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EXPLORING THE DYNAMICS OF ETHIOPIAN ADMINISTRATIVE CONTRACT LAW: PRINCIPLES, REGULATIONS, AND INTERACTION WITH OTHER GOVERNMENT CONTRACT LAWS

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Abstract

The legal framework governing administrative contracts in Ethiopia is essential for government contracts involving public services, works, and goods. However, uncertainties persist in Ethiopian legal practice regarding the applicability of traditional administrative contract law due to several key issues. This article critically examines relevant Ethiopian laws related to government contracts, Federal Supreme Court Cassation Bench Decisions, and various literature on administrative contract jurisprudence, as well as practices of other jurisdictions with similar legal norms. The study is geared towards assessing various problems, including the lack of a clear and evolving definition developed by the judiciary on the types of administrative contracts, the absence of uniformity in applicable laws for similar government contracts, and the development of different laws such as public-private partnerships, procurement contract laws, and investment contracts without a clear delineation of the interrelations between them. Furthermore, the lack of understanding of the different goals of these laws poses significant challenges. Additionally, problems arise from the Ethiopian administrative contract legal regimes, such as the absence of specificity in determining administrative contracts, leading to disputes between parties and potential violations of due process of law. To this effect, the article recommends the harmonization of related laws, specifying the relationship with preexisting legislations in newly enacted and related laws.

Keywords: Administrative contract law, Government Contract, Procurement, Public-private Partnership, Public Service

I. INTRODUCTION

Government contracts play a crucial role in the functioning of government operations, impacting public services, project developments, security, budget, and the resolution of claims and disputes.[1] The efficiency and transparency of the procurement function directly influences

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[1] Kanwal Puri, The Legal Nature of Government Contracts (Ph.D. thesis, Australian National University, Canberra, March (1978).

the effectiveness of government expenditure in meeting its objectives.[2] However, discrepancies and lack of clarity in the legal frameworks governing government contracts, particularly in the Ethiopian context, has resulted in significant challenges.[3]

The legal framework governing government contracts in Ethiopia includes administrative contract law, Public Procurement Proclamation and its Directive, Public-Private Partnership Proclamation and its Directive, and Investment Proclamation and its regulations. However, inconsistencies between these laws and their interplay have led to confusion and lack of uniformity in their application, as well as resulted in poor compliance and enforcement.[4]

Particularly, this article mainly focused on the problems related to administrative contracts in its interaction with other laws of government contract. This is due to the need of increasing involvement of governments in the welfare activities related provision of public services, particularly in developing and least developed countries,.[5] Thus, the law of administrative contract has its own peculiar features to serve public interests.[6] The unique powers and principles associated with administrative contracts, such as the ability for the government to unilaterally modify or terminate the contract and the requirement for the private contracting party to continue with their obligations even if the government fails to perform.[7] This underscores the need to study administrative contracts and other regimes of government contacts to understand the specific prerogatives involved in administrative contracts, especially in the context of public welfare and government outsourcing.

Addressing these challenges and adopting a coherent regulatory environment in government contracts is crucial for ensuring provision of public services on one hand, and promoting transparency, efficiency, and compliance with international best standards on the other. Therefore, there is a need of comprehensive research to explore the implications of these challenges on government contracts in Ethiopia and propose solutions for enhancing the legal

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[2] Gizachew Abebe, Efficiency, Accountability and Transparency in Public Procurement: The Level of Compliance in Africa (Ethiopian case), at 1286.

[3] The World Bank, *Methodology for Assessing Procurement Systems (MAPS) 2022, The Federal Democratic Republic of Ethiopia, Assessment of the Public Procurement System,* VOLUME III – ANNEXES 2021, 28 (2022).

[4] *Id*.

[5] Eveline M. Burns, The Role of Government in Social Welfare, Social Work Journal, July 1954, at 95, Vol. 35, No. 3, July 1954, Oxford University Press, https://www.jstor.org/stable/23712446. Accessed 2 sept. 2021. See also International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, and UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, at 3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 02 September 2021] such duty governments emanate from the very nature of the government as a guardian of its nationals and in any contention regarding this assertion, various inherent right of individuals recognized in different national, regional, and international human rights instruments. For instance, an adequate living standard, among others include housing, and social service (UDHR, Art.25, ICESCR Art. 11,)

[6] Eveline Burns, *supra* note 5. See also Georges Langrod, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 4 Am. J. Comp. L. 325 (1955).

In addition, International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, and UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p.3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 02 September 2021] such duty governments emanate from the very nature of the government as a guardian of its nationals and in any contention regarding this assertion, various inherent right of individuals recognized in different national, regional, and international human rights instruments. For instance, an adequate living standard, among others include housing, and social service (UDHR, Art.25, ICESCR Art. 11,)

[7] *Id*, Langrod, *supra* note 335.

framework to improve the integration among regulations and strengthen their institutional capacity in the procurement system.

