



International  
Labour  
Organization



# The Ethiopian Overseas Employment Proclamation No. 923/2016: **A COMPREHENSIVE ANALYSIS**



ILO COUNTRY OFFICE FOR ETHIOPIA, DJIBOUTI, SOMALIA, SUDAN AND SOUTH SUDAN



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# FOREWORD

Labour migration, especially in search of employment opportunities, from Ethiopia to the Middle East has been in the rise in recent years. However, the incidence of abuses against migrant workers have raised critics and concerns on migration in this area. Currently, Ethiopia has become an important origin, transit and destination for regular and irregular migration flows in the Horn of Africa. The majority of Ethiopian regular and irregular migrants are destined to the Middle East (mainly to Saudi Arabia and other Gulf States via Somalia, Djibouti and Yemen).

In October 2013, the Ethiopian Government banned migration of domestic workers to the Middle East temporarily. According to MOLSA (Ministry of Labour and Social Affairs) prior to the temporary ban, 480,480 citizens had migrated regularly to the Middle East between 2011 and 2013. However, many more have migrated irregularly, predominantly victims of traffickers, mainly using brokers at the source and destination countries that facilitate the illegal recruitment and labour migration. Accordingly, in 1998 the government of Ethiopia adopted a proclamation to establish Private Employment Agencies (PEAs) with the responsibility of protecting the rights, safety and dignity of Ethiopians employed and sent abroad<sup>1</sup>. This proclamation later was revised as Employment Exchange Services Proclamation (EESP) 632/2009 with additional and improved intention of strengthening the mechanism for monitoring and regulating domestic and overseas employment exchange services. In addition, the proclamation puts further provisions with regard to new requirements based on the changing nature of the labour migration process. The proclamation has recently been revised for the third time, on 19th February, 2016 as the new Ethiopia's Overseas Employment Proclamation 923/2016.

The new law (Proclamation No. 923/2016), in addition to identifying three types of recruitment for overseas employment (public employment organs, agencies, and direct employment) also provide significant modifications to better manage the labour migration process and ensure the protection of Ethiopian migrants working overseas. For an effective implementation by the Government and key stakeholders, a better understanding of the proclamation is required. To this effect, a “*Comprehensive analysis of the Ethiopian overseas employment proclamation No. 923/2016*” were undertaken.

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<sup>1</sup> Proclamation No.104/1998 Private Employment Agency Proclamation



This analysis provides an in-depth insight of the proclamation in its entirety, how it improves the labour migration management in Ethiopia, improved protection mechanisms for migrant workers, and the revised mechanisms to administer and monitor PEAs. Moreover, it also examines the receiving countries' (i.e. GCC States) policy environment and identifies a framework within which Ethiopia can continuously advocate for a bilateral agreement and cooperative responses from destination countries, so that the benefits and accountabilities of migration are shared by all parties. The analysis also assesses the relevance of the proclamation in light of destination countries' policy environment.

I would like to congratulate the Government of the Federal Democratic Republic of Ethiopia and particularly the Ministry of Labour and Social Affairs for its efforts geared towards improving labour migration governance in Ethiopia and adopting the Ethiopian Overseas Employment Proclamation 923/2016. Finally, I would like to thank the European Union who is funding the ILO project "*Development of a Tripartite Framework for the Support and Protection of Ethiopian Women Domestic Migrant Workers to the GCC States, Lebanon and Sudan, 2013-2016*" under which this report was produced.

**George Okutho**

*Director*

*June 2016*

## ABSTRACT

Labour migration from poorer countries to the Gulf Cooperation Council (GCC) region is a common phenomenon. However, the incidence of abuses against overseas workers have raised critics and concerns on migration in this area. The kafala system, which is predominant in GCC countries, is considered the principal cause of the negative outcomes of migration as it restricts the freedoms of migrant workers putting them in a slave-like condition of work.

In the light of these considerations, a number of sending countries have adopted specific legislations with the aim to protect their migrant workers. Although significant changes are still required, some of the recipient countries have also begun to make legal reforms to ensure minimum working conditions and protection to these workers.

Ethiopia deploys a significant number of migrant workers to GCC countries, which are too often seriously abused. Therefore, it has recently enacted the Overseas Employment Proclamation No. 923/2016, in this study also called the Proclamation, with the aim to ensure the rights, dignity, and safety of its workers overseas.

The new Proclamation, beyond the identification of three types of recruitment for overseas job – through public employment organs, agencies, and direct employment – introduces significant changes to control and manage the labour migration process. Accordingly, no deployment of overseas workers is allowed in the absence of a bilateral agreement with the recipient country. Moreover, the deployment of workers (i) under the age of 18, (ii) without the 8th grade of education, and (iii) without a certificate of occupational competence is strictly prohibited.

As to private employment agencies, this business is restricted to Ethiopian citizens who have a capital of one million ETB. In addition to other eligibility requirements, the agencies are required to deposit a financial guarantee of 100,000 USD or its equivalent in ETB. Those employers who are entitled to undertake direct employment are required to deposit a foreign employer's guarantee of 50 USD per worker.

The Ministry of Labour and Social Affairs (MOLSA), which is in charge of the overseas employment process management, is authorized to set employment standards, to license the agencies, and to take administrative measures against those agencies that contravene the Proclamation. Moreover, also the Ministry of Foreign Affairs (MOFA) and other organs play a significant role in this process.

Despite the steps forward introduced by this Proclamation and similar international and domestic legal instruments on the subject, some gaps still persist. For what concerns the Proclamation, these shortcomings pertain to its failure in requiring the recipient countries to ensure practical measures to guarantee the rights of overseas workers. Additionally, it does not introduce institutional mechanisms to facilitate the reintegration process of returnee migrants.

# ABBREVIATIONS

FDRE	Federal Democratic Republic of Ethiopia
GCC	Gulf Cooperation Council
ILO	International Labour Organization
MOFA	Ministry of Foreign Affairs
MOLSA	Ministry of Labour and Social Affairs

# INTRODUCTION

In the past decades, foreign workers have helped in the rapid transformation of the infrastructure and the industrial development of the Gulf region. Despite the great significance of this phenomenon, the majority of recipient countries do not recognize that their economies are often completely reliant on the labour of migrant workers. Hence, they appear reluctant to set a domestic framework that safeguards the rights and dignity of these workers, and to ratify the international legal instruments on the subject (Nasram, 2007, p. 11-12).

More specifically, the situation of domestic workers is the most problematic, since they are usually excluded from the legal framework that ensures protection to the other categories of workers. The enactment of specific laws to protect domestic workers is particularly difficult in GCC countries, where they are commonly viewed as intruding in the private life and space of the family (John Hopkins School of Advanced International Studies, 2013, p. 43).

As a result, most countries in the GCC region are subject to criticism for their treatment of foreign workers, especially female migrant domestic workers. Stories of mistreatment, abuse, sexual harassment, and even killing are routine news in the media<sup>1</sup>. Furthermore, the kafala system ties a migrant worker's legal residence to her/his sponsor or employer, which gain enormous discretionary authority on the worker's life<sup>2</sup>.

In response to this situation, various sending countries have enacted legislations to regulate the deployment of workers overseas. In Ethiopia, the first legislation on this subject was enacted in 1998, with the aim to regulate private employment agencies and to ensure adequate protection to the Ethiopians deployed overseas. As this law was not sufficient to address the issue of overseas employment, the Government of Ethiopia adopted the Employment Exchange Services Proclamation No. 632/2009. Nonetheless, the irregular migration, trafficking and smuggling of migrants has increased over time. This phenomenon has caused grave violations of human rights and suffering of citizens. As a result, Ethiopia promulgated the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No. 909/2015, with the objective to provide adequate protection, support, and rehabilitation to victims of trafficking and to impose severe penalties on culprits.

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1       Supra Note 1 p. 11

2       Supra Note 2 pp. 43-44



Despite the positive action of Proclamation 909/2015 in curbing the problem of irregular migration, and the support accorded to overseas workers in the Second Growth and Transformation Plan (The Federal Democratic Republic of Ethiopia, 2010, p. 251), the shortcomings were still evident. It is in this context that, to face the dynamism in the labour migration process and with the aim to obtain bilateral agreements and strengthen lawful overseas employment, Ethiopia enacted the Overseas Employment Proclamation No. 923/2016. Its principal objectives cover the establishment of bilateral agreements, the fight to human trafficking, and clearly define and regulate the role of the private sector in overseas employment exchange service<sup>3</sup>.

This paper is intended to provide a comprehensive analysis of Proclamation 923/2016, with particular emphasis on the experience of other countries, and on the relevance of the Proclamation in the international and domestic legal frameworks.

The paper is divided into six chapters. Chapter 1 investigates the requirements of recruitment and deployment including factors as age, level of competence, the existence of bilateral agreement, the modes of recruitment and placement, the administration and management of private employment agencies, and the role of the Ministry of Labour and Social Affairs in the entire process.

Chapter 2 will provide a review of the legal regimes that govern overseas employment. We compare the experiences of the Philippines and Bangladesh with the Ethiopian situation. Chapter 3 assesses the compatibility of the Proclamation with other international legal instruments,. In particular, with the Domestic Workers Convention, 2011 (No. 189), the Migration for Employment Convention (Revised), 1949 (No. 97), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the International Covenant on Civil and Political Rights. From the domestic perspective, the study examines the Constitution of the Federal Democratic Republic of Ethiopia, the Civil Code, the Criminal Code, the Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No. 909/2015, and the Labour Proclamation No. 377/2003. Chapter 4 sheds light on the legal and policy frameworks of the recipient countries, the role of bilateral agreements, and the relevance of the Proclamation in this environment. Chapter 5 examines the role of the Ministry of Labour and Social Affairs, the Ministry of Foreign Affairs, the task force envisaged in Proclamation 909/2015, the Police, the Prosecution Department, and the Judiciary.

Chapter 6 undertakes a comparative analysis of Proclamation 923/2016 and Proclamation 632/2009 to identify the improvements obtained. Concluding remarks and recommendations will complete this analysis.

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3 Ethiopia's Overseas Employment Proclamation 923/2016, Preamble

# 1. BACKGROUND

Despite the past efforts of the Ethiopian Government, the human rights of Ethiopian migrants are still at risk. For this reason, it has recently enacted Proclamation 923/2016 to regulate the migration process and provide a better safeguard of the rights, safety, and dignity of its citizens.

## 1.1 REQUIREMENTS FOR RECRUITMENT AND DEPLOYMENT

### 1.1.1 AGE, LEVEL OF EDUCATION, COMPETENCE, AND DOCUMENTATION

Article 48/2 of the Proclamation declares that the minimum age for employment is 14. However, the minimum age rises to 18 in case of overseas work, as prescribed in the Civil Code. Therefore, the overseas recruitment of persons under the age of 18 is illegal and produces the revocation of the license of the responsible agency<sup>4</sup>. To tackle the hardships that illiterate workers from rural Ethiopia frequently face, the Proclamation incorporates stringent educational requirements. The Proclamation requires the completion of the 8<sup>th</sup> grade of education to undertake overseas employment<sup>5</sup>. In addition, the Proclamation strictly requires a worker to possess a certificate of occupational competence issued by the appropriate competence assessment center, which attests the match between the worker's skills and the occupation he/she is going to perform abroad<sup>6</sup>. Article 42/2/c declares that, in case a recruiting agency contravenes this norm, the license will be suspended. Moreover, the worker must personally provide for its passport, medical certificate, vaccination certificate, and birth certificate. Conversely, the expenses for the entry visa fee, round trip transport, residence and work permit fee, insurance, visa and document authentication, and approval of the employment contract are required to be borne by the employer<sup>7</sup>. In addition, if the contract is canceled due to reasons not attributable to the worker, the employer or the agency are required to reimburse the worker<sup>8</sup>.

4 Ethiopia's Overseas Employment Proclamation 923/2016 Article 42/3/d

5 Id Article 7/1/a

6 Id Article 7/1/b

7 Id Article 10

8 Id Article /3/

## 1.2 BILATERAL AGREEMENTS

The application of the legal regime is usually restricted within the jurisdiction of the country of origin. Hence, in the absence of adequate legal protection, the workers deployed in a foreign country find themselves in the adverse situation where employers are in the condition to modify the contract; reduce wages and deny the workers any basic rights<sup>9</sup>. To address these shortcomings, the Proclamation also requires the existence of bilateral agreements between Ethiopia and the receiving countries as a prerequisite for deployment of workers<sup>10</sup>. The Proclamation specifies that the agreements must address the issue of working conditions, means and venues of enforcement, among other details.

## 1.3 MODES OF RECRUITMENT AND PLACEMENT

The Proclamation defines three modes of recruitment for overseas employment: public recruitment, direct recruitment, and recruitment through private employment agencies. The first category is based on the existence of a government-to-government agreement<sup>11</sup>. Accordingly, in presence of an agreement between the government of Ethiopia and that of the receiving country, the Ministry of Labour and Social Affairs will provide the recruitment and placement services, including interviewing and selection, medical examinations, approval of employment contracts, provision of pre-employment and pre-departure orientations, and facilitation of departure of employed workers<sup>12</sup>.

Direct employment is allowed only in the exceptional situations provided in Article 6/2. Accordingly, the Ministry of Labour and Social Affairs may permit direct employment if the employer is part of the staff of an Ethiopian Mission, an international organization, or where the job seeker acquires a job opportunity by his/her own accord, with the exception of the housemaid service<sup>13</sup>. Direct employment based on the worker's initiative is conditional on the fulfillment of stringent requirements ensuring the basic rights and dignity of the worker. In this case, the Ethiopian Mission, or, in its absence, the Mission of the host nation on the Ethiopian territory, and the Ministry of Foreign Affairs, must assure that the worker will not be exploited in the receiving country<sup>14</sup>. Moreover, the Ministry must advertise this procedure and the need to provide evidence on life and disability insurance coverage, the document related to the transportation service, together with the employment contract<sup>15</sup>.

The private employment agencies can conduct the recruitment and deployment services in the presence of a license from the Ministry of Labour and Social Affairs and must respect the requirements of the Proclamation.

