement ways of improving efficiency. In contrast, competition in the private market-place and the risk of losing money or going out of business supposedly stimulates the search for increased efficiency.²⁰ Yet,

¹⁶ R. Walmsley, *supra* note 8.

¹⁷ Jones T. and Newburn T, Learning from Uncle Sam? Exploring U.S. Influences on British Crime Control Policy Governance, *International Journal of Policy, Administration and Institutions* (2002), p.101.

¹⁸ Samuel J. Brakel, Privatization and Corrections, No.107, Reason Foundation Policy Insight (1989).

¹⁹ *Id.*

²⁰ Mfanelo Patrick, *supra* note 9, p. 10.

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

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

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

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

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

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

1.3 Role of Private Prisons

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

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

²³ Abt Association, *supra* note 12, p. 4.

²⁴ 26 percent of the privates, compared to 16 percent of government prisons and regarding facilities for parole violators returned to custody 16 percent compared to 7 percent.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Monograph, Privatizations in South Africa: Issues, Challenges and Opportunities, 64(1), Institute of Security Studies, 11(2001), available at <http://www.iss.org.za/Pubs/Monographs/No64/Chap5.html>, accessed on 13 may 2019.

²⁸ Trade Union Research Project (T.U.R.P.), Privatization of Prisons and Prison Services: The International Experiences, Published by Durban University of Natal (2000) p. 21.

1.4 Legality of Delegating Correctional Services

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

²⁹ Joseph E. Field, Making Prisons Private: An Improper Delegation of a Government Power, *Journal of Hofstra Law Review*, Vol. 15, No. 3, (1987) p.11.

³⁰ *Carter v. Carter Coal*, U.S. Supreme Court New Deal-era, No. 298, 238, (1936).

³¹ DM Lawrence, Private Exercise of Governmental Power, *Indiana Law Journals*, Vol. 61, (1986), p.647& 653.

³² *Sunshine Anthracite Coal Co. V. Adkins*, U.S Supreme Court 381, 399 (1940).

³³ For instance, Arizona Regional State Law prohibits contractors from taking any disciplinary action against an inmate. Colorado Regional State Law prevents private contractors from making conclusive recommendations about parole of particular inmates.

³⁴ Abt Association, *supra* note, 12, p. 58.

1.4.1 Liability for Prison Conditions

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

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

³⁵ M. Walzer, Hold the Justice' New Republic, (New York, April 1985, p. 12; Washington Post, (March 23, 1986), p. F6, col. 2.

³⁶ Sullivan, Privatization of Corrections: A Threat to Prisoners' Rights, in G. Bowman, and others (eds), Privatizing Correctional Institutions, (1994), p.139.

³⁷ *Street v. Corrections Corp. of America*, U.S Supreme Court, 102 F. 2d 810, 814 (1996); *Payne v. Monroe County*, U.S. 779 F. Supp. 1330, 1335 (1991).

³⁸ *Monell v. Dep't of Social Services*, U.S Supreme Court, 436. 658, 694 (1978).

³⁹ *Abt Associates*, *supra* note 12, p. 60.

1.4.2. Contractual Dimensions of Private Prison

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

1.4.3 Employment Issues

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

⁴⁰ *Id.*

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

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

1.5 Critique

The notion of private prisons remains one of the most controversial policies in the criminal justice debate. Since its inception, opposition to private sector involvement in the prison service is mainly related to the following key concerns. These are *state responsibility, gaming and accountability*. State responsibility is a contentious point as to the involvement of the private sector in the prison service, which is by its nature the power of the government. Contenders argued that the use of detention and the deprivation of liberty fall in the ambit of state responsibility, and are thus not suitable for private sector management. In 1993, Tony Blair⁴³ endorsed such a view when he opined that “it is fundamentally wrong in principle that persons sentenced by the state to imprisonment should be deprived of their liberty and kept under lock and key by those not accountable primarily and solely to the state”.⁴⁴

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

⁴² Abt Association, *supra* note, 12, p. 61.

⁴³ Tony Blair was the former Prime Minister of United Kingdom from 1997 to 2007.

⁴⁴ Will Tanner, The Case for Private Prisons, Reform Ideas No 2, (February 2013), p.4 available at http://www.antonioacasella.eu/nume/Tanner_private_prisons_2013.pdf accessed on March, 2020.

⁴⁵ Trade Union Research Project (T.U.R.P.), Privatization of Prisons and Prison Services: The International Experiences, Published by Durban University of Natal, (2000), p. 21.