Uniformity and clarity of legal frameworks on government contracts, consistency of judicial rulings and implications on the provision of public services, contract efficiency, accountability, transparency, and the overall business environment are the main concerns of the article. For that purpose, in-depth exploration of the challenges posed by the discrepancies between administrative contract law, procurement laws, and public-private partnership laws, as well as the impact of these discrepancies on the effectiveness of government expenditure for the provision of public services are critically examined.

The research methodology involved approaches to comprehensively analyze the administrative contract legal framework that regulate government contracts in Ethiopia. It begins with a thorough literature review encompassing legal texts, scholarly articles, case laws, and government reports to understand the applicability of legal frameworks.

The article is organized in to five sections accordingly, the second section critically examined the nature and purpose of administrative contract. The third section discussed about the nature of interactions between the law of administrative contract and other laws of government contract such as investment laws, Public-Private Partnership (PPP), and procurement laws of Ethiopia. The fourth section of the article examined how the Federal Supreme Court Cassation Division (FSCCD) entertained government contracts. Finally, the article summarised findings based on the questions raised and forwarded important recommendations. The article is limited to certain aspects of the challenges stemming from the complicated landscape of government contracts. Nevertheless, the issues and recommendations put forth offer ample issues to trigger substantial discussion among scholars, legal practitioners, the judiciary, policymakers, and legislators.

II. THE ADMINISTRATIVE CONTRACT LEGAL REGIME: MEANING AND PURPOSE

A. The Purpose to Define Administrative Contract

Determination of contracts designated as administrative contract is essential to exercise entitlements peculiar to administrative contract regimes. It may also have implication on the rights and obligations of the administrative bodies and private contracting parties both at international and national level as discussed in the forthcoming sections.

In civil law countries administrative and civil contracts are two distinct types of contracts. Contracts regarded as administrative nature are governed by a special rule distinct from civil contract rules.[8] The distinction has implication on the rights and obligation of the contracting parties. Hence, establishing a borderline between two types of contracts is vital to achieve the policy objectives intended by each law and ensure certainty on the rights and obligations of contracting parties. In civil law contract for administration, we apply private laws and any disputes arising from such contracts are to supposed to be settled by regular courts.[9] For instance, the new Commercial Code of Ethiopia excluded certain entities from the scope of the code depending on the identity of the parties.[10] Accordingly, the code stated "…unless otherwise

[8] Georges Langrod, *supra* note 6, 328.

[9] Razq Alrashidi, Saudi Administrative Contracts and Arbitrability, Ph.D. Thesis, University of Stirling (2017), at 5.

[10] COMMERCIAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Proclamation No. 1243/202, FEDERAL NEGARIT GAZETTE EXTRA ORDINARY ISSUE (hereafter Commercial Code), 2021.

expressly provided by law, the provisions of this Code shall not apply to administrative organs that are bodies corporate under public law…" (emphasis mine).[11] Hence, it is crucial to define and demarcate between the two contracts since there are significant differences in the whole process and outcome in the two legal regimes. Administrative contract is defined and discussed as follows:

B. The Meaning of Administrative Contract

There is no comprehensive definition to the exact types of administrative contracts. Traditionally, sectors that are regarded as vital to the society and rendered by the government. These sectors include education, health, transport, water, light, sanitation, recreation etc were considered as public services that must be rendered by the state.[12] However, it's difficult to establish what sectors are regarded as administrative based on this non-exhaustive list. First, sectors are regarded as administrative based on the traditional function of the state. However, public services to be provided by the government are not static, which varies from time to time depending on the prevailing political economy. In addition, the extent of service provision by the government depends on the development level of a society. Due to these reasons it's difficult to establish clear distinction and criteria between government contracts that are administrative and private nature. Such distinction is often made based on the public interest consideration, and the purpose intended by a contracting authority.

In defining administrative contract, countries that have adopted the legal regime, including Ethiopia devised similar legislative approach; in one hand there are provisions that expressly specify some contracts as administrative contract, and on the other hand the law specify certain requirements that make a specific contract administrative nature. However, in both cases the determination is open for judicial interpretation.[13]

1. Specified Administrative Contracts

Specified administrative contracts refers to contracts explicitly specified by the law of administrative contract. For instance, under Ethiopian law concession of public service,[14] public work contracts,[15] and public supply of goods are expressly designated as administrative contract.[16]

Concession of public service is defined as: "*Any activity which a public community has decided to perform for the reason that it has deemed it to be necessary in the general interest and considered that private initiative was inadequate for carrying it out shall constitute a public service".*[17] The nature of the contract is stipulated as a: "*…contract whereby a person, the grantee, binds himself in favour of an administrative authority to run a public service getting a*

[11] *Id.*, at Article 4 (1).

[12] Alrashidi, *supra* note 8.

[13] CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa [hereinafter Civil Code]. The Ethiopian administrative contract law has also adopted a similar approach, Article 3132 (a) has stipulated administrative contracts are those expressly stipulated by law, and this include: concession of public service (Article. 3207), public work contract (Article 3242); and public supply of goods and services (3242). On the other hand, 3132 (b) and (c) stipulated for contracting parties and judicial determination based on the nature and contents of the contract (i.e., when the contract involves provision of public service and when contractual contracts have included exorbitant clauses)

[14] *Id.*, at Art 3207.