9 Supra Note 1 p. 11

10 Id Article 12

11 Id Article 4

12 Id Article 5

13 Id Article 6/2/a-c

14 Id Article 6/3/a

15 Id Article 6/3/b-d

## 1.4 ADMINISTRATION AND MANAGEMENT OF PRIVATE EMPLOYMENT AGENCIES

### 1.4.1 LICENSING: GENERAL REQUIREMENTS

An overseas employment agency must have a business registration certificate and obtain a license from the Ministry of Labour and Social Affairs. If deployment and other operations involve different countries, it is mandatory to obtain a separate license for each operation<sup>16</sup>. The Ethiopian framework differs from the majority of other jurisdictions, as this business is reserved to Ethiopian citizens. The applicant is required to have a capital of 1 million ETB, and must have no prohibition to operate this kind of business<sup>17</sup>. Also, any business organization interested in this service must clearly set as its only objective the operation of overseas employment exchange service.

The Proclamation defines the persons who are not eligible to obtain the license due to measures associated with contravention of Proclamation 632/2009, due to violation of other laws, or due to the undertaking of specific offices susceptible to conflict of interest. Proclamation 632/2009 provides dispositions concerning the contravention. Specifically, (i) an agency whose license is revoked, for failure to provide remedies for complaint against the violation of rights, safety, and dignity of workers, (ii) an agency whose license has been suspended three times, and (iii) the recipients of a prior notice of revocation are not allowed to obtain the license<sup>18</sup>.

With respect to the violation of other laws, individuals/companies convicted for human trafficking, smuggling of migrants, organized crime, terrorism, drug dealing, or money laundering, and those whose case is pending cannot obtain the license<sup>19</sup>. Although defined with protective purposes, this provision violates the principle of presumption of innocence enshrined in the Constitution of Ethiopia.

The Proclamation also declares that owners or employees working in specific businesses, such as travel agency, airline ticket offices, those who are transistors or seamen, are not eligible to get the license<sup>20</sup>. Moreover, to tackle the incidence of conflict of interest, officials or employees of the Ministry of Labour and Social Affairs, Ministry of Foreign Affairs, Department for Immigration and Citizenship, Police Commission, and any governmental organ involved in the implementation of the Proclamation, as well as the Ethiopian community leaders overseas and their family members cannot engage in overseas employment exchange service cannot obtain a license<sup>21</sup>. In addition to the eligibility criteria above, the agencies must satisfy some other requirements concerning the submission of business-related documents<sup>22</sup>. The general manager must hold a first degree and is required to produce evidence attesting that he/she has opened an office in the receiving country or that he/she has delegated an individual licensed to operate an employment exchange service. Additionally, the delegate must accept the representation with verification from

16 Id Article 21

17 Id Article 22

18 Id Article 23/1

19 Id Article 23/2

20 Id Article 23/3

21 Id Article 23/4

22 Id Article 24



the Ethiopian Embassy and the Ministry of Foreign Affairs<sup>23</sup>. To ensure decent living conditions to workers in a foreign country, the applicant must provide evidence of the presence of a temporary shelter in the destination country, which must be verified by the Ethiopian Mission, and must prove his/her right to move to and from the destination country with a confirmation letter from the recipient country itself<sup>24</sup>.

Based on the rules, the issued licenses cannot be transferred even to the heirs of a sole proprietor. Moreover, no person can operate in more than one agency, either directly nor indirectly. Any change in the management or employee staff must be notified to the Ministry of Labour and Social Affairs, while changes in the management personnel must be publicized through the media<sup>25</sup>.

Compared with the Commercial Registration and Business Licensing Proclamation No. 686/2010, the requirements under the present Proclamation are much more stringent. Accordingly, while article 41 of Proclamation 686/2010 warrants the transfer of business, article 28 of Proclamation 923/2016 strictly prohibits it. Moreover, neither the Commercial Code nor Proclamation 686/2010 require notification of change in the management or in the employee staff. The negative outcome of these stringent requirements is that they may discourage people from engaging in this kind of business.

## **1.4.2 PROVISION OF GUARANTEES**

The Proclamation provides a variety of mechanisms to control the employment relations in the different phases of recruitment, deployment and post-deployment. Particular attention is given to those cases where the agency does not have sufficient property to respond to the recourse of workers that have sustained a damage. Hence, it is pivotal to set a scheme prior to deployment that guarantees the proper compensation to a damaged worker. With this purpose, the law requires the provision of a financial guarantee, a foreign employer's guarantee fund, and an insurance.

### **A. THE FINANCIAL GUARANTEE**

The agency is required to deposit 100,000 USD or the equivalent in ETB in a blocked bank account<sup>26</sup>. As article 43 of the Proclamation explains, the deposit can be withdrawn according to the order of the Ministry of Labour and Social Affairs in case of a complaint of contravention lodged by the worker or his/her representative. Moreover, the Ministry is entitled to dispose of the deposit for various purposes in the interest of the worker. These include the coverage of the transport of the worker and his/her belongings upon the termination of the contract, the repatriation of a worker with serious physical injuries, or the transportation of the body of a worker who dies in the event where the agency fails to cover these expenses<sup>27</sup>. Once the money is withdrawn for one of these purposes, the agency is required to replenish

23 Ibid

24 Ibid

25 Id Article 28-30

26 Id Article 60/1

27 Id Articles 60/3 and 69/1

the same amount within 10 working days<sup>28</sup>. The withdrawal of this money is also possible in the event where the agency, in contravention of its obligations, fails to cover the medical expense of a worker repatriated due to serious physical injuries (see article 69/1/c).

In the absence of pending claims against the agency before any competent organ and after the lapse of six months following the termination of all the employment contracts of the workers deployed by the agency, the financial guarantee will be released to the agency in case it decides to cease the activity.

## **B. THE FOREIGN EMPLOYER'S GUARANTEE FUND**

The guarantee fund must respond to the claims of the workers hired by foreign government organizations, through the MOLSA or a foreign employer who is allowed to undertake direct employment. In this case, the foreign employer is required to allocate 50 USD for each worker recruited<sup>29</sup>. The money shall be deposited in a fund established and administered by the Ministry. The fund is primarily meant for settling the claims of workers and is not subject to attachment, although the Ministry can dispose of it for profitable and convenient investment, after consultation with the Ministry of Finance and Economic Cooperation<sup>30</sup>. However, given the scant amount required and the severity of the damages sustained by most workers in the past, a pertinent objection relates to the coverage of the fund, which may not be sufficient to compensate the injured parties.

## **C. THE INSURANCE**

This type of remedy may not be readily available for a worker in the absence of disability or death. Pursuant to article 62/1 of the Proclamation, the employer is required to purchase life and disability insurance from a local insurance company irrespective of the mode according to which the employment exchange service is conducted. The insurance policy together with the employment contract must be submitted to the Ministry. In the absence of this submission, the Ministry may not approve the employment contract nor it permits the direct employment in accordance with article 6/3/b. Though these requirements represent a step forward, as we will see in the comparative analysis with Philippines, the insurance mechanism contemplated by the Proclamation does not provide sufficient protection.

### **1.4.3 RECRUITMENT PROCEDURES**

The agency is required to get approval from the Ministry of Labour and Social Affairs before advertising any overseas vacancy. The announcement shall include the number of vacant posts, the destination country, the wage rate, and a declaration that the agency does not collect service charge from the worker for any service provided<sup>31</sup>. This requirement discourages the agencies from unlawfully collecting

28 Id Article 60/4

29 Id Article 61/2

30 Id Article 61/4

31 Id Article 35

charges from workers and makes job seekers aware that they do not have the duty to pay any charges to the agency. If the agency violates this provision, the Ministry is entitled to order refund in accordance with article 41. As a rule, the recruitment must be conducted only within the premise of the agency's office. As a matter of exception, however, in the event where the recruitment requires substantial workforce, it can be conducted in a temporary recruitment venue authorized by the Ministry or the appropriate authority<sup>32</sup>.

After completion of the recruitment process, the agency submits the contract of employment compiled in accordance with the model contract envisaged in article 37, signed by the employer, the worker, and the agency, for the approval of the MOLSA, the Ethiopian mission, and the MOFA.

#### **1.4.4 DEPLOYMENT OF WORKERS**

Before workers are deployed for overseas employment, they must be provided with pre-departure orientation on the working environment of the recipient country, on their rights, on the possible ways to air out their grievances, and on the ways to get assistance from the Ethiopian Mission and other human rights groups in the host country. It may be useful to provide workers with pamphlets in the languages they understand with these essential details. Although the Proclamation is silent on the timing of the orientation, the advice is to conduct it at least three days before departure (Ambito & Banzon, 2011, p. 17-18), to allow the potential migrants the necessary time to digest the information received<sup>33</sup>.

The deployment must happen within one month following the approval of the employment contract. The agency is required to notify the deployment to the Ethiopian Mission, register the workers within 15 days, verify the issuance of the work and residence permit, and report to the Ministry of Labour and Social Affairs<sup>34</sup>. If no deployment is made within this period, the contract of employment will be revoked by the Ministry<sup>35</sup>.

#### **1.4.5 THE ROLE OF THE ORGANS INVOLVED IN THE MANAGEMENT OF OVERSEAS EMPLOYMENT**

##### **A. THE MINISTRY OF LABOUR AND SOCIAL AFFAIRS**

The Ministry of Labour and Social Affairs is the prime organ entrusted with the task of supervising the entire overseas employment process through creating the necessary structure and assigning a labour *attaché* in consultation with the Ministry of Foreign Affairs. Accordingly, the Ministry is duty bound to undertake regular pre-employment and pre-departure awareness-raising programmes for workers who desire to seek overseas employment, as well as for the public, the staff of private employment agencies, and foreign employers. The area of focus includes

32 Id Article 36

33 Ibid

34 Supra Note 7 Article 38

35 Id Article 39

the conditions of receiving countries, the required skills, the rights and duties of the worker<sup>36</sup>.

The Ministry also has the power to require the agencies to disclose information about recruitment and placement, conditions of work, and to assign a labour inspector to that end. Accordingly, the inspector controls whether an agency has the expertise to undertake the recruitment, whether it relies on an automated database, and whether it has provided pre-employment and pre-departure orientation<sup>37</sup>. The inspector also undertakes investigation when informed that an agency has contravened the Proclamation or other legislations, and has the power to enter in the office of the agency during working hours to inspect the relevant documents<sup>38</sup>. Following the investigation, the inspector files a report with recommendations on the measures to be taken.

The Ministry must provide legal support in the reintegration of migrant workers and in the stipulation of amicable settlement between the parties involved in the contract. The Ministry has the power to facilitate a conciliation before embarking on the administrative measures enshrined in article 45 and following. Accordingly, the Ministry receives the complaint submitted by the worker, employer, or the agency, and attempts to conciliate the parties. When the amicable settlement fails, the complaint is entitled to submit the case to the adjudication office of the Ministry.

In the following sections, we will see some of the major roles that the Ministry plays in the entire process of overseas employment.

The Ministry is empowered to set employment standards and prepare a contract model based on surveys of the labour market situation in the recipient country. The model includes regular working hours, overtime pay, and annual leave and wages, among other things. The wage must not be lower than the highest among the minimum wage in the receiving country, the minimum wage set by the bilateral agreement, and the wage set by international agreement ratified by both countries. The model requires that the contract envisages the provision of free transport service to and from the workplace (or its reimbursement), free medication, food and accommodation, or payment *in lieu* <sup>39</sup>. The model, which represents a minimum standard, must be prepared in light of the laws and customs of the receiving country, the policies of the employer, the bilateral or multilateral agreements signed with the recipient country, the international conventions, and market conditions. However, the parties have the liberty to stipulate other terms and conditions and other benefits, as long as the package is more beneficial to the worker<sup>40</sup>.

According to the Proclamation, in case of violations any party of the employment contract or their representatives are entitled to lodge complaint to the Ministry, within a limited period of time (three years)<sup>41</sup>.

In order to ensure the proper implementation of the Proclamation and to redress any violation, article 43 provides a complaint lodging mechanisms. Accordingly,

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36 Id Article 8

37 Id Article 20/3

38 Ibid

39 Id Article 17

40 Id Article 18

41 Id Article 73



the victim worker or his/her representative is entitled to submit oral or written complaint to the Ministry. The representative should be a proper agent who can lodge a complaint on behalf of the worker. However, given the level of literacy of most workers, commonly they do not have a real agent. To deal with this problem, it would be a good solution to allow worker's relatives to assume this role. When the worker is abroad, it would be sound to allow him/her to complain to the Ethiopian Mission instead of restricting the matter to the Ministry. Following the lodging of complaint under article 43, as a quasi-judicial body, the Ministry undertakes proper hearing, and proceeds as stipulated in the Civil Code. While the complaint is pending, the Ministry has the power to take temporary measures as non-approval of any other employment contract submitted by the agency in question<sup>42</sup>. Moreover, the agency's license may be suspended if it fails to present the necessary documentation, if the agency is believed to cause further damage to workers, or if *prima facie* evidence shows the agency's violation of the Proclamation or other relevant legislations<sup>43</sup>.

After investigation on the matter, the Ministry renders a decision in accordance with article 45/5 and is empowered to order the agency to execute the decision within 15 days. Any failure causes the forced execution on the agency's account, which is blocked as workers' security bond, on the agency's movable property or on its immovable property in this order<sup>44</sup>. In addition to this, the license of the agency can be suspended or revoked depending on the circumstances. Specifically, the contraventions must be inclusive of (i) obstruction of the activities of the labour inspector assigned in accordance with article 20; (ii) failure to notify the Ministry the appointment of managers; (iii) recruitment for overseas work of an employee under 8<sup>th</sup> grade or without certification of competence; (iv) failure to deploy a worker within one month from the approval of the contract without a good cause; (v) failure to provide remedy for employee whose rights, safety, and dignity are violated; (vi) failure to file a report regarding deployed and terminated employees; (vii) failure to provide pre-departure orientation and counselling; (viii) failure to immediately verify and report on death or injury of a worker; (ix) failure to replenish the financial guarantee withdrawn by the order of the Ministry when a complaint is lodged; and (x) under the circumstances expressed in article 46/2<sup>45</sup>.