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

2. Major Practical Problems of the Prison System in Ethiopia

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

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

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

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

⁴⁶ *Id.*

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

2.1 Overcrowding

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

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

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

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

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

The Ethiopian Human Rights Commission⁴⁹ admitted that many of the prisons' rooms were getting overcrowded by the increasing the number of prisoners. Prisoners slept over the floors and at night they were crowded to the extent that prisoners who wanted to excrete had to move over the inmates. During the nighttime, they had to urinate in buckets. New prisoners who could not find unoccupied beds either shared others' beds or slept on the floor in the congested area between the beds where others had to move over them. Moreover, it was observed that out of 114 prisons visited, 41 were highly congested while the remaining detentions are insufficient to accommodate their detainees. Most of the shelters were made of mud the walls were falling apart devoid of sufficient air and light and had no tiled floors.⁵⁰ Generally, most shelters had several problems in terms of construction, size, a number of detainees accommodated, types of detainees in each room, and internal conditions. In the police detention centers, where all other things remain constant, there was no medical service at all.

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

2.2. Lack of Separate Accommodation

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

⁴⁹ Ethiopian Human Right Commission (EHRC), 2015, 2016 & 2017 state of prison report in Ethiopia.

⁵⁰ *Id.*

⁵¹ Addisu Gulilat, The Human Rights of Detained Persons in Ethiopia; Case Study in Addis Ababa, Master Thesis, Addis Abeba University, (2012), p.35.

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

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

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

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

⁵² See the 1960 Indian Model Prison Manual, Ministry of Home Affairs, and Government of India.

⁵³ Jones T. and Newburn T., *supra* note 17, p. 81.

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

2.3. The Search for an Alternative Policy Solution

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

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

While studies⁵⁶ show that there is insignificant use of alternatives to incarceration in Ethiopia, still there is a contestation that the release of prisoners

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

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

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

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

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

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

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

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

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

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

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

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

3. Viability of Private Prison Policy in Ethiopia

3.1 Legal Perspectives

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

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

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

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

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

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

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

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

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

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

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

⁶⁷ *Id.*

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

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

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

⁶⁸ Interview with Worku Yaze, *supra* note 57.

⁶⁹ *Id.*

⁷⁰ The policy stands of state in this regard not only on the face of the 2011 criminal justice policy, yet also prior to such is reduction of prisons thereby limiting and reducing the construction of additional prisons, even to the extent that appears to follow abolishing theory. Most importantly, as indicated elsewhere in this paper, a recent statement made by Prime Minister Dr. Abbiy Ahmed to the House of People Representatives on 22/03/2011 EC has also affirmed this.

⁷¹ Tsegaye Workayehu, Presiding judge of ANRS Supreme Court Cassation Division, June 16, 2017; Dessie Seyume, Head of Research and Training Process of ANRS Attorney General, June 6, 2017 and Interview with Firdie Cheru, *supra* note 58.

⁷² Belayineh Berhanu and Haile Asenake, *supra* note 56.

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

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

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

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

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

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

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

3.3 Practicability of Private Prison Policy in Ethiopia

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

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

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

⁷⁷ Abt Associates, *supra* note 12, p.23.

⁷⁸ *Id.*, p.29.

⁷⁹ James Austin & Garry Coventry, U.S. Department of Justice Office of Justice Programs, Emerging issues on privatized prisons, a document was prepared by the National Council on Crime and Delinquency, U.S. Department of Justice Office of Justice Programs, (2001), p.12, available on, <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>, accessed on 20 June, 2020.

⁸⁰ Interview with Tekeba Belayineh, *supra* note 65 and Interview with Abebe Kassie, *supra* note 66.

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

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

⁸¹ Adrian T. Moore, *Private Prisons: Quality Corrections at a Lower Cost*, Policy Study No. 240, p.9.

⁸² Schonteich, M., *Unshackling the Crime Fighters: Increasing Private Sector Involvement in South Africa's Criminal Justice System*, Johannesburg: South African Institute of Race Relations, (1999).

⁸³ *Id.*

⁸⁴ Correctional Services Act of South Africa, Schedule D., (1998).

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

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

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

3.3 Challenges of Correctional Privatization in Ethiopia

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

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

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

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

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

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

3.3.1 The Presence of Indigenous Private Institutions and Issue of Profitability

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

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

⁸⁹ Ethiopian Investment Agency, Overview of Ethiopian Investment Opportunities and Policies, (2018), available at <http://www.flandersinvestmmtandtrade>, accessed on 15 June 2019.

⁹⁰ Interview with Worku, *supra* note 57; Interview with Dessie, *supra* note 71.

⁹¹ Interview with Inspector Shumet Molla, Chief Inspector, Head of Bahir Dar City Prison Center, on April, 2019.