[15] *Id.*, at Art 3244.

[16] *Id.*, at Art 3297.

[17] *Id.*, at Art 3207(1).

remuneration therefor by means of fees received on the use thereof".[18] This definition is not crystal clear regarding the exact types of contracts regarded as concession of public service though the law specified it as a contract qualified as administrative contract expressly.[19]

Public work contract- this contract is the other type of contract specified/ qualified as administrative contract by the operation of law.[20] The civil code has defined it as *"A contract of public works is a contract whereby a person, the contractor, binds himself in favour of an administrative authority to construct, maintain or repair a public work in consideration of' a price."*[21]The provision has adopted a circular definition; hence, it lacks specificity regarding the exact public works intended to be covered.[22]

Administrative supply of goods- administrative supply contract is the other type of contract recognised as administrative contract by the operation of law. The Ethiopian civil code title XIX, Chapter 4 specified administrative supply of goods as an administrative contract.[23] However, the civil code has no definition for the term 'supply of goods.' From the administrative contract jurisprudence and the spirit inferred from the rules that govern administrative contract administrative supply of good is defined as:[24]

> An agreement between a legal person of the public law "administration" with an individual or company "a contractor or supplier". The supplier undertakes under this agreement to supply the administration with certain movables necessary to run the public facility and ensure that it runs regularly and steadily, in exchange for a specific price specified in the contract, the materials and supplies agreed upon in the administrative supply contract are supplied in one payment and may also be supplied over a long period of time.

2. Non-specified administrative contracts

These contracts may not always be explicitly provided for and governed by the law. These agreements are regarded as administrative since they adhere to both traditional and administrative judiciary's conceptions of administrative contracts. Therefore, these contracts satisfy the requirements of administrative contracts. The action is intended to have a specific legal impact, such as managing, building, or planning a public facility.

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[18] *Id*., at Art, 3207 (2).

[19]Alrashidi, *supra* note 8, Literature defines concession of public service more insightfully by providing some instances: "A concession contract is an agreement between the government … and a private entity, in which the private entity assumes the exclusive right to construct, operate, maintain a public service or utility (such as supplying water, gas, electricity, or sanitation services) for a given number of years."

[20] Civil Code, *supra* note 13, Art 3132(a): Art. 3244.

[21] *Id*., at 3244 (1).

[22] Alrashidi, *supra* note 8, at 89, Absence of crystallized definition for 'public works' is also common in other countries that have administrative contract legal regime. In this regard a scholar has commented such instance in Kingdom of Saudi Arabia's law *"Similar to other 'public' related terminology, however, no regulation or code provides a definition of "public works", but inference suggests that this occurs through the contractual practice, which includes projects for construction of buildings, roads, bridges and civil engineering work."*

[23] Civil Code, Art. 3132(a).

[24] Noor Issa Al-Hendi, *The Legal System for the Administrative Supply Contract*, 98 J. LAW POLICY & GLOBALIZATION 174 (2020).

Considerations for the determination of a non-specified contract as administrative contract are stipulated in the Ethiopian Civil Code as follows:[25]

a. *It is expressly qualified as such …by the parties*[26]*; or*
b. *It is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such services;*[27] *or*
c. *It contains one or more which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.*

For government contracts that are not expressly stipulated, the meaning of administrative contract can be inferred from different elements of the contract such as the purpose of the contract; identity of the contracting parties; exceptional provisions (exorbitant clauses) enshrined under a contract are the benchmarks. Federal Supreme Court Cessation decision (FSCC) has underlined the relevance of such criteria, though doubtful that the court has used it appropriately.[28]

a) ***Purpose:*** administrative bodies have options to enter into a contract subject to either a private or administrative contract regime.[29] Hence, the mere existence of an administrative body in a contractual relationship doesn't make the venture an administrative contract rather the purpose intended must be considered. The primary purpose of distinct administrative contract legal regime is to ensure provision public service and ensure their continuity.

A contract executed by a governmental agency, other than expressly qualified by law is to be considered administrative, pursuant to the definition adopted in the Civil Code, when the performance of the private contractor fulfils a "public purpose." Furthermore, when "*It is connected to an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such services:*"[30] or other type of public service is different from 'concession of public service', which is qualified by the law.[31] However, the difference between the two types of public contracts is not clear except the term

[25] Civil Code, Art. 3132.