With respect to revocation, violation of article 23/3 through engagement with travel agency or airline ticket office, failure to renew license within the three-month period provided under article 33/5, recruitment and deployment of a worker under the age of 18, recruitment or deploying of workers to a destination without bilateral agreement with Ethiopia or to a prohibited destination, recruiting or deploying workers to a service that adversely affects public health or morality or damages the country's image, receiving fee in cash or in kind from a worker in return for overseas employment service, deployment of a worker before approval of employment contract or to a country other than approved in the contract, engaging in a place of work which is not stated in the license, substituting or replacing the approved contract without the Ministry's knowledge, withholding and prohibiting

42 Id Article 46/1

43 Id Article 46/2

44 Id Article 51

45 Article 42/2

travel documents and other information of the worker before or after deployment, commission of those grounds of suspension under Article 42/2 for the fourth time, compelling a worker to relinquish his rights and benefits through fraudulent practice or duress, are some of the contraventions which give rise to revocation of an agency's license.<sup>46</sup>

Following the suspension or revocation order, the agency must cease to engage in any overseas employment exchange service and it is required to notify this fact to the public<sup>47</sup>. This measure, however, does not relieve the agency from its liability linked to the workers already deployed<sup>48</sup>.

In addition to these administrative measures, the commission of contraventions described in article 42/3, except the failure to renew license within the specific period, entails criminal liability pursuant to the "appropriate" criminal law<sup>49</sup>. Unlike Proclamation 632/2009, which mentions the provisions of the Criminal Code to be applicable for an agency that violates the law, the terminology of Proclamation 923/2016 seemingly has been chosen to include the application of provisions in addition to the Criminal Code. In particular, the Proclamation 909/2015, which clearly defines trafficking and entails severe penalties on traffickers and other offenders, depending on the circumstances.

However, although some of the acts in violation of Proclamation 923/2016 entail criminal liability pursuant to the relevant criminal law, some may not fall under these provisions. The criminal liability holds when the violation is committed by an agency, while when an overseas employer or the representative of an agency are imputable; only civil and administrative liability are envisaged.

The violations of the Proclamation most commonly relate to breach of the employment contract or when the agency's representative fails to discharge its obligations.

It has become a common phenomenon that employers in GCC countries abuse their workers in a variety of manners. These include demanding longer hours of work, denying leaves, withholding of wages and passports, sexual harassment, physical assault, and even manslaughter<sup>50</sup>. To tackle all these problems, the Proclamation recognizes these incidents to justify the imposition of appropriate measures.

The compliant mechanism is similar to that described above, with minor exceptions<sup>51</sup>. Any person, meaning a natural or juridical person as per article 2/15, is entitled to lodge a complaint. This is without prejudice to the Ministry's right to conduct proceedings on its own initiative pursuant to article 54/3.

The consequences to violations vary from temporary measures to permanent ban. Accordingly, given the fact that the employer and the agency's representative reside aboard, the complaint is heard *ex-parte*. During the investigation, which is carried out during the pendency of the complaint, the Ministry is empowered to temporarily suspend an employer or a representative from employing workers

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46 Id Article 42/3

47 Id Article 48/3-4

48 Id Article 48/5

49 Id Article 47/3

50 Supra Note 1 p. 11

51 Id Article 54/1

from Ethiopia and from participating in the overseas employment exchange service respectively<sup>52</sup>. When it is proved to the satisfaction of the Ministry that the employer or the representative committed the contravention, the suspension becomes a permanent prohibition<sup>53</sup>. In addition to the temporary measures and the ban described above, article 56/3 clearly provides that the responsible subjects are required to pay reasonable compensation to the worker. Although this provision is silent as to the means of execution of this compensation, other provisions lead us to the conclusion that the compensation is executed on the property of the agency, since it is duty bound to be held jointly and severally liable with the employer, in accordance with article 40. Accordingly, where the contract of employment is breached by the employer, the agency and the employer will be held jointly and severally liable. It means that the employer and the agency can serve as joint guarantors in pursuant to article 1933 of the Civil Code, for the strict observance of the clauses of the contract of employment.

In the same way, the violations committed by the worker cause actions by the Ministry. In particular, the commission of crimes punishable under Ethiopian laws or under the laws of the host country, violation of the practices of the host country, and unwillingness to be deployed without good cause. These violations result in administrative measures that vary from suspension from overseas employment for a given period to a total disqualification, depending on the incidence of the offences<sup>54</sup>. Moreover, if the employment contract is canceled for the responsibility of the worker, he/she is required to reimburse the employer's expenses already sustained<sup>55</sup>.

In the forgoing subsection, we have investigated the administrative measures pertaining to violation of the Proclamation or contractual clauses by either party. The next discussion will examine the cases in which a party is aggrieved by the administrative measures taken by the Ministry or the appropriate authority.

Pursuant to article 59/1, the aggrieved party is entitled to lodge an application to the Federal High court or to a regional court of jurisdiction. As opposed to Proclamation 632/2009, according to which the application should be in the form of appeal, the new Proclamation is ambiguous. By virtue of the various binding decisions rendered by the Federal Cassation Court of Ethiopia, as far as the decision given by the court referred in article 59/1 suffers from basic error of law, as opposed to error of fact, the party aggrieved is entitled to file an application to the cassation court.

## **B. PROVISION OF LEGAL ASSISTANCE**

We have seen the administrative measures taken by the Ministry of Labour and Social Affairs and the criminal action that can be instituted against an agency. As far as civil actions are concerned, article 71 envisages proceedings before the regular labour benches established in accordance with the Proclamation. As per article 64/5, the Ministry, or the appropriate regional labour body, is duty bound to provide legal assistance to workers who have suffered an injustice in connection with overseas employment. This assistance is presumed to include the services of representation

52 Id Article 54/4

53 Id Article 56/1-2

54 Id Article 58

55 Id Article 10/4

before a court of law.

One of the notions introduced by this Proclamation has to do with the burden of proof. In the majority of legal proceedings, either civil or criminal, the person who alleges a fact has the burden of proof. The most notable exception in the Ethiopian jurisprudence is provided under the Anti-Terrorism Proclamation No. 652/2009, which shifts the burden of proof on the defendant, in violation of the constitutionally guaranteed right of presumption of innocence.

Similarly, as per article 72 of Proclamation 923/2016, if the worker alleges that the conditions of work are violated – “conditions of work” as defined in article 2/6 of this Proclamation and in article 2/6 of Proclamation 377/2003 – the defendant who objects is also required to prove the absence of these violations.

The party who alleges violation of the employment contract, and for that matter, violation of the Proclamation, has two options: (i) to lodge a complaint before the Ministry of Labour and Social Affairs or (ii) to institute an action before the labour benches. However, the period of limitation to be employed in these two venues is different since in the first case the period of limitation is longer. Accordingly, the administrative complaint following the alleged violation of the Proclamation shall be barred by limitation unless brought within three years from the date of violation or knowledge of violation. Nonetheless, who addresses to the regular courts is required to observe the various limitations provided under article 162 of Proclamation 377/2003. The general limitation for an action arising from employment relations, as stated under article 162/1, is one year from the date on which the claim becomes enforceable. However, an action for reinstatement to work and one for payment of wages, overtime pay, and other payments shall be barred within a period of three and six months respectively (see article 162/2 and 162/3). Moreover, as provided under article 162/4, the period of limitation for any claim by a worker or employer for any kind of payment is six months from the date of termination of the contract.

#### **1.4.4.2 THE ROLES OF THE OTHER ORGANS**

The National Committee for a better coordination of activities designed for victims protection, assistance and rehabilitation and the anti-human trafficking and smuggling of migrants task force, established under article 39 of Proclamation 909/2015, are entrusted with various duties relevant for the proper implementation of Proclamation 923/2016.

Pursuant to article 15/2, among various duties, the task force is required to ensure the proper provision of cooperation and support to the organs engaged in counselling and reintegration activities of returnees, to conduct studies with the aim to conclude bilateral agreement, to take legal action against those responsible for violating the right of citizens in recipient countries, to ensure that the human traffickers are brought to justice, to create awareness on illegal employment exchange activities, to facilitate the exchange of overseas employment information and data, and to adopt its own rules of operation.

In addition, the Ministry of Foreign Affairs plays a big role to ensure the rights, safety, and dignity of Ethiopian overseas workers. Specifically, it assigns labour attachés, oversees the activities of the Ethiopian Mission, and creates good diplomatic relations with the receiving countries.

## 2. THE LEGAL REGIMES GOVERNING OVERSEAS EMPLOYMENT: A COMPARATIVE ANALYSIS

In this chapter, we will analyse Proclamation 923/2016 in the light of the experiences of the Philippines and Bangladesh. The comparison will cover the guarantees provided to overseas workers and the rehabilitation programmes for returnees.

### 2.1 THE ETHIOPIAN PROCLAMATION AGAINST THE PHILIPPINES REPUBLIC ACT

The Philippines are usually praised for having the most effective laws that guarantee the rights of migrant workers and set the institutional framework to monitor and enforce these rights<sup>56</sup>. The law under study is the Migrant Workers and Overseas Filipino Act No. 10022/2009, hereafter called the Act, which amended Act No. 8042/1995. The comparison will cover the scope of application, the provision of skill and development enhancement programmes, the types of guarantees required to the recipient countries, the administration of criminal and civil sanctions, the provision of legal aid, and the reintegration programmes for returnees.

#### 2.1.1 THE SUBJECTS OF PROTECTION

One of the objectives of the Act is the institution of an effective mechanism to ensure that the rights and interests of distressed overseas Filipinos, in general, and Filipino migrant workers, in particular, are adequately protected and safeguarded, irrespective of the presence of regular documentation. In the Ethiopian framework, the issue of undocumented workers, especially those victims of trafficking, is disciplined in Proclamation 909/2015.

#### 2.1.2 THE PROVISION OF SKILL PROGRAMME AND THE RECRUITMENT FEE

The provision of adequate training to workers deployed overseas is essential to address one of the possible sources of conflict between the workers and their employers. Cognizant of this, paragraph g of the Act requires the Government of the Philippines to provide free and accessible skill and development enhancement

56 Supra Note 35 p. 1



programme to ensure that only skilled workers undertake overseas employment. The Ethiopian Proclamation requires an occupational competence certificate to seek overseas employment, but it is silent about the subjects of the training. In addition, it clearly provides that the worker must cover the expenses<sup>57</sup>. Given the poor economic conditions of most Ethiopian job seekers, the responsibility to cover these expenses is likely to represent a burden pushing them to irregular migration, shortcoming that may call for an amendment.

With regard to the fee, the Act does not prohibit a recruitment agent from collecting service fees from workers deployed abroad. Accordingly, section 6(a) prohibits to charge more than what is prescribed by the Secretary of Labour and Employment. Conversely, the Ethiopian no-fee placement system can be cited as one of the strengths of the Ethiopian Proclamation<sup>58</sup>.

### **2.1.3 THE GUARANTEES REQUIRED TO RECIPIENT COUNTRIES**

The Philippines Act strictly requires specific guarantees to the recipient country that must be fulfilled before workers are deployed. Accordingly, in the absence of labour and social laws protecting migrant workers, multilateral conventions, declarations, regulations, bilateral agreements, or concrete measures in this regard, the Philippines Overseas Employment Administration may not issue a permit for the deployment of overseas Filipino workers<sup>59</sup>. The Philippines Foreign Affairs Department must issue a certification upon the fulfillment of these requirements before worker deployment<sup>60</sup>. Otherwise, the government official in charge is sanctioned and may incur in dismissal<sup>61</sup>.

In Ethiopia, although the presence of bilateral agreements should be a prerequisite for overseas deployment<sup>62</sup>, its absence not always prevents the deployment. Furthermore, Ethiopian workers can migrate irrespective of the fact that the recipient country has signed or ratified multilateral conventions on the protection of migrant workers, or that it is taking positive and concrete measures on this matter. In the absence of these strict guarantees, the protection of the rights of Ethiopian overseas workers still remains a big challenge, and the exploitation of these workers may continue unabated. As an example, according to some data provided by a recruitment agency in March 2013, this risk is evidenced by the differences in wages – 183 USD against 324 USD per month – for similar activities in Kuwait, between workers from Ethiopia and from the Philippines<sup>63</sup>.

In the majority of cases, migrant workers cover the expenses associated with travel documents and medical examination from loans. These loans usually bear very high interest, and in the worst cases they are generated through a usury-like arrangement. Repayment of this loan is one of the factors that push overseas

57 Supra Note 7 Article 10/2/f

58 Id Article 42/3/i

59 The Migrant Workers and Overseas Filipino Act No. 10022/2009, Section 3

60 Id Section 4

61 Ibid

62 Supra Note 7 Article 12

63 International Human Rights Clinic, The Protection of the Rights of Domestic Migrant Workers in a Country of Origin and a Country of Destination, 2013 p. 24

workers to accept humiliating working conditions. To this respect, the Act outlaws the granting of loan to an overseas worker with annual interest rate that exceeds 8 per cent<sup>64</sup>. Requiring a worker to get a loan only from specifically designated institutions, entities, or persons is also illegal<sup>65</sup>. On the contrary, the Ethiopian Proclamation is silent on this issue.

#### **2.1.4 THE ADMINISTRATION OF CRIMINAL AND CIVIL SANCTIONS**

Under the Filipino Act, who commits an illegal action in the process of recruitment and deployment is criminally liable. It is stipulated that the affidavits and testimonies of personnel from the Department of Labour and Employment, the Overseas Employment Administration, and other law enforcement agencies who witnessed the offence are sufficient to convict the accused. Lawyers from the Overseas Employment Administration are allowed to take the lead in the prosecution and are entitled to additional allowances for this service<sup>66</sup>. Making use of these specialized lawyers with incentives that encourage their performance has a significant role in facilitating the prosecution of the culprits.

Pursuant to the Ethiopian Proclamation, although certain illegal acts committed in the course of recruitment, deployment or licensing process entail criminal liability, most contraventions result only in administrative measures such as suspension and revocation. In case of criminal acts, the Attorney General is in charge of guiding the prosecution. Nevertheless, due to the massive work under the responsibility of the Public Prosecution Department, the process may result scarcely effective.

On the other side, the Act of the Philippines allows double jeopardy. It clearly states that the filing of an action pertaining to an offence punishable under the Act is without prejudice to the filing of cases punishable under other existing laws or regulations<sup>67</sup>.

As to the criminal sanctions of illegal recruitment, section 6 stipulates severe penalties. Accordingly, the imprisonment varies between 12 and 20 years, while the fine ranges from one to two million Philippines Pesos (PHP). In the instance where the person illegally recruited is less than 18 years of age, or recruitment is conducted by a non-licensee or a non-holder of authority, the maximum imprisonment and fine will be imposed. Any other action prohibited by the Act entails imprisonment from 6 to 12 years and a fine from half a million to one million PHP. This sanction is without prejudice to the revocation of license. In addition, if the offence is committed by a foreigner, the person will be deported without any further proceedings.

On the other side, the Ethiopian Proclamation does not specifically consider criminal sanctions, differently from Proclamation 632/2009, as they are provided in Proclamation 909/2015.

Regarding civil liabilities, the Labour Arbiters of the National Labour Relations Commission have the original and exclusive jurisdiction on cases related to overseas employment and must act within 90 days from the date of filing<sup>68</sup>.

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64 Supra Note 61 Section 6

65 Ibid

66 Ibid

67 Supra Note 61 Section 5

68 Id Section 7



In Ethiopia, these matters are responsibility of the regular labour divisions. As these courts are burdened with a number of employment related cases, the process may take a long period, although articles 138/2 and 139/3 of Proclamation 377/2003 requires disposition of these cases within 60 days.

Both the Ethiopian and Filipino laws stipulate the joint and several liability of the employer and the agency for any breach of the contractual terms. In addition, the Filipino law requires this provision to appear in the employment contract and to be a condition for its approval. It further stipulates that if the recruitment agency is a juridical person, the corporate officers, directors, and partners are jointly and soldierly liable with the entity for any claim and damage<sup>69</sup>.

In case of unlawful termination or deduction of salary, the Act entitles the worker to the full reimbursement of his/her placement fee, the deductions with 12 per cent interest per annum, plus his/her salaries for the unexpired portion of the employment contract or for three months for every year of the unexpired term<sup>70</sup>. Proclamation 923/2016 does not treat this matter, which instead is disciplined in Proclamation 377/2003.<sup>71</sup> It stipulates that unlawful termination entails a payment of six months of wage to the worker, one month of wage for one year of service, plus one third for each additional years in the form of severance pay. Moreover, the notice period pay depends on the year of service and the payment *in lieu* of leave not taken by the worker<sup>72</sup>. If the payment is delayed due to the employer's fault, he/she may be required to pay up to three months of wage as a penalty<sup>73</sup>.

However, the overseas worker whose rights are infringed by an employer or by a recruitment agency, or who is illegally recruited, may not have the knowledge and the means to proceed against these parties. In anticipation of this, most jurisdictions stipulate the provision of free legal aid, and this is the case for both Ethiopia and the Philippines. The Filipino Act also requires the collaboration of the Anti-Illegal Recruitment branch, the Department of Justice, non-governmental organizations, and volunteer groups<sup>74</sup>. Moreover, to support migrant workers, the Act requires the establishment of a Legal Assistance Fund through allocating a budget of 100 million PHP. This fund is exclusively used to cover the expenses associated with legal services provided to migrant workers and to secure the release of Filipino workers arrested for matters associated with their foreign employment<sup>75</sup>. Depending on the urgency of the case, the Act allows the hiring of foreign counsel to be exempt from the strict procedures of Government Procurement Act<sup>76</sup>. In the light of this analysis and given the magnitude of the problem, the adoption of similar arrangements would ensure a more effective protection to Ethiopian overseas workers.

### **2.1.5 LICENSING OF PRIVATE EMPLOYMENT AGENCIES**

Both countries have detailed procedures on the licensing and regulation of private employment agencies engaged in the recruitment of overseas workers.

69 Ibid

70 Ibid

71 Supra Note 7 Article 71

72 Ethiopian Labor Proclamation No. 377/2003 Articles 39-43

73 Id Article 38

74 Supra Note 61 Section 8

75 Id Sections 18-19

76 Id Section 19

The Proclamation entrusts the power of licensing and regulating private overseas employment agencies to the Ministry of Labour and Social Affairs. In the Philippines, however, this power is vested on the specialized Overseas Employment Administration. In Ethiopia, the absence of a specialized administration and the several duties incumbent on the Ministry, in accordance with the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, may interfere with the management of the licensing process.

### **2.1.6 MEDICAL EXAMINATIONS AND INSURANCE**

Pursuant to the Act, the medical examination necessary to undertake overseas employment depends on the type of job<sup>77</sup>. The process is regulated by the Department of Health, which strictly prohibits monopoly of medical clinics thereby ensuring the freedom of Filipino workers to choose any of the clinics accredited or operated by the Department<sup>78</sup>. In order to address the transportation problems, the Act requires the Department establish and operate regional and provincial clinics offering the standard operation procedures<sup>79</sup>. Any foreign employer who fails to accept the results of valid health examinations conducted by these clinics will be banned from participating in the overseas employment programme<sup>80</sup>. Moreover, if the examination finds a Filipino worker medically unfit on his/her arrival in the country of destination, the Act clearly provides that the clinic is responsible for the costs of repatriation and deployment of this worker<sup>81</sup>.

In the Ethiopian context, the Proclamation requires that the the Ministry of Health determine the medical centre<sup>82</sup>. As there are no clear guidelines on the selection criteria of these centres, this procedure is at risk of corruption. Moreover, as it does not require the regions to establish clinics for this purpose, job seekers must sustain high expenses to undertake the examination in Addis Ababa. Furthermore, the Proclamation does not provide measures to apply against the medical institution in the event where a worker is found to be medically unfit following his/her arrival at the destination country. This has serious repercussions both on the worker and on the employment agency.

As per article 62 of the Proclamation, the employer is required to purchase life and disability insurance from the local market. Since this law does not specify the amount of cover, reference is made to the Ethiopian Commercial Code, according to which the maximum cover required for death and permanent total disability is 40,000 ETB, a largely insufficient amount.

On the contrary, the Act prescribes clearer and better terms. The minimum insurance cover must be between 10,000 and 7,500 USD for death and permanent total disability respectively<sup>83</sup>. The insurance should also cover the costs of transport and funeral services. In addition, the insurance includes a 100 USD subsistence

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77 Supra Note 61 Section 16

78 Ibid

79 Ibid

80 Ibid

81 Ibid

82 Supra Note 7 Article 9/1

83 Supra Note 61 Section 23

allowance per month, for a six-month period, to a worker who is in litigation with the employer in the receiving country<sup>84</sup>. Another important element is the issue of compassionate visit, by virtue of which the insurance covers the transport costs of one family member or requested individual when the migrant worker is hospitalized for seven consecutive days<sup>85</sup>. In comparison with the standards set by the Act, the insurance cover available for an Ethiopian overseas worker appears rather insignificant.

Furthermore, the Ethiopian law does not specify how the worker or his/her successors can claim from the insurer, while in the Philippines the insurance company is strictly required to effect the payment within a period of 10 days following the submission of a written notice supported by the necessary evidence.

### **2.1.7 THE REINTEGRATION OF RETURNEES**

Proclamation 923/2016 requires the Ministry of Labour and Social Affairs, in cooperation with concerned bodies, to facilitate the reintegration of returnees, but leaves the details to be specified by other directives<sup>86</sup>. The Act, however, establishes a National Reintegration Center for overseas Filipino workers, and strictly requires the pertinent organs, such as the Overseas Workers Welfare Administration and the Overseas Employment Administration, to formulate a programme for the reintegration of returnees<sup>87</sup>. To this end, technical education centres are required to give priority to the enrollment of these returnees with special emphasis on livelihood, entrepreneurial development, and savings<sup>88</sup>. The National Reintegration Centre for Overseas Filipino Workers is required to establish a computer-based information system on returnees, so that prospective employers, both public and private, will have access to additional information to offer job opportunities and develop capacity-building programme<sup>89</sup>. Furthermore, the Overseas Workers' Welfare Administration Program is geared towards assisting overseas workers and their families while they are abroad and when they return to home country.

One of the basic reasons that force Ethiopians to remain in a slave-like situation in the GCC countries and to re-migrate to these countries even after deportation is the lack of any hope in the home country. The absence of effective reintegration programme is an additional cause of Ethiopian distress and suffering.

In addition, the National Reintegration Center for Overseas Filipino Workers is designed to have offices in the most problematic host countries. These offices operate 24 hours per day all week long and rely on a lawyer versed in Islamic law or human rights, a psychologist, and a social worker. Public relation officers well acquainted with the host country's language and culture are also part of the staff (e.g. labour *attachés*)<sup>90</sup>. On the other hand, allegedly, the Ethiopian mission appears rather inefficient, despite the fact that the Proclamation envisages the assignment

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84 Ibid

85 Ibid

86 Supra Note 7 Article 64/4

87 Supra Note 61 Section 10

88 Ibid

89 Supra Note 61 Section 11

90 Id Section 12

of labour *attaché* in consultation with the Ministry of Foreign Affairs.

The Act requires the establishment of an inter-agency committee composed of various departments with a shared database. Data must cover the number of migrant workers, their place of work and type of job, pending cases against Filipinos, the host country's legal system, a list of labour and human rights instruments signed by the host country, and list a of overseas organizations that provide assistance to Filipinos<sup>91</sup>. This is a clear evidence of the commitment of the Government of the Philippines to protect its overseas workers. Again, it appears that Ethiopia must undertake additional legal reform to properly address the grave problem of exploitation of Ethiopians working overseas.

## **2.2 THE ETHIOPIAN OVERSEAS EMPLOYMENT PROCLAMATION COMPARED TO THE BANGLADESHI OVERSEAS EMPLOYEES AND MIGRANTS ACT**

Bangladesh issued its Overseas Employees and Migrants Act in 2013, hereafter the Act. As we did for the case of the Philippines, the comparison will cover the licensing requirements, the financial guarantees, the relationship with the host nation, the administration of criminal justice associated with illegal recruitment, and the reintegration programmes.

### **2.2.1 THE LICENSING REQUIREMENT OF PRIVATE EMPLOYMENT AGENCIES**

Similarly to other jurisdictions, a license for the recruitment of overseas workers can be issued for a natural person or for a juridical person. As to natural persons, no license can be issued for a person other than a Bangladeshi citizen <sup>92</sup>. In the case of juridical persons, if 60 per cent of the share is held by Bangladeshi citizens, a license can be issued<sup>93</sup>. The Ethiopian law is different since it completely prohibits any involvement of foreigners in this business.

An applicant for a license is required to submit an affidavit declaring that, while sending migrant workers overseas, fees and other amounts beyond the ceiling fixed by the government will not be charged<sup>94</sup>. When workers are recruited through advertisement, it is required a clear declaration that any fee will not be charged before and unless the worker is recruited<sup>95</sup>. The cumulative reading of articles 9/2/f, 19/3 and 21 of the Act clearly indicates that charging placement fees to overseas workers is legal, contrary to the Ethiopian context.

Once the license is issued, unlike the Ethiopian and Filipino laws, article 22/1 of the Bangladeshi Act stipulates that the contracting parties are the employer and the worker only. By virtue of article 22/2, a simple agent-principal relationship is assumed, hence the agency is considered as a representative of the employer.

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91 Ibid

92 Overseas Employees and Migrants Act of Bangladesh of 2013 Article 10/1/a

93 Id Article 10/2

94 Id Article 9/2/f

95 Id Article 19/3

Nonetheless, in terms of liability, both the employer and the agent are held jointly and severally liable for the claims of the worker. Although advantageous for the worker, a joint and several liability in this legal arrangement appears controversial. The two laws also differ in terms of the validity of the license. While a license in Ethiopia remains valid for one year only, the period of validity in Bangladesh is three years<sup>96</sup>. Within this period, for public interest reasons, the Bangladeshi government has the power to withdraw the license already issued<sup>97</sup>. In Ethiopia, the license can be revoked following a contravention. There is no provision on the withdrawal of a license although prohibition of sending workers, depending on the situation of the host country, is disciplined in article 74.

### **2.2.2 THE UTILIZATION OF THE FINANCIAL GUARANTEE**

By virtue of article 18 of the Act, following the cancellation of a license, the Bangladeshi government is entitled to confiscate variable amounts of the surety money. The money shall be used to compensate the affected migrant worker or to cover the costs of repatriation. In this regard, the Ethiopian law does not treat confiscation, although the Ministry of Labour and Social Affairs has the right to withdraw the money to cover, *in lieu* of the agency, the transport of an injured worker or the body of a deceased worker, or for execution purposes pursuant to article 51/1.

In Bangladesh, if the confiscated money is not adequate to compensate the worker, the recruitment agent will be held liable for the balance. In Ethiopia, the law does not directly provide for cases where the financial guarantee is not sufficient. However, article 40 indicates that both the employer and the agency remain liable.

The Ethiopian law is better compared to the Bangladeshi Act for what concerns the fate of the financial guarantee. The latter provides that in the instance where the agency's license expires, the money will be returned to the agency<sup>98</sup>. Conversely, in Ethiopia the money will not be returned to the agency unless it is proved to the satisfaction of the regulatory body that there is no pending claim against the agency and that six months have lapsed since the termination of the employment contract of all overseas workers deployed by the agency<sup>99</sup>. This is particularly relevant to allow overseas workers to claim for their rights.

### **2.2.3 THE RELATIONSHIP WITH THE HOST COUNTRY**

As stated in the forgoing discussion, the Ethiopian law prohibits the deployment of Ethiopian workers for an overseas job in the absence of a bilateral agreement with the receiving country, while the Filipino Act requires further guarantees from the host country. The Bangladeshi Act, however, does not consider bilateral agreement as a prerequisite for worker deployment; as the choice is left to the discretion of the government<sup>100</sup>.