[26] Al Shamsi, Abdulla. "Arbitration In International Administrative Contracts and Administrative Contracts with International Dimensions. In the UAE." (2017). Liverpool John Moores University, Ph.D. thesis, 46&47. In this instance, it does not mean private contracting parties can envisage their contract as an administrative contract. *'Administrative jurisprudence establishes the condition of a public legal person involvement in a contract to consider such contract administrative in line with the nature of administrative rules, because such rules, together with the rules of public law, were created, in the first place, to govern the activities of public administrative authorities but not private ones.' The Supreme Administrative Court in Egypt justified this by saying that: "A contract in which an administration is not a party, shall not, under all circumstances, be deemed as administrative, because such rules, together with the rules of public law, were created in the first place to govern the activities of public administrative authorities but not private ones"*

[27] *Id*., at 52, the famous Terrier ruling, issued in 1903, played a significant role in establishing the principle that whatever is involved in the organization and operation of public national or local facilities falls under the jurisdiction of administrative judiciary and is considered administrative work. State Commissioner Jean Romieu reported this ruling, and since then, the French Council of State has issued numerous rulings based on the concept of public facilities as a criterion to differentiate administrative contracts from contracts governed by private law.

[28] ወይራ እንጨትና ብረት ሥራ ኃ/የተ/የሕብረት ሥራ ማህበር እና የአዲስ አበባ ከተማ መስተዳደር የንግድና ኢንዲስትሪ ልማት ቢሮ Woyera Wood and Iron works Limited partnership v. *AA City Administration, administration trade and industry office, file no. 80464, vol.14, Tahisas 16, 2005, at 106.*

[29] Civil Code, Art. 3131.

[30] Abdulla, *supra* note 22, 52.

[31] Civil code, *supra* note 13, Article 3132 (a) and 3207.

'…permanent participation of the party contracting with the administrative authorities in the execution of such service'[32] used to differentiate from concession of public service. The Federal Supreme Court Cassation Division has used such criteria in deciding the administrative nature of a contract.[33]

However, the notion of 'public interest/purpose' is not a defined and static notion; rather it varies from country to country, place to place depending on the priorities of the public in a defined political sphere.[34] Administrative law scholars have also tried to define public interest or purpose in a broad manner as:[35]

> *...the satisfaction of a public need, a direct and immediate relation with "specific" State functions (i.e., those considered of a truly public nature), the involvement of an administrative function, the presence of a public interest, are all factors that have been considered sufficient to impart an administrative nature to a government contract…*

It could be difficult to bear a government contract that, directly or indirectly, does not fulfil a public purpose, however, in case of administrative contract, the consideration is provision of services that ensure equal access and benefit to every person of any class.[36] The definitions are also subjective in nature as they depend on the narrow or broad role of the State preferred by the interpreter: depending on the level development of states road construction, installing utility lines; building hospitals and clinics; health service; housing; schools among others are activities made for public need.[37]

since the nature of the contract may not be determined during the conclusion of the contract. Private parties enter a contract with a government body may not be certain about rights and obligations. Often issues regarding the nature of the contract arise during the performance or non-performance of the contract, and when related disputes arise. Hence, private parties encounter challenges when engaging in contracts with governmental entities, particularly those not explicitly categorized as "administrative contracts."[38]

3. Exorbitant Clauses (exceptional provisions)

In addition to this definition of the administrative contract by reason of its object and identity of the parties, Ethiopian law has also adopted the French concepts of the exorbitant

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[32] *Id*, 3132 (b).

[33] *America University of Ethiopia v. Addis Ababa City Administration, AA City Administration land development and administration board, and AA City Administration land administration and construction permit office, file no.77175, vol. 13, Hamle 19, (2004).*

[34] Alrashidi, *supra* note 7, at 102.

[35] Hector A. Mairal, *Government Contracts Under Argentine Law: A Comparative Law Overview*, 26 FORDHAM INTERNATIONAL LAW JOURNAL 1730 (2002).

[36] *Id*. See also Mairal, *supra* note 33, 1731.

[37] *Id*. See also Alrashidi, *supra* note 7, at 103 and Homayoun Mafi, "*Iran's Concession Agreements and the Role of the National Iranian Oil Company: Economic Development and Sovereign Immunity*," NATURAL RESOURCES JOURNAL 48, no. 2 (Spring 2008): 412. *The question is whether oil concessions have the nature of public law or fall within the province of private law. An oil concession has neither exclusive public nor private character, but a mixed public and private character. Some scholars have suggested that the economic development agreements have a public character because they involve vital interests of the developing country. It seems, therefore, that the State can abrogate the concession by unilateral action in the public interest. It might be argued that the matter is private because the concessionaire acquires under the contract rights analogous to those in a contract of private law.*

[38] Mairal, *supra* note 33, at 1136.

clause"[39] and the exorbitant regime.[40] Contracts may be identified as administrative contract from the clauses that they have incorporated. Clauses that enable contracting administrative body to exercise public powers or when the contract has special provisions, which confers certain powers of control to the public administration.[41] However, the exact nature and types of exorbitant clauses is not yet crystallised in the Ethiopian administrative contract regime and judicial practice. Hence, determining the features of exorbitant clauses is essential to identify whether a certain contract is administrative contract or not. Moreover, such clauses are available in different government contracts concluded in the Ethiopian context such as PPP Proclamation.[42] Hence, its essential to examine the major features from developed jurisprudences such as; France, Egypt, and UAE. Among some forms of exorbitant conditions derived from judicial rulings, the most important ones include.[43]