Previous experiences widely attest that sending workers overseas without agreement

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96 Id Article 11

97 Id Article 13

98 Id Article 18/5

99 Supra Note 7 Article 60/5

100 Supra Note 94 Article 25



is risky. In fact, this situation can exacerbate the problems of migrant workers, especially when the recipient country has not ratified international instruments on minimum working conditions and in the absence of laws that ensure protection to overseas workers. Additionally, requiring an agency to have a representative licensed by the host nation is also a positive step that puts the Ethiopian law in a positive light.

#### **2.2.4 THE ADMINISTRATION OF CRIMINAL JUSTICE ASSOCIATED WITH ILLEGAL RECRUITMENT**

The Bangladeshi Act stipulates criminal liability and the possible penalties for violation of the Act. It also provides that the trial for this type of crimes must conclude within four months from the date of the charge, although the period can be extended by two months for sufficient cause<sup>101</sup>. On the contrary, Proclamation 923/2016 relies on Proclamation 909/2015, treating these cases as the regular cases. The absence of specific arrangements may undermine the effort to combat human trafficking and illegal recruitment of workers and can be considered one of the shortcomings of this new Proclamation.

#### **2.2.5 THE REINTEGRATION PROGRAMMES**

As stated above, one of the problems of the Ethiopian Proclamation is that it does not clearly address the issues of reintegration of overseas workers, although it calls for the provision of support in general terms. In this respect, the Bangladeshi Act offers a brighter perspective: it envisages full-scale reintegration programmes, and requires the provision of loans, tax exemptions, saving schemes, investment opportunities and other facilities to returnee migrants<sup>102</sup>. This is without prejudice to the establishment of the Labour Welfare Wing, which is part of the country's mission in the host nation. In addition to ensuring the protection of returnees, this organ is in charge of inspecting the workplace of migrants, consulting the employers, and filing periodic reports on a variety of issues. These include the provision of information on workers (e.g. list), cases brought against workers, number of convictions, and counselling and legal assistance offered by the mission<sup>103</sup>.

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101 Id Article 38

102 Id Article 30

103 Id Article 23

# 3. THE COMPATIBILITY OF THE PROCLAMATION WITH INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORKS

## 3.1 OVERVIEW

Article 9/4 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) provides that “all international agreements ratified by Ethiopia are an integral part of the law of the land.” Moreover, article 13/2 of the FDRE Constitution provides that the fundamental rights and freedoms recognized under Chapter 3 of Constitution shall be interpreted in a manner conforming to the International Covenant on Human Rights and the other international instruments adopted by Ethiopia. Ethiopia has ratified numerous international and regional treaties. These include the African Charter on Human and Peoples Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Elimination of All Forms of Discrimination against Women Convention; the Convention on the Rights of the Child; the Convention on the Elimination of Racial Discrimination; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Prevention and Punishment of the Crime of Genocide; the Forced Labour Convention, 1930 (No.29); and the Private Employment Agencies Convention, 1997 (no. 181).

The FDRE Constitution has the primacy over all the other laws. Article 9/1 proclaims that any law, customary practice, decision of an organ of State or public official that contravenes the Constitution has no effect. At the federal level, international agreements and proclamations have the same status as they are issued by the Federal legislature. These are followed by decrees, regulations and directives in this order.

Once a treaty or an international agreement is made, its ratification will be made by the Parliament, called the House of Peoples’ Representatives, issued as proclamation and published in the official Negarit Gazetta.

This chapter will provide an international perspective: the compatibility of Proclamation will be reviewed *vis à vis* the Domestic Workers Convention, 2011 (No. 189); the Migration for Employment Convention (Revised), 1949 (No. 97); the International Convention on the Protection of the Rights of All Migrant Workers



and Members of their Families; and the International Covenant on Civil and Political Rights. Then, the Proclamation will be analysed against the domestic legal framework, with specific attention to the Constitution.

## **3.2 THE COMPATIBILITY OF THE PROCLAMATION WITH THE INTERNATIONAL LEGAL FRAMEWORK**

### **3.2.1 THE DOMESTIC WORKERS CONVENTION, 2011 (NO. 189)**

Convention No. 189 was adopted in 2011 with the prime objective of full protection of domestic workers. It came into force in 2013 and it has been ratified by 22 countries. Unfortunately, though it lays the corner stone for the protection of domestic migrant workers and has a big role to play in addressing the deep-rooted problems of Ethiopian overseas workers, the country has not yet ratified this Convention.

As can be understood from the document, what makes this Convention unique is that it is comprehensive, as it covers nationals and non-nationals, live-in and live-out domestic workers, part-time and full-time workers. Although it does not directly address the issue of all overseas workers, the Convention requires equal treatment of domestic workers. Accordingly, it specifically requires member states to take measures pertaining to normal work-hours, overtime pay, rest days, and annual leave in accordance with the national laws in force<sup>104</sup>. The Convention requires that the employment contract specify the minimum working conditions and is signed before the worker undertakes the domestic work abroad<sup>105</sup>. In Ethiopia, the Labour Law does not apply to domestic workers that are hence denied any protection. Therefore, Proclamation 923/2016 has been designed to cover domestic workers deployed overseas, and the model contract envisaged under article 17 aims to incorporate the minimum standards provided under the Convention.

The Ethiopian overseas domestic workers are usually victims of abuse, harassment and discrimination, and have no access to justice. The provisions of Articles 5–16 of this Convention are of paramount importance to address these injustices. Accordingly, protection against abuse, harassment and violence is responsibility of the State parties, while the minimum wage, weekly rest, direct and regular payment of wage without discrimination, provision of safe working environment, social security and, above all, effective access to justice is guaranteed by the provisions of the Convention.

To respond to the usual practice of withholding of passport and travel documents, Article 9/c entitles these workers to keep these documents in their possessions. Article 42/3/q of Proclamation 923/2016, which prohibits withholding of travel documents, is a manifestation of its compatibility with the Convention on the matter. The provisions of the Proclamation pertaining pre-departure training, effective protection and means of repatriation are also in line with the Convention.

The suffering of domestic workers is partially caused by the nature of private employment agencies, hence the Convention stipulates the mechanisms to be used by national parties in matters concerning the regulation of the agencies and the

104 The ILO Domestic Workers Convention, 2011 (No. 189) Article 10/1

105 Id Article 8/1

handling of complaints against these agencies<sup>106</sup>. Member states are also required to take measures ensuring that the fees charged by the agencies are not deducted from the remuneration of domestic workers<sup>107</sup>. The Ethiopian Proclamation accords higher protection as it prescribes a non-placement fee system and unequivocally prohibits the employment agencies from charging any fee on the worker.

In the light of the concerns raised by employers about the interference of regulation in their family affairs, especially in the GCC countries, Article 17/1 requires member states to develop measures to create a conducive atmosphere for inspectors to investigate the working conditions of domestic workers without affecting the employer's right to privacy. According to the law of the Philippines, which has already ratified this Convention, the labour *attaché* in the overseas Mission is entrusted with power of inspection and consultation with employers on related matters. The Ethiopian counterpart requires the assignment of an *attaché* with this objective<sup>108</sup>, but leaves the matter to the joint regulation of the Ministry of Labour and Social Affairs and the Ministry of Foreign Affairs.

The non-binding Recommendation No. 201 provides legal details and other measures to be taken by member states to ensure the implementation of the Convention. Accordingly, Paragraph 21/1 calls for member states to establish a national hotline with interpreter with a view to assist workers in distress, to establish emergency housing, and to arrange a mechanism through which they can air their grievances. Conversely, Proclamation 923/2016 does not specifically envisage the provision of emergency housing and communication channels, which are key for overseas workers in distress, usually forced to absconding following the abuses by employers.

### **3.2.2 THE MIGRATION FOR EMPLOYMENT CONVENTION (REVISED), 1949 (NO. 97)**

This Convention entered into force in 1952. One of the special features of this Convention is Article 14/1, which authorizes state parties to exclude from their ratification any or all the Convention Annexes. Neither Ethiopia nor other recipient countries as Qatar, Kuwait, Saudi Arabia, and Jordan have ratified this Convention.

In order to protect migrant workers from miserable working conditions, Article 1/a of the Convention requires member states to have special provisions concerning migrant workers and to inform the ILO and other member states on their work and livelihood conditions. This provision warrants the continuous flow of information between the recipient country and the country of origin.

Instead of living the matter to the domestic legislation of the recipient country, Article 2 requires the state parties to provide an adequate and free service to assist migrant workers. This assistance, according to Article 6 of Annex I, includes provision of information, interpretation, and any other services that a migrant worker and his/her family may need until he/she is acquainted with the system of the host country.

As freedom of movement is one of the basic rights recognized by international and

106 Id Article 15/1

107 Ibid

108 Supra Note 7 Article 14

domestic instruments, this Convention also requires state parties to ensure this right. Accordingly, by virtue of Article 4, while a country of origin is required to facilitate the departure and journey of workers who desire to undertake overseas employment, a recipient country, on the other hand, is duty bound to facilitate their reception. However, unclearly, the state parties have not the discretionary power to allow or not the deployment of workers, although the incidence of temporary ban with the objective of protecting workers is not specifically regulated.

Contrary to the Ethiopian Proclamation, which does not provide about the families of migrant workers, Article 5/a of this Convention provides for state parties to protect the health of these workers and their families through adequate medical attention. Moreover, unlike the Ethiopian counterpart, which is silent about transit states, Article 5/b implies that such protection extends even when the worker and his/her family are in a third state for transit purposes.

Article 6 stipulates the equal treatment of nationals and migrant workers with regard to remuneration, work-hours, overtime pay, and social security.

The modes of recruitment are provided under Article 3 of Annex I, with the exclusion of workers recruited under government sponsored arrangements for group transfer. Article 7/2 provides that public authorities are responsible for the service to the migrant worker, which must be free of any charge. Article 4 of Annex I contains a similar stipulation. Conversely, the provision stipulates that private employment agencies can charge a service fee. Proclamation 923/2016 declares that, when the Ministry of Labour and Social Affairs undertakes the recruitment, the migrant worker is not required to pay any fee for this service, but the employer is duty bound to pay it in accordance with Article 11. The Ethiopian Proclamation offers higher protection on this matter, as it prohibits the agencies from receiving any fee from the worker.

In the instance where a worker sustains serious bodily injury, article 69/1/b of the Proclamation requires an agency to repatriate him/her and cover the transport expenses. This provision does not clearly address the situation in which the worker is not willing to be repatriated. On the contrary, Article 8 of the Convention provides protection to the worker in these cases. It provides that, in the event where the worker is unable to follow his/her occupation for reason of illness contracted or injury sustained subsequent to the start of the contract, unless the worker desires otherwise or unless the bilateral agreement stipulates otherwise, a state party may not force the worker and his/her family to go back to their country of origin. This provision is silent as to who is going to cover the living expenses, while the social security requirement under Article 6 is purported to address this issue.

Article 5 of Annex I requires the delivery of a copy of the employment contract to the worker before departure, unless there is a bilateral agreement that provides differently. Obviously, the rationale behind this requirement is to prevent an employer from changing the terms of the contract with the aim to procure undue advantage at the expense of the worker.

Pursuant to Article 1 of Annex II, the prime focus is the protection of migrant workers recruited under government sponsored arrangements for group transfer. Article 4 states that the service in this arrangement must be rendered to the worker free of any charge, while Article 5 requires the transit state to take measures for expediting

the passage thereby avoiding delays and administrative difficulties.

To exemplify the Ethiopian situation, assume that workers from western Ethiopia wish to undertake employment in the Republic of Sudan. Given the proximity, the transportation may happen through land transport via South Sudan, a transit state. As Proclamation 923/2016 does not deal with the situation in a transit state, the interest of these workers is likely to be affected in these circumstances. Therefore, since Ethiopia, the Republic of Sudan and South Sudan have not yet ratified this Convention, the safety of Ethiopian workers in transit territories may be at risk.

Annex III, on the other hand, stipulates about the importation of the personal effects, tools, and equipment of migrant workers. By virtue of Article 1/1, the personal effects are exempt from custom duties, as far as it is proved that these belongings will be used in the course of their occupation. This exemption, as per Article 2, extends to the workers and their families that return to the country of origin.

Though the Ethiopian Proclamation is silent on this matter, a bilateral agreement can address the exemption issue at the customs of the recipient country. As far as returnees are concerned, the items imported are considered personal effects in the meaning of article 2/52 of the Customs Proclamation No. 859/2014 and can be subjects of exemption in accordance with article 33/2, as long as they do not exceed the maximum stipulated in the directives.

### **3.2.3 THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES**

This Convention was adopted in 1990 and entered into force in 2003 after being ratified by 20 member states. Though the number of countries raised to 34 in 2005, Ethiopia is not yet a state party.

The Convention provides a definition of migrant worker<sup>109</sup> and obligates the states of transit to protect this category of migrants. The entire migration process, for both domestic and non-domestic workers, which includes preparation, departure, transit, and stay in the recipient country, is covered in the Convention<sup>110</sup>. In terms of protection, the Convention does not discriminate documented and undocumented migrants. It means that its scope of application is far wider than the one of Proclamation 923/2016, which is primarily geared towards protecting documented overseas workers. The Proclamation extends protection to Ethiopian overseas workers while at home and while in the recipient country, without making any reference to their situation while in transit.

The other striking feature of the Convention is that it gives adequate protection to the families of migrant workers, either at home or in the host country, in terms of equality of treatment to nationals and access to education<sup>111</sup>.

The Convention further recognizes arrested migrants the right of a due process, including the right to fair trial equal to that of nationals of the recipient state<sup>112</sup>.

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109 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families Article 2

110 Id Article 1

111 Id Article 30

112 Id Article 18

Equal treatment to nationals with respect to remuneration, conditions, and terms of employment is also guaranteed under Articles 25 and 70, while Articles 20 and 22 respectively prohibit the confiscation and destruction of travel documents and the collective expulsion. Furthermore, the Convention calls for exchange of information and cooperation among member states to increase their capacity to combat illegal migration and trafficking<sup>113</sup>. The Convention also prohibits recruitment undertaken in the absence of mutual agreement between the country of origin and the host state, without the involvement of public bodies or agencies established by the law<sup>114</sup>. It also requires the state parties to enable the creation of a conducive economic environment for the resettlement of migrant workers and their families and to facilitate their durable social and cultural reintegration in the state of origin<sup>115</sup>.

In this light, the Proclamation exhibits shortcomings, especially concerning the due process right, the equality of treatment of arrested Ethiopians overseas, and the measures for the resettlement and reintegration of returnees.

### **3.2.4 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

This Covenant was adopted in 1976, and it has been ratified by Ethiopia in 1993, with the exclusion of the two Optional Protocols.

This Covenant enshrines provisions crucial to protect migrant workers from any form of exploitation. It calls for the elimination of slavery and servitude<sup>116</sup> and guarantees the freedom of movement by outlawing practices as the confiscation of passport and travel documents<sup>117</sup>.

Proclamation 932/2016 is generally in harmony with the provisions of the Covenant, since it outlaws the acts of ill treatment of overseas workers and guarantees their freedom of movement.

## **3.3 THE COMPATIBILITY OF THE PROCLAMATION WITH THE DOMESTIC LEGAL FRAMEWORK**

The new Proclamation deals with movement of people from jurisdiction to jurisdiction, and necessarily overlaps with several laws that will be analysed. The closest law is the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No. 909/2015, as it concerns the crimes committed under the guise of overseas employment operations. We may also mention the Constitution of the Federal Democratic Republic of Ethiopia, the Criminal Code, which provides for unlawful sending of persons and many other relevant offences, the Labour Proclamation No. 377/2003, and the Civil Code of Ethiopia.

### **3.3.1 THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995**

Pursuant to Article 32 of the Constitution, the freedom of every Ethiopians to move and reside within the country and to leave the country is always guaranteed. As

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113 Id Article 65

114 Id Article 66

115 Id Article 67

116 The International Covenant on Civil and Political Rights, Article 8

117 Id Article 12



the Overseas Employment Proclamation warrants the rights of Ethiopians to move and work abroad, we can say that these two instruments are in harmony. The other constitutional provision of relevance is Article 18/2, which strictly prohibits the holding of persons in slavery or servitude and outlaws human trafficking for whatever purpose. In this regard, Proclamation 923/2016 reflects the spirit of the Constitution since it prohibits illegal recruitment and trafficking. Article 42/2, which guarantees limited work-hours, minimum wages, rest, leave, remunerated leave for public holidays, and healthy and safe working environment, is of prime importance for the subject under discussion. Proclamation 923/2016, in particular with its article 17, which requires the preparation of model contract of employment for overseas workers, guarantees what is stipulated in the Constitution. Again, we can appreciate the alignment of these legal instruments.

### **3.3.2 THE PROCLAMATION ON THE PREVENTION AND SUPPRESSION OF TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS**

Some of the acts in violation of Proclamation 923/2016 are supposed to entail criminal liability pursuant to the relevant criminal law. Specifically, these acts are certainly criminal only when committed by an agency. Conversely, it is unclear if these entail only civil and administrative liability when committed by an overseas employer or an agency representative.

Stringent licensing, financial guarantee, and insurance requirements stipulated in Proclamation 923/2016 can produce a deterrence effect against trafficking. However, the actors are not only the agencies, but also foreign employers and agency representatives, and the application of these requirements, which is limited to the national territory, may undermine the prevention of human trafficking. It is not clear whether a violation of the Proclamation entail criminal liability, or whether, alternatively, Proclamation No. 909/2015 is applicable in these cases.

More in detail, each foreign employer must contribute to the financial guarantee fund by 50 USD per person employed<sup>118</sup>. In addition, an agency is required to have 1 million ETB of capital to obtain its license, besides a financial guarantee of 100,000 USD or its equivalent in ETB in a blocked account. Although intended to increase the protection of migrant workers, these stringencies may prevent many agencies from continuing their business so as only those with solid financial situation will remain where monopoly possibly sets in. This situation may lead to a shortage of supply of overseas employment services, which may in turn encourage covert sending of workers seeking employment abroad, and allow trafficking crimes to flourish.

The idea behind the employment Proclamation is that a strict control on agencies, their overseas representatives and overseas employers will yield a better prevention of human trafficking. Nonetheless, the other participants in the overseas employment relation seem to have less importance in the Proclamation. The agency representatives may be required the citizenship of the receiving country and to have a license in the host country to conduct overseas employment exchange services<sup>119</sup>. Other requirements are present for the renewal of a license<sup>120</sup>. Representatives

118 Supra Note 7 Article 61

119 Id Article 24/9

120 Id Article 33/2



that violate the Proclamation face civil liability and prohibition from engaging in Ethiopia's overseas employment activities. No mention is made of possible criminal liability.

Similarly, a foreign employer is required to make direct employment only under the permission of the Ministry of Labour and Social Affairs, in which case he must contribute 50 USD for each worker employed. No criminal liability is envisaged for violations under article 53.

From this analysis it emerges the need of a tighter control over these two actors in the overseas employment set up.

### **3.3.3 THE CRIMINAL CODE, 2004**

Some of the acts, supposedly entailing criminal liability, under articles 42/3 and 47/3 of the Proclamation, may not be properly covered by Proclamation 909/2015. The Criminal Code contemplates the crimes of forgery, fraudulent misrepresentation, and similar. For instance, the case of an agency engaging in services, workplace, or country not mentioned in the license is disciplined under article 598 of the Criminal Code. However, this provision is incompatible with Proclamation 909/2015 for what concerns the punishment, but it might be repealed by article 77 of Proclamation 909/2015. Of course, this repeal applies to the matters covered by Proclamation 909/2015 and unlicensed sending of persons abroad does not seem to be part of them.

There are still some acts, although supposedly criminal, not categorized in the criminal law. For example, the acts enumerated in articles 42/3/d and /j of the Proclamation.

### **3.3.4 THE OVERSEAS EMPLOYMENT PROCLAMATION NO. 923/2016**

The Overseas Employment Proclamation provides for the employment of Ethiopians abroad. This law, according to the Labour Proclamation No. 337/2003, is governed by a directive issued by the Ministry of Labour and Social Affairs. At the same time, it is addressing one aspect of the employment services listed in article 172 of Proclamation 377/2003. A closer perusal of Proclamation 923/2016 reveals that overseas employment is possible only upon permission by the Ministry after considering the assurances that the employee's rights and dignity will be protected in the receiving country. This was also envisaged in Proclamation 377/2003.

With regard to labour inspection, Proclamation 923/2016 provides for the assignment of a labour inspector to investigate the agency's compliance. It is not provided the inspection of a foreign employer or an agency representative<sup>121</sup>.

Though it is not applicable in overseas employment situations, the Labour Proclamation provides for labour inspection services. They envisage an actual inspection of working conditions in the workplace by a labor inspector appointed by the Minister of Labour and Social Affairs. As in the majority of cases the abuses occur in the receiving country, it is not a safe procedure to delegate the protection of nationals employed abroad to an agency or a foreign employer. Nevertheless, in

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121 Id Article 7

receiving countries it is not possible to intervene with labour inspections and, unless comparable investigations are carried out, it is difficult to assume that the dangers of human trafficking under the guise of overseas employment are curbed. Proclamation 923/2016 does not allow the Ministry to assign a labour inspector to conduct workplace inspection, but allows the assignment of a labour *attaché* to the Ethiopian Mission in the receiving country. Proclamation 923/2016 and the Labour Law are in harmony for what concerns the task of the labour *attachés*.

To conclude, Proclamation 923/2016 considers illegal the recruitment and deployment abroad of workers below 18 years of age, and any violation of this provision supposedly entails criminal liability in accordance with the relevant criminal law (see articles 42/3/d and 47/3).

### **3.3.5 THE CIVIL CODE**

As a contractual relation, employment is governed by the general rules of contract. One of the most important principles pertains to the freedom of contract, as long as the agreement conforms with the law. However, for preventive and protective reasons, the law subjects overseas employment contract to the permission of the Ministry of Labour and Social Affairs, and no direct employment is allowed without its permission. If a contract provides exclusive advantage to one party is not considered invalid, but the disadvantaged party may request its termination for good cause (see Civil Code, article 1824). Under such circumstances, the approval of the contractual relation for precautionary reasons can be considered against the principle of freedom of contract envisaged in the Civil Code (articles 1678-1679). Nonetheless, the preference of Proclamation 923/2016 to ignore this principle is understandable. The Government aims to prevent its citizens from accepting a contractual relation which may not ensure the protection of their interests. Either way, one could argue that the Ministry should play an advisory role instead of acting as the ultimate umpire, and its intervention should be a response to the needs of citizens otherwise forced to remain in a defective contractual relation.

## 4. THE LEGAL AND POLICY FRAMEWORK OF RECIPIENT COUNTRIES, THE ROLE OF BILATERAL AGREEMENTS, AND THE RELEVANCE OF THE PROCLAMATION

### 4.1. OVERVIEW OF THE LEGAL AND POLICY FRAMEWORK OF RECIPIENT COUNTRIES

Since the GCC countries attract the majority of Ethiopian overseas workers, a brief review of the legal framework and general policy environment of some of these countries is essential.

Most GCC countries are reluctant to promulgate laws concerning domestic workers, and often neither willing to ratify the international legal instruments on the subject. This also happens as the laws protecting domestic workers are viewed as an intrusion into the private life and space of the family<sup>122</sup>. Therefore, the situation of domestic workers is negative, since they are usually excluded from the scope of the labour laws, and hence from the protection of minimum working conditions, such as wages, leave, and payment for overtime work.

The State of Kuwait, for instance, has signed a number of international conventions whose provisions can be extended to domestic workers. On the other side, it has not ratified any of the specific international frameworks available, such as the Convention No. 189, only signed, and the International Convention on the Protection of the Rights of Migrant Workers and their Families, not even signed<sup>123</sup>. However, the Anti-Trafficking Law No. 91/2013, which imposes severe penalties on traffickers, stands as a positive development. Moreover, the 1962 Kuwaiti Constitution, as reinstated in 1992, enshrines fundamental principles that can contribute to the protection of overseas employees. In this connection, mention can be made of Article 10, which requires the state to guard the youth and protect it from exploitation, and Article 12, which enshrines the concept of humanitarianism. Article 29, on the other hand, provides that people are peers in human dignity and hence, under the law, have equal public rights and obligations. This provision specifically outlaws any differentiation based on race, origin, language, or religion. The other significant provisions for migrant workers appear in Articles 41 and 42. While the former ensures equality of working conditions, the latter clearly prohibits

<sup>122</sup> Id p. 43

<sup>123</sup> Supra Note 65 p. 44

coercive labour. This constitutional guarantee, however, does not seem to have a practical significance since Kuwait's ill treatment of overseas workers is still an outstanding issue in the agenda of human rights groups.

In response to the repeated criticism, many actions have been undertaken. In addition to the amendments to the Labour Law and the enactment of a law related to the recruitment of domestic helpers, the Parliament of Kuwait's enacted the first legislation on the rights of domestic workers in 2015. The new law grants domestic workers the right to a day off per week, 30 days of annual paid leave, 12 workhours a day with rest, and an end-of-service benefit of one month per year at the end of the contract. Kuwait's move can represent a model for the rest of GCC countries, nonetheless this law raises some concerns. Specifically, despite the provision requiring a maximum of 12 work-hours a day, which already reveals a discriminatory nature in the light of the usual 8-hour working day for other employees, it does not provide details on rest and leave. Moreover, its implementation is proving to be an issue.

Continuing with the analysis, Qatar issued Labor Law No. 14 in 2004, setting the minimum working conditions, including working hours, vacations, public holiday, health and safety, and termination of employment. The negative side is that domestic workers are excluded from it. In 2011, Qatar issued a law to combat trafficking in persons that prohibits all forms of trafficking and prescribes sufficient stringent penalties, together with the adoption of improved identification of the victims. Despite these measures, the country has been criticized for not being able to create a conducive legal environment that accords adequate protection to migrant workers. The critics have become more acute following the FIFA's award of the 2022 World Cup to this country. As a result, Qatar has enacted Law No. 21 in 2015. This law introduces some changes but does not outlaw the much abusive *kafala* system. In this respect it is stated:

The key element in Qatar's exploitative labor system is the *kafala* system, which ties a migrant worker's legal residence to the employer or sponsor. The new law leaves in place a requirement for any foreign workers to obtain a "No Objection Certificate" from their current employer if they want to transfer legally to another employer. The workers also must obtain exit permits from their employers to leave Qatar. The requirements enable employers to arbitrarily prevent their employees from leaving Qatar to return to their home country or from escaping an abusive work situation<sup>124</sup>.

Pursuant to article 16 of this law, a foreign national who obtains entry or residence permit for a specific purpose, or to work with a specific party is required not to violate the purpose itself. In addition, the worker is required not to leave the occupation provided by his/her recruiter, nor work with another party for which he/she has not received a permit. Violation of this provision entails a jail term of up to 3 years and a fine of 50,000 Qatari Riyals. This provision is a manifestation of the *kafala* system and violates the international legal

124 Human Rights Watch Report, November 8,2015

instruments. In particular, it violates the provisions of Article 13 of the Universal Declaration of Human Rights, which stipulates that everyone has the right to freedom of movement and residence within the borders of each state; and has the right to leave any country, including his/her own, as well as to return to it. Though the *kafala* system still forms part of the Qatari legal system, the new Qatari law introduces some changes with respect to the withholding of passports and travel documents. As per article 8, the employer is required to give these documents to the foreign national after completing the licensing or renewal procedures, unless the worker consents otherwise. Violation of this provision entails a fine up to 50,000 Qatari Riyals.

The analysis continues with Saudi Arabia, one of the largest employers of Ethiopian workers. This country has approved some amendments to its labour law that includes paid leave and compensation for job related injuries among others<sup>125</sup>. Following the 2015 amendment of the Labour Law, the Saudi government has also taken some enforcement measures, including the withdrawal of license and closure of business against the companies that fail to pay wages and to respond to the complaints of the employees<sup>126</sup>. It is also clear the increase in penalties imposed against employers that violate the rights of workers.