1. Conditions that involve practice of public authority's power which:
    a. The conditions which involve the privileges enjoyed by the administration compared to the other contractual party. In other words, the administration decides to make use of its public law privileges and rights to impose procedures and methods provided for by public law in such contracts.[44]
    b. Conditions that include granting the other contractual party powers with regard to third parties include concession contracts. Such conditions involve provisions that grant the contracting party the right to collect fees from users of the public facility.[45]

2. Conditions that can only be interpreted or implemented in light of the administrative contract theories, which include.[46]
    a. The right of the other contracting party to receive compensation for damages incurred by inversion of the economies of the contract, which could only be interpreted

[39] *Id*., in 1723, "When, at the end of the 19th century, the presence of a public service became the criterion to decide in favour of the administrative jurisdiction, the concept of contract administrative was enlarged to include also those contracts involving the performance of a public service. Soon thereafter, however, the Conseil d'Etat adopted an additional criterion: the administrative nature of the contract could result also from its terms and conditions, thus giving birth to the notion of the "exorbitant clause".

[40] *Id*.

[41] *Id*.

[42] For instance, the PPP Proclamation Art. 56 (1) stated "Under the circumstances set forth in the Public Private Partnership Agreement, the Contracting Authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service…" such stipulations are tantamount to exorbitant clauses provided contracting parties included it in the contract.

[43] Abdulla Rashid Obaid Al Shamsi, *supra* note 24, at 61.

[44] *Id*., at 61 and 62, The first is the power of administration to implement the contract directly, such as having the right to set a debt executive deed (bond or policy) by its own decision and implement such policy upon the assets of the other contracting party. Another example is when contracts contain conditions that force the other contracting party to submit to administration supervision, guidance and control, throughout the period of implementation of the contract. It also includes cases involving the right of the administration to levy penalties on the contracting party in case the latter violates his contractual obligations. It also includes the right of the administration to amend contractual obligations against fair compensation to the other contractor and the right of the administration to take over all or part of the insurances as compensation for damages incurred upon the administration by the other party's violation of contractual provisions.

[45] *Id*., at 62. They also include the right to practice some of the police functions; the right to seize properties for constructing buildings for public facilities; the right to obtain benefit from non-possessory easement rights; as well as contracts pertaining to public works, including giving special privileges to contractors, such as temporary usurpation of real estates.

[46] *Id*.

through administrative contract theories and the theory of financial balance for administrative contracts.[47]

b. Conditions relating to the review of agreed upon prices in light of the fluctuations that may take place during the implementation of the contract. This may be understood as direct application of the theory of force majeure in administrative contracts.[48]

3. Conditions derived from the document of terms and conditions: These are the conditions set by the administrative authority in administrative contract which are usually unified, prior and typical conditions, for each administrative contracts the administration wishes to conclude. These conditions are included in the terms and conditions document (Cahier Des Charges/ specification), which is stipulated as an integral part of the contract and complementary to the contractual provisions.[49]

III. PECULIAR CONTRACTUAL DOCTRINES AND PRIVILEGES OF THE ADMINISTRATIVE BODY

A. Right of Unilateral Modification

The term "mutability" describes the government's ability to unilaterally alter contracts to serves the public good.[50] This implies that the contractor cannot challenge administrative changes or insist on strict adherence to the terms of the original contract. The contractor's only option is to ask for money to make up for any extra costs or unanticipated losses brought on by these revisions.

The administration's ability to modify contracts is based on the necessity for government effectiveness and the concept of public service.[51] Even when the administration transfers functions to a concession agreement, it still retains responsibility for the performance of these functions. This means that the administration has inherent powers of control and can adjust the terms of the agreement to meet the changing needs of the public service.[52] These adjustments can take various forms such as; increasing or decreasing the services provided, terminating the contract, or altering the mode of carrying out the contract. The administration has the authority to suspend, vary, or rescind the contract, transfer it to another party, or even take over the contract itself.

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[47] *Id*., at 63

[48] *Id*.

[49] *Id*., at 64. It is established in the French administrative judiciary that referral to this document (Cahier Des Charges) does not necessarily indicate affecting exorbitant conditions, unless the document includes exorbitant conditions, which are unfamiliar in private law provisions. The question arises concerning to what extent we can consider the provision that assigns the right of termination solely to the administration as an exorbitant condition. The French Court of Disputes, as well as the French Council of State, has envisaged that the termination of contract provision by the sole discretion of the administration represents an exorbitant condition in relation to ties with private law

[50] The "mutability" principle in French administrative contracts was established by the Cie Générale Française des Tramways ruling.

[51] Kanwal Puri, *supra* note 1, at 318.

[52] Civil Code, Art. 3179.

'The administrative authorities may, notwithstanding that the contract makes no provision to this effect, unilaterally impose on the person contracting with them certain modifications of the contract, where a change of circumstances justifies such modifications in the general interest.'