The regulation issued in 2013 guarantees domestic workers nine hours of rest every day, meaning that the workhours are 15 per day, contrary to the conventional workhours for other jobs, one day off per week, and one month of paid vacation every two years.

In addition to this discriminatory treatment of domestic workers, the problems related to the *kafala* system are not fully addressed. Accordingly, the exit visa requirement that prevents foreign workers from leaving the country without the employer's permission is still maintained, and the migrant workers who change jobs without their employer's approval remain at risk of becoming undocumented<sup>127</sup>.

We continue our analysis with the United Arab Emirates. The country has passed a series of ministerial decrees. They cover a wide range of issues, such as the requirement of workers to sign standard employment contracts prepared by the Ministry of Labour, the termination of employment contract, and the unilateral termination right of workers who are on a renewed term<sup>128</sup>. Though these reforms are significant to protect overseas workers, they clearly exclude domestic workers. As most of Ethiopians deployed in this country are domestic workers, this legal framework is certainly not conducive to their protection.

As illustrated above, although some GCC countries have made some reforms on their legal and policy frameworks pertaining to overseas workers, in the presence of the *kafala* system and in the absence of clear enforcement mechanisms, these guarantees are insufficient.

125 Human Rights Watch Report, November 15, 2015

126 Ibid

127 Ibid

128 Human Rights Watch Report, November 1, 2015



## 4.2 THE ROLE OF BILATERAL AGREEMENTS AND THE RELEVANCE OF THE PROCLAMATION

As can be understood from the previous discussion, Ethiopia relies on a relatively elaborate system to regulate the dynamics of labour migration. The licensing of private recruitment agencies is specifically geared towards ensuring the placement of overseas workers in jobs that do not expose them to abuse and exploitation. However, as the legal framework is applicable within the territory of Ethiopia, it may not accord effective protection to migrant workers as it depends on the system of the host country.

In the event where the treatment by the host country of overseas workers deteriorates, the measure in the hands of the countries of origin is a deployment ban<sup>129</sup>. These bans are primarily intended to put pressure on recipient countries to take measures that give better protection to overseas workers. Ethiopia, for instance, considering the barbaric treatment and the mass deportation of its overseas employees in the GCC area, in 2013 banned the deployment of its workers to these countries. Nevertheless, instead of forcing the recipients to introduce better working conditions, evidence shows that the ban has increased the influx of illegal migration, especially through Sudan and Egypt's Sinai Peninsula, and has worsened the situation of the workers already deployed<sup>130</sup>.

The condition of bilateral agreements as prerequisites for deployment is a positive step. Accordingly, Ethiopia strictly prohibits the deployment of overseas workers without the presence of a bilateral agreement signed with the recipient country. Even then, unless these agreements clearly provide details on the rights and duties of the parties and the means and venues of enforcement in case of violations, these arrangements may not give sufficient guarantees. Furthermore, an analysis of the international best practices reveals that bilateral agreement must include clauses on social security arrangements, so that overseas workers can obtain equal entitlements to the benefits granted to nationals.

In line with this, Ethiopia has recently been negotiating a bilateral agreement with the Kingdom of Saudi Arabia. The agreement is designed to include details on the working conditions. One of the factors delaying the conclusion of the agreement pertains to the minimum wages of domestic workers: Ethiopia proposed a minimum wage of 1,200 Riyals, while Saudi Arabia offers 700. Saudi Arabia also requests Ethiopia to ban deported citizens from going back to it<sup>131</sup>. Similarly, the conclusion of a bilateral agreement with the United Arab Emirates is delayed because of the objection to the inclusion of a minimum wage requirement<sup>132</sup>. These difficulties prove the resistance of the recipient countries in according meaningful protection to overseas workers.

Hence, the application of the Proclamation raises issues of jurisdiction and may not have effective relevance within the described framework. Even the presence of bilateral agreements may not necessarily guarantee the rights of overseas workers, unless backed by positive and concrete measures resulting from a real commitment of these nations.

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129 Supra Note 35 p. 85

130 The United States Department of State, 2014 Report

131 [www.ena.gov.et](http://www.ena.gov.et) March 23, 2016

132 Ibid



## 5. THE ROLE OF DIFFERENT STAKEHOLDERS IN THE IMPLEMENTATION OF THE OVERSEAS EMPLOYMENT PROCLAMATION

### 5.1 OVERVIEW

Primarily, the implementation of the Overseas Employment Proclamation is responsibility of the Ministry of Labour and Social Affairs. Yet, other parties are in charge of duties that help its implementation and the achievement of its objectives. Starting with the labour *attachés* assigned by the Ministry, we may list the National Coordinating Committee and the task force, envisaged in Proclamation 909/2015, the labour inspectors, the Ministry of Foreign Affairs (MOFA) and its missions abroad, the health institutions, and the banks. Furthermore, the Police, the Prosecution Department, and the Judiciary play a key role.

### 5.2 THE MINISTRY OF LABOUR AND SOCIAL AFFAIRS

As we have described in chapter one, this Ministry has the prime responsibility to manage and regulate the overseas employment of Ethiopians. According to the Proclamation, it may render services such as recruitment and placement of workers for a governmental organ of another country. Supposedly, this must be done in accordance with a bilateral agreement between Ethiopia and the other country<sup>133</sup>. The Ministry conducts these services through interview and selection of workers, medical examination, pre-employment and pre-departure orientations to workers, approval of employment contracts, and facilitation of departure for the employees<sup>134</sup>.

It also controls direct employment based on specific conditions and the advertisement of foreign vacancies<sup>135</sup>. Among other functions, MOLSA assigns a labour *attaché* to the Ethiopian Mission in the receiving country, with the purpose to ensure the safety, protection of rights, and dignity of Ethiopian nationals working abroad<sup>136</sup>.

Pursuant to article 16, MOLSA has the power to regulate the working conditions by issuing directives. It may also prepare a model contract of employment containing, among other things, the level of wage, the types of leave, and grounds for contract termination. In doing so, it must take into account the culture, customs, the labour and social laws of the receiving country, the policies of the employing company, the

133 Supra Note 7 Article 4

134 Id Article 5

135 Id Article 6

136 Id Article 14

relevant bilateral and multilateral agreements, and the prevailing labour market conditions<sup>137</sup>.

For inspective purposes, MOLSA can issue special ID for workers with an approved contract of overseas employment. It assigns labour inspectors to investigate the agencies operating overseas employment and test their compliance with the Proclamation. It is in the power and duty of the inspector (i) to ensure that the agency has given orientation on general conditions of work, (ii) to examine the situation of the receiving country, and (iii) to provide pre-employment and pre-departure orientation and counselling services to workers traveling abroad for overseas employment. We can also mention the power to enter the premises of an agency at any time during working hours, to inspect the necessary documents, records, books of account and others, and make enquiries<sup>138</sup>.

The Ministry not only supervises the overseas employment process but also takes administrative measures whenever a breach occurs<sup>139</sup>. If the responsible of the breach is an agency, the measure can be the suspension or the revocation of the license and, depending on the circumstances, may also entails criminal liability pursuant to the relevant criminal laws. In case of violations committed by an overseas employer and the agency's representative, prohibition of employing workers from Ethiopia and prohibition of participation in Ethiopia's overseas employment activities are the measures taken, in this order<sup>140</sup>. The Proclamation provides for the procedure to follow in case of complaints arising from the breaches committed by an agency, its representative and an overseas employer<sup>141</sup>.

### 5.3. THE MINISTRY OF FOREIGN AFFAIRS

As stated above, the Ministry of Labour and Social Affairs must consult with the Ministry of Foreign Affairs (MOFA). As a member of the task force established to combat human trafficking<sup>142</sup> and as a government organ dealing with foreign relations, the MOFA must play a significant role in this consultation. The labour *attaché* is the person closer to the Ethiopian nationals employed abroad and the only official probing possible violations against them. Also, the labour *attachés* are based in the Ethiopian Missions administered by MOFA, and any arrangement could be made only by consulting with this Ministry.

The Ministry, as a member of the task force, has a responsibility in tackling the abuses in overseas employment<sup>143</sup>. In particular, it helps the development of supporting measures by organizing and disseminating data on the list of victims and their whereabouts, together with their current conditions<sup>144</sup>. MOFA also assesses the risk levels in different countries where victims reside and communicate with them, facilitating the establishment of Ethiopian.

The Ethiopian missions abroad have a great responsibility in the implementation

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137 Id Article 17

138 Id Article 20

139 Id Articles 42 and 53

140 Id Article 56

141 Id Articles 41-59

142 Prevention and Suppression of Human Trafficking and Smuggling of Migrants Proclamation No 909/2015 Articles 39-40

143 Supra Note 7 Article 15/2

144 Supra Note 140 Article 42

of the Proclamation, for instance through the verification of requirements. The relation between an agency's representative and the agency itself must be verified prior to proceeding with the licensing process<sup>145</sup>. In other occasions, as a prerequisite to MOLSA's approval of an overseas employment contract, the Ethiopian Mission must verify the authenticity of the signature of the employer<sup>146</sup>.

## **5.4 THE TASK FORCE ENVISAGED IN PROCLAMATION 909/2015**

The task force, as envisaged in Proclamation 909/2015 and provided under Proclamation 923/2016, ensures the proper implementation of the Overseas Employment Proclamation. The task force is in charge of combating the crimes related to human trafficking. At the preventive level, the task force requires the undertaking of studies with the aim to conclude bilateral agreements between Ethiopia and potential receiving countries. It facilitates information exchange and requires provision of public training on the illegal features of overseas employment and the violation of rights, and ensures that the responsible of violations are brought to justice. It must also ensure proper support to the parties responsible of victim support<sup>147</sup>.

## **5.5. THE POLICE, THE PROSECUTION DEPARTMENT AND THE JUDICIARY**

The Federal Attorney General, which has replaced the role of the Police and the Ministry of Justice, is in charge of investigative and prosecutorial duties.

According to the anti-trafficking Proclamation 909/2015, the investigative authorities may apply special investigative methods, which include infiltration, surveillance, interception of communications and similar<sup>148</sup>. The infiltrator is exempted from criminal liability for any related actions related, unless it commits homicide or rape against the victim. Sometimes, the interception of communication may be conducted without any court order, according to the circumstances<sup>149</sup>. These allowances are necessary to facilitate the law enforcement against human trafficking.

The procedures of arrest of suspects and investigative remand, for a period inferior to four months<sup>150</sup>, are indicated in Proclamation 909/2015<sup>151</sup>.

Proclamation 909/2015 eases the ordinary procedure of prosecution to allow the shifting of the burden of proof <sup>152</sup>. In some of the offences related to human trafficking, the prosecutor is expected to prove only the material aspect of the crime, while the burden of proof may be shifted by the court to the accused. Co-offender witnesses may obtain immunity from prosecution in return<sup>153</sup>, although this is applicable only to crimes of human trafficking where the victim has not suffered

145 Supra Note 7 Article 24/9/b

146 Id Article 37/2

147 Id Article 15

148 Supra Note 140 Article 18

149 Id Article 19

150 Id Article 25

151 Id Article 20

152 Id Article 21

153 Id Article 23

major injuries. Otherwise, however, the intention to collaborate may obtain the co-offender a reduction of punishment<sup>154</sup>. Also, prosecution may not be barred by limitation<sup>155</sup>. All these examples are manifestations of how the procedure is being relaxed to allow easy law enforcement in case of trafficking committed under the guise of overseas employment.

However, with the exception of few cases envisaged in Proclamation 923/2016, the violations are either criminal in other laws or not easily classified in criminal law provisions, therefore disciplined under the ordinary procedures.

Contrary to this relaxation, one may observe a stringent situation regarding the victim's consent. As a rule, Pursuant to article 70 of the Criminal Code, consent of the victim does not represent a defense. Moreover, Proclamation 909/2015 declares that consent is not a defense only when obtained through illegal means. This approach and the requirement that the illegality of consent must be proved contradicts and undermines the law enforcement described above.

Within the Judiciary, the labour benches have the jurisdiction over civil cases of breach of the employment contract. The regular courts have also the jurisdiction to entertain the cases of illegal recruitment and trafficking. Though the Judiciary has a key role in the implementation of this Proclamation, as we have seen previously, due the fact that the courts handle a massive amount of cases, they may not be in condition to guarantee a quick process.

## 5.6 OTHER ORGANS

Although the role they play is minor and indirect, organizations such as health institutions, mass media, and banks may also contribute to the implementation of this Proclamation, as they support the major protagonists to discharge their duties.

Among other activities, the MOLSA is conducting awareness-raising programmes as stipulated under article 8. In this regard, it is supposed to use the mass media to disseminate correct and up to date information to the general public about overseas employment.

The MOLSA provides the services of recruitment and deployment of workers to foreign governmental organizations and requires the medical examination<sup>156</sup>. In this regard, the Ministry of Health, although it is not a member of the task force, participates in the implementation of the Proclamation by selecting the health institutions. Certainly, the health facilities disseminated all over the countries are other actors that contribute to the execution of this process.

As illustrated before, MOLSA requires the agencies running overseas employment operations to deposit financial guarantees in blocked accounts<sup>157</sup>. Hence, the importance of the banks is evident in securing the enactment of this procedure.

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154 Id Article 24

155 Id Article 25

156 Supra Note 7 Articles 5 and 9

157 Id Article 60

## 6. A COMPARATIVE ANALYSIS OF PROCLAMATIONS 923/2016 AND 632/2009

The purpose of this comparison is to highlight the changes and the improvements produced by the new Proclamation with the aim to manage the dynamics of labour migration. The comparison will cover a variety of issues: (i) the scope of application, (ii) the modes of overseas employment, (iii) the licensing requirement of private employment agencies, (iv) the minimum working conditions, (v) the requirements of age, education and competence, (vi) the financial guarantee, and (vii) the effects of contravention.

### 6.1 COVERAGE AND SCOPE

Proclamation 632/2009 is geared towards monitoring and regulating both domestic and overseas employment, while Proclamation 923/2016 regulates overseas employment only. Accordingly, article 2/1 of Proclamation 632/2009 defines an agency as the subject that offers the service of matching offer and supply of local employment, without being a party of the employment contract, and makes a worker available locally or abroad to a third party through the conclusion of an employment contract<sup>158</sup>. Conversely, in the new Proclamation, the agency can be any person other than a government body, which makes a worker available to an overseas employer by conducting a contract of employment<sup>159</sup>. In both cases, the agency is prohibited to ask a worker in cash or in kind payments as a compensation to overseas employment exchange services.

Additionally, while the former Proclamation refers to Proclamation No. 377/2003 to define an employer and a worker, the new Proclamation incorporates an autonomous definition.

### 6.2 MODES OF OVERSEAS EMPLOYMENT EXCHANGE SERVICE

Pursuant to Proclamation 632/2009, employment exchange services can be conducted by private employment agencies or by public institutions. The conditions for direct recruitment are also clearly explained<sup>160</sup>. The Ministry of Labour and Social Affairs may permit direct recruitment if evidence attested by the Ministry of Foreign Affairs is provided from the Ethiopian Embassy or the Consul of the host

158 Employment Exchange Services Proclamation No. 632/2009 Article 2/1

159 Supra Note 7 Article 2/1

160 Supra Note 156 Article 32/1

country. In its absence, evidence must be attested by the host country's Chamber of Commerce or by the Ministry in charge of Labour or Foreign Affairs<sup>161</sup>.

The new Proclamation puts the existence of a bilateral agreement between Ethiopia and the recipient country as a condition for overseas deployment, and adopts the modes of overseas employment exchange services described above, although with some significant differences. In this connection, article 4 warrants that the Ministry of Labour and Social Affairs undertake recruitment and placement services to governmental organizations in the host country. The basic services include (i) interviewing, (ii) selection, (iii) causing medical examination, (iv) approval of employment contract, and (v) pre-employment and pre-departure orientations. In this Proclamation, direct employment is generally prohibited, but, as a matter of exception, is allowed in special circumstances. In particular, when the employer is (i) a staff of an Ethiopian mission, (ii) an international organization, or when (iii) a job seeker acquires a job by his/her own accord in position other than that of housemaid<sup>162</sup>. This Proclamation abolishes the previous possibilities of direct employment through an undertaking situated in Ethiopia for its branch abroad and an undertaking situated abroad that wishes to employ a worker for its own. The Ethiopian Mission, or the Mission in Ethiopia of the host country in its absence, and the Ministry of Foreign Affairs<sup>163</sup> must produce evidence that assure the rights and dignity of the worker are respected. The new Proclamation does not specify the situation in which neither the Ethiopian Mission in the host country nor the host country's Mission in Ethiopia are available. In addition to the other requirements, the new Proclamation requires the Ministry of Labour and Social Affairs to advertise vacant positions.

### **6.3 LICENSING REQUIREMENT OF PRIVATE EMPLOYMENT AGENCIES**

This section compares citizenship, capital, and other eligibility requirements. In the former Proclamation, foreigners who had permanent residence permit in Ethiopia were entitled to run an agency operating in overseas employment<sup>164</sup>. Conversely, the present Proclamation restricts the business to Ethiopian citizens only<sup>165</sup>.

In addition to the restrictions based on citizenship, the present Proclamation envisages a capital requirement that was not incorporated in the former Proclamation. Accordingly, for an individual or a company to obtain an agency license, the capital required is not less than one million ETB.

Pertaining to the other requirements of licensing, although both Proclamations set somehow similar conditions of eligibility to obtain the license, the new version provides more details.

Both Proclamations envisage the revocation of license for violation of the provisions,

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161 Id Article 32/2

162 Supra Note 7 Article 6/2

163 Id Article 6/3

164 Supra Note 156 Article 6

165 Supra Note 7 Article 22



punishment and accusation of involvement in illegal employment or human trafficking as grounds to disqualify. Additionally, the new Proclamation includes other cases of rejection, which encompass individuals who are sentenced or whose case is pending for crimes of terrorism, organized crime, drug trafficking, and money laundering<sup>166</sup>. The new Proclamation also prohibits a detailed list of persons and officials or employees of various Ministries and institutions<sup>167</sup> from operating an overseas employment agency with the purpose to avoid conflict of interest.

Once the license is issued, both Proclamations provide similar requirements. The new Proclamation also requires to notify any change of management or employee staff, and to publicize it through the mass media<sup>168</sup>.

## 6.4 THE FINANCIAL GUARANTEE

For what concerns the financial guarantee, the new Proclamation makes significant improvement. Pursuant to articles 7/1/d and 23 of Proclamation 632/2009, the financial guarantee required to an agency varies depending on the number of workers deployed overseas. Accordingly, if an agency deploys up to 500 workers, it is required to deposit 30,000 USD or its equivalent in ETB as a security. If the number of workers deployed is in the range of 501-1000, the financial guarantee required is 40,000 USD or its ETB equivalent. In the instance where an agency deploys more than 1000 workers, it is required to deposit 50,000 USD or its ETB equivalent. Out of this sum, a share of 50 per cent must be deposited in a blocked bank account, while the balance can be in the form of an approved and irrevocable instrument of guarantee from a recognized financial organization<sup>169</sup>.

Proclamation 923/2016, in articles 24/6 and 60, sets much stricter requirement on the provision of a financial guarantee as a pre-requisite to get a license. Accordingly, article 60/1 requires the deposit of the whole sum of 100,000 USD or its ETB equivalent in a blocked bank account irrespective of the number of workers deployed abroad. If the agency wishes to operate in more than one country, it is required to obtain a separate license for each country<sup>170</sup> and it seems that a similar but separate guarantee is required. Though this can be burdensome for the agency, it plays an important role in guaranteeing the protection of the rights and safety of the workers.

As to the utilization of this guarantee fund, both instruments clearly state that it is withdrawn and used by the Ministry in specific cases, as to cover the expenses to repatriate the body of a deceased worker or an injured worker when the agency fails to do it.

In addition, when the workers are hired by a foreign organization through the Ministry of Labour and Social Affairs in accordance with article 4, or by a foreign employer who is allowed to undertake direct employment pursuant to article 6/2, the new Proclamation requires the foreign employer to allocate 50 USD to the foreign

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166 Supra Note 7 Article 23/2/

167 Id Article 23/4/

168 Id Articles 29-30

169 Supra Note 156 Article 23

170 Supra Note 7 Article 21/2

employer guarantee fund for each worker it recruits<sup>171</sup>. In the former Proclamation, however, despite the fact that direct recruitment is allowed in certain instances, there is no similar requirement and hence the protection of these employees could be at risk.

## **6.5 MINIMUM WAGE**

By virtue of the former Proclamation, the Ministry of Labour and Social Affairs is entitled to issue directives to determine the minimum wage of overseas workers depending on the situation of each country. According to the new Proclamation, the deployment of workers for overseas employee is not allowed in the absence of a bilateral agreement between the government of Ethiopia and the host country. Based on this condition, the minimum wage must not be lower than the highest among the prescribed minimum wage in the receiving country, the appropriate minimum wage set by the bilateral agreement, or the wage set by international agreements ratified by both countries.

## **6.6 AGE, LEVEL OF EDUCATION AND COMPETENCE**

As per Art 48/2 of the labour proclamation, the minimum age for employment is 14. However, a worker shall not be recruited for an overseas job unless he/she attains the age of 18, as prescribed in the Civil Code. The former Proclamation considered the employment of persons under the age of 18 illegal pursuant to article 25/1/a and resulted in the revocation of the agency's license in accordance with article 28/1/a. Similarly, the new Proclamation entails the revocation of the license as per article 42/3/d.

As opposed to the former Proclamation, which is silent about the issue, in due appreciation of the hardships that illiterate workers from rural Ethiopia frequently face, the new Proclamation incorporates stringent requirements pertaining to education and competence. In this juncture, the Proclamation requires a worker who desires to undertake overseas employment to complete at least the 8<sup>th</sup> grade of education<sup>172</sup>. In addition, the Proclamation strictly requires a worker to possess a certificate of occupational competence issued by the appropriate competence assessment center, which attests the suitability of the worker<sup>173</sup>. As per article 42/2/c, if an agency recruits a worker in contravention to this requirement, it will incur in the suspension of its license.

## **6.7 BREACH OF EMPLOYMENT CONTRACT AND CONTRAVENTION OF THE PROCLAMATION: WHICH EFFECTS?**

### **6.7.1 THE JOINT AND SEVERAL LIABILITY PRINCIPLE**

In both Proclamations, breach of the contract of employment by an agency or an employer results in the joint and several liability of the employer and the agency<sup>174</sup>. Hence, as the agency stands like a joint guarantor in the meaning of article 1933 of the Civil Code, it cannot ask the worker to proceed against the employer first.

171 Id Article 61/2

172 Id Article 7/1/a

173 Id Article 7/1/b

174 Article 22 of Proclamation 632/2009 and Article 40 of Proclamation 923/2016

Rather, the worker is entitled to proceed against the agency alone, against the employer, or against both.

Since the majority of migrant workers do not have the knowledge, the courage and the means to institute legal action against an employer in the host country, requiring an agency at home to assume joint and several liability with the employer is of paramount importance in this situation.

### **6.7.2 THE ADMINISTRATIVE MEASURES OF SUSPENSION AND REVOCATION**

Both Proclamations provide similar obligations of the agency engaged in overseas employment service. The new Proclamation has detailed provisions on complaint lodging and hearing. Accordingly, the Ministry of Labour and Social Affairs administers the measures of suspension or revocation depending on the gravity of the case in line with the type of contravention.

Following suspension or revocation, article 29 of the former Proclamation allowed the agency to file an application in the form of appeal to the Federal First Instance Court or to the regional high court within 15 days. The decision of the court shall be final. The new Proclamation, however, allows a party, and not only an agency, to lodge a pleading on the decision of the Ministry on the alleged violation to the Federal High Court or a regional court of jurisdiction within 15 days. The decision of this court shall be final as well<sup>175</sup>.

In terms of dispute resolution, the present Proclamation gives ample power to the Ministry of Labour and Social Affairs that varies from the responsibility of conciliation to that of undertaking administrative measures. However, by virtue of the former Proclamation, any dispute between a worker and an agency must be solved in accordance with Proclamation 377/2003, although article 31/3 empowers the MOLSA to provide conciliation and legal counselling service.

To conclude, a deep analysis of the two legal instruments reveals that Proclamation 923/2016 has brought significant changes in the management of overseas employment. The restriction of the business of private employment exchange service to citizens of Ethiopia, the cap on capital requirement to run this business, the requirement of education and competence, the requirement of bilateral agreements, the requirement of a higher rate of financial guarantee and of foreign employer's guarantee are all significant improvements, which play a relevant role to curb the problems of Ethiopians working overseas.

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175 Supra Note 7 Article 59

## 7. CONCLUSION

In comparison with the previous legislations on the subject, The Ethiopian Overseas Employment Proclamation brought significant changes in the management of the labour migration process. Nonetheless, in the light of the international best practices, Ethiopia must undertake additional reforms to properly address the problem.

From the perspective of the recipient countries, although GCC countries have made some reforms on their legal and policy frameworks pertaining to overseas workers, they do not show a real commitment to abolish the repressive *kafala* system. As the enforcement of the Proclamation is restricted to domestic jurisdictions, its relevance may be undermined in the framework of the recipient countries. Moreover, although requiring bilateral agreement as a prerequisite for overseas deployment is a good measure, it may not be fruitful in the absence of clear enforcement mechanisms. Hence, additional effective guarantees from the receiving countries seem to be essential. Again, although the Proclamation is somehow compatible with the international and domestic legal frameworks, serious gaps are observed in the enforcement mechanisms. Therefore, in consideration of these shortcomings, the following recommendations are made.

### 7.1 RECOMMENDATIONS

1. Ethiopian overseas workers usually lack sufficient support from the Ethiopian Missions in the receiving countries. Subsequently, the Government of Ethiopia should appoint competent individuals who are willing to help their compatriots, rather than making the assignment simply on the basis of political affiliation. Moreover, the government should conduct performance audit of the Missions on a regular basis and encourage those individuals with outstanding performance in assisting overseas workers. In addition, the government must avail appropriate funding for the deployment of labour *attachés* and provide them with adequate training.
2. Given the fact that the Ministry of Labour and Social Affairs is entrusted with the duties enshrined in Proclamation 691/2010, it may not be in a position to properly handle the licensing and the additional issues associated with the management of overseas employment. Thus, as in the case of the Philippines, establishing a separate institution with this specific objective would be crucial.

3. Since all illegal recruiters are not necessarily Ethiopian nationals, and since the recruitment is carried through a network of persons in different countries, concrete measures must be taken in collaboration with the other countries.
4. Although the requirement of bilateral agreements between Ethiopia and the recipient countries is a positive step, it is not sufficient. Therefore, in the absence of labour and social laws that protect the rights of migrant workers in the host country, when the host country has not ratified multilateral conventions, declarations, or regulations, and is not willing to take concrete measures, the deployment of Ethiopian overseas workers should be strictly prohibited.
5. In order to enable a fast disposition of the cases of illegal recruitment and human trafficking, the government must improve the investigative capacity of the Police through the provision of training and awareness-creation programmes. Moreover, the establishment of a special prosecution department within the Attorney General's Office, with the prime objective of prosecuting cases pertaining to illegal recruitment and trafficking, would be very important. As to the judiciary, establishing special benches for these cases would be a relevant solution.
6. Although the Proclamation outlaws the recruitment of persons under the age of 18 for overseas employment, evidence shows that these persons are being recruited because passports are issued on the basis of the information appearing in their *kebele* identification cards, which can be easily falsified with this purpose. Hence, the Registration of Vital Events and National Identity Card Proclamation No. 760/2012, which requires the registration of births in the register of civil status, the Government must show a real commitment and ensure its full implementation.
7. One of the basic shortcomings of the Proclamation is its failure to address the issue of reintegration. For this reason, an independent institution with this specific objective must be established and endowed with the necessary budget. Moreover, a conducive atmosphere for the collaboration between government departments and other non-governmental organizations, including the Ethiopian Bar Association, must be created to enhance the assistance and reintegration programmes, as well as the provision of free legal support to the victims of abuse.

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