The administrative authority may acquire the authority of unilateral modification of the contract from a contract itself, or an enabling legislation, or by a direct intervention arise out of administrative decision.[53] In either way, the contracting authority may have the right to modify aspects of the contract unilaterally when it deems the change to be in the public interest.[54] The right to unilateral modification includes a wide array of discretions. For instance, in the case of concession of public service, unilateral modification could encompass "*all the obligations which they think fit for the proper operation or improvement of the service granted*".[55] Such modifications are particularly made in relation to the subject matter of the contract and its operation, and it may include increasing the coverage of the operation.[56] However, this right is not absolute and it is subject to limitations based on the nature of terms of the contract and right of the private operator. For instance, the contracting authority does not have the right to change the contract's financial provisions[57] or its fundamental nature or object, or organization of the service or the administrative body take control of the management of the operator.[58]

However, the unilateral power of the administration is not without limits. Its exercise is subject to judicial review. The administration only has the power to modify those provisions of the contract that are closely related to the contractor's public duty to adapt their performance to new technological developments. The contractor's pecuniary interest is protected, and the law provides them with a double guarantee: (i) if the changes prescribed by the administration disrupt the original contract, the contractor can seek its cancellation,[59] and (ii) if the new obligations disturb the financial equilibrium of the contract, the contractor can seek compensation.[60]

B. Right Of Unilateral Termination and Reciliation

The contracting authority has the right to terminate the contract early of the time contemplated due to various reasons. The very purpose of concluding an administrative contract is provision of public service, good and work that the public demands. However, whenever the public demand has no longer exist, staying in the contract is useless to the administrative body.[61] There are also other grounds such as incapacity, default or fault of the private contracting party to unilaterally terminate a contract.

The other administrative power to unilaterally end a contract before the lapse of its duration is *reciliation*. This notion is different from the unilateral termination made for the public interest in the previous paragraph on the ground of termination and remedies for the private contracting party. In this case, the administrative body can terminate the contract due to the default or incapacity of the private contracting party.[62] The administrative contract law of Ethiopia has enshrined this doctrine. For instance, in relation to concession of public service, the administrative body can invoke 'loss of right'[63] and 'sequestration'[64] on the ground of grave

[53] Razq Alrashidi, *supra* note 8, at 91.
[54] Civil Code., at Art. 3179.
[55] *Id*., at Art. 3216 (1).
[56] *Id*., at Art. 3217.
[57] *Id*., Art. 3219.
[58] *Id*., Art. 3218.
[59] *Id*., at Art. 3182 (1) "…*where an intervention by the administrative authorities has as its effect to upset the general economy of the contract*."
[60] *Id*., at Art. 3181 (1).
[61] *Id*., at Art. 3182.
[62] Mewett, *supra* note 4, at 223.
[63] Civil Code, Art. 3238 (1) *"The loss of right of the grantee may be ordered where he has committed a fault of a special gravity."*
[64] *Id*., at Art. 3241.

fault, and default, incapacity, or incompetence of the private contracting party, respectively. In terms of consequences, loss of right[65] and sequestration put the private contracting party without any sort of remedy and the private contracting party would rather bear the cost of running the service and risk.[66]

C. Derogation of 'Good Faith' In the Interpretation of Administrative Contract

In case of civil contract or contract between private persons, the law requires them to perform their respective obligation in good faith.[67] However, such principle may be overridden in case of administrative contract so far, a contracting administrative body got it crucial for ensuring public interest.[68]

> *In the administrative contract law, the defending of the public interest may lead to derogation from the principle of bona fides exigit ut, quod convenit fiat (the good faith requires to fulfil what was agreed). This principle is defeated, in the administrative law by jurisprudential and legal dirigisme which allows of the contracting public authority to alter unilaterally the regulatory part in the administrative contract and gives it the exclusive right to control and the right to denounce the contract when the public interest so requires.*

When it comes to the interpretation of administrative contracts, a rigid construction rule is often used, albeit one that significantly favours the administration. This distinction is significant because it distinguishes administrative contracts from contracts of adhesion in civil law.[69] In civil law, courts frequently favour with the weaker party in an adhesion contract.[70] However, there is no such trend in the case of administrative contracts as these arrangements are founded on the subordination of all parties to the purpose of serving the public good.[71]

Throughout the administrative contract interpretation process, the emphasis is on considering the requirements of the public interest.[72] This means that the administration is not restricted from applying a lesser sanction if enforcing the greater sanction would disrupt the public interest, which is intended to be avoided.[73] Similarly, the administration is not precluded from applying a greater sanction if the consequences of a breach are more severe than initially anticipated at the time of contracting.[74] The key principle underlying administrative contract interpretation and enforcement is to prioritize the public interest. This gives the administration the freedom to tailor its actions and sanctions to best serve the public interest, even if it deviates from exact contractual obligations.[75]

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[65] *Id*. In relation to loss of right Art. 3239 has stipulated "*The loss of right shall entail a definitive cancellation of the contract.";* And, regarding to sequestration Art. 3242 *"The sequestration shall temporarily deprive the' grantee of the exercise of the rights which he held under the concession" provided that the grantee has got the capacity to resume performance*. See also, Art. 3288, 3291, Reciliation has also available in case public work contract.

[66] *Id*., at Art. 3239 (2), and 3242 (2).

[67] *Id*., at Art. 1732.

[68] Cătălin-Silviu SĂRARU, "*The Interpretation of Administrative Contract,*" JURIDICAL TRIBUNE 4.1 (June 2014): at 153.

[69] Kanwal Puri, *supra* note 1, 325:326.

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] Civil Code, *supra* note 13, Art. 3211 (1).

Likewise, the Ethiopian law has adopted a similar stance by stating, interpretation of contractual terms shall not impair the regulatory power of the administrative body: *"The provisions of the contract may not be interpreted being an obstacle to the application of new regulations concerning the control of the management and the regulation of public order''*[76] since administrative prerogatives and powers are the foundation of administrative contract, the doctrine is enshrined in different provisions. For instance, the administrative body may not agree to surrender their statutory power in relation to concession of public service during the currency of concession.[77]

D. Principle of Diligence

As noted in the previous section, the duty of the private contracting party in the performance of his obligation is not limited to the terms of the contract. The private contracting party is required to discharge unforeseen obligations that are not stated in the contract. The obligation of the private party exceeds the terms of the contract in order to ensure the continuity of public services.[78] Likewise, the Ethiopian Civil Code (Article 3172) has stated the manner of performance of the contracting parties *"...shall perform their obligation in a correct manner, deemed to be satisfactory according to the rules of art prevailing at the time and in the kind of activity concerned"* and they shall perform "*diligently…"* Hence, the duty of the private contracting party may exceed the obligations stipulated in the contract, and the non-observance of which could entail liability of non-performance.[79]

E. Acts of Government

The doctrine of fait du prince focuses on changes to the contractual equilibrium brought on by rules imposed by the administration itself in the areas of finance, economics, or labor. No matter how slight, fait du prince includes any harm to the contractor's position and permits complete restitution for the incurred loss in circumstances defined by the law. This doctrine is established on a basic principle that the government's duty to act for the public shall not be impaired by a contractual undertaking.[80] In the case of administrative contract, the usual rule is that the contractor is entitled to indemnification unless a governmental action such as; general taxation (based on the idea of equal sharing of public costs), applies to all citizens equally. This indemnity may be granted in a number of ways, including by permitting the contractor to raise consumer prices, offering financial assistance, or easing the contractor's contractual obligations. However, in the Ethiopian administrative contract law, contrary to this usual rule, the private party is entitled to compensation even when the general measures of the government "…*directly*

[76] *Id*., at Art. 3211 (1).

[77] *Id*., at Art. 3216 (3). See also Art. 3251 (1), in relation to public work contract the government has a supervision power, and such right shall not be compromised by any contrary agreement.

[78] Kanwal Puri, *supra* note 1, 308.

[79] *In the nineteenth century there was a conflict between gas companies and municipalities in France. The municipalities have concessioned the monopoly of lighting at the gas companies. With the discovery of electricity, municipalities wanted to transform the mode of lighting, but they were hindered by the monopoly of the gas. The State Council has remedied this situation through an analysis subtle of the contracts. The State Council considered that the gas companies' monopoly was the right not to be completed by any other contractor, provided that the operator to ensure through its service, serving as best of the public interest, and therefore the public should benefit from new discoveries. Therefore, the operator has a duty to change the mode of lighting. If he refuses to comply, the municipality may grant a concession of the electrical distribution to another entrepreneur.*

[80] Civil Code, Art.3190 (1).

modify the provisions of the contract or prevent the enforcement of some provisions of the contract or prematurely put an end to the performance of the contract…"[81]

The English legal concept of "act of state" is comparable to the French idea of fait du prince. According to English law, an administrative agency cannot use a contract to limit its ability to exercise administrative discretion that has been provided by statute. A private party to the contract may not have recourse in damages because a public authority cannot be restrained from using such discretion. 'Acts of government' doctrine in the Ethiopian administrative contract law has a similar stance to this doctrine, which exonerate an administrative body from the contract. Acts of government could be general or particular (statutory) measures depending on the scope of the measure. General measures, which are general in a scope of application, are enacted in a form of proclamations, directives, regulations, or orders. Such measures more likely affect the substance of an administrative contract by "…directly modify the provisions of the contract or prevent the enforcement of some provisions of the contract or prematurely put an end to the performance of the contract" [82] On the other hand, such measures may make the contract expensive or more onerous by changing the circumstance contemplated for the performance of the contract.[83] The law has made such distinction based on the extent their consequence on the private contracting party for the purpose of compensation, accordingly contracts affected in their substance is subject to compensation, whereas the effect that makes performance of a contract is not eligible to compensation.

On the other hand, acts of government may be regarded as particular measures due to the limited scope or impact of statutory measures on the sector or firm by which an administrative body has a contract. Such measures that affect the contract may be made; either by an administrative body that is a party to the contract or by another authority which would affect the right of the private contracting party. If the measures are made by the contracting administrative body and have a consequence on the substance of the contract or made the performance of the contract more onerous on the private contracting party, then the latter is entitled to compensation. At this juncture, the law has stipulated an important condition that limits the duty of the administrative body to compensate *"No compensation shall however be due where the measure taken is merely the ascertainment or the inevitable consequence of economic facts extraneous to the parties"*.[84] Whereas, measures made by an authority other than the contracting administrative body that affect the contract in any manner does not entail entitlement of compensation.[85]

F. Theory of unforeseen Circumstances (théorie de l'imprévision)

The contractor must maintain continuity of service unless it becomes objectively impossible, which is the core tenet of an administrative contract.[86] This rule is based on the idea that administrative contracts are in place to assure the delivery of public services and shouldn't be changed unless doing so would result in an impossibility. Even when the administration is at fault, the contractor may occasionally not be given a longer deadline for performance. However, the government is absolved of its duty if the contractor fails to perform.

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[81] *Id*.
[82] *Id*., at Art. 3190.
[83] *Id*., at Art 3191.
[84] *Id*., at Art 3192 (2).
[85] *Id*., at Art 3193 (1)).
[86] Saul Litvin, *Force Majeure, Failure of Cause and Théorie de l'Imprévision: Force Majeure, Failure of Cause and Théorie de l'Imprévision*: *Louisiana Law and Beyond*, 46 LA. LAW REVIEW, 1 (1985), at 63.

In some cases, contractors had to keep working even when it had a negative effect on their company, as making it more expensive, difficult, or even impossible. Due to the negative effects of interacting with the government, several contractors were ineffective or expected high returns to make up for unexpected losses. The doctrine of imprévision developed in order to overcome these problems and improve the legitimacy of administrative contracts. According to the doctrine of imprévision, the contractor cannot terminate the contract if, after the contract was formed, unanticipated circumstances materialize for which no or insufficient provision has been made. Instead, they can be forced to do it and then ask the administration for compensation for their additional costs. When the performance was required by the public interest, the administrative courts adopted this doctrine.[87] In such instance, a court may amend the terms of a contract between a private contractor and a public entity by considering unanticipated events.[88] It transcends the common law frustration doctrine.[89] Unlike imprévision, which allows for the alteration of the express contractual provisions to accommodate changing circumstances, frustration results in the termination of the agreement. Imprévision does not seek to define the contract but rather to ensure continuity of performance.

According to the doctrine of imprévision, a court may amend the terms of a contract between a private contractor and a public entity by considering unanticipated events and as such it transcends the common law frustration doctrine. Unlike imprévision, which allows for the alteration of the express contractual provisions to accommodate changing circumstances, frustration results in the termination of the agreement. Imprévision does not seek to define the contract but rather to ensure continuity of performance. Imprévision is used when the circumstances that led to the contract's original terms are completely altered and making performance more difficult, costly, time-consuming, or hazardous.[90] The contractor's financial interest is safeguarded by the ability to pursue monetary compensation for additional costs or unforeseen losses brought on by unanticipated circumstances. The party seeking indemnification need not prove that the contract is physically or legally unable to be carried out; rather, they only need to show that unexpected events have upset the economic terms of the agreement.[91] In circumstances of imprevision, the contractor may request indemnification from the administration,[92] which would allow both parties to share unexpected losses rather than having to bear them solely.[93] The administration may take over and conduct the service itself if the contractor refuses to continue performance on any circumstances. In the event of an absolute impossibility, the doctrine of force majeure applies.[94]

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[87] The prominent instance of the doctrine of imprévision is Compagnie Générale d'Éclairage de Bordeaux. In this instance, it became economically impossible for the gas firm to continue operating at the original contract terms due to the rise in coal prices during the 1914–18 war. In just fifteen months, the cost of coal climbed from 35 Francs per tonne to 117 Francs per tonne. The Conseil d'État ordered the gas business to continue performing the contract but permitted them to significantly increase the price of gas invoiced to the administration to avoid the gas company going bankrupt, which would have resulted in the streets of Bordeaux going without lighting.

[88] *Id*., at Art. 16.

[89] *Id*., at Art. 14.

[90] *Id*., at Art. 3183 (1).

[91] *Id*., at Art. 3182 (1).

[92] Civil Code, Art. 3181.

[93] *Id*., at Art. 3183.

[94] For instance, the concessionaire in the case of Compagnie des Tramways de Cherbourg was on the edge of bankruptcy and raising tram tickets would have led to a loss of passengers. The Conseil d'Etat deemed this to be a case of force majeure, which neither party could override. The contractor was entitled to be released from their contract duties because the contract's intended goal-operating a railway service at a fair price-had been defeated.

G. Supervision

The idea that public law requirements are different from private law requirements is a cornerstone of administrative contract law. The government is still in charge of making sure that contracts are carried out in the best interests of the public. In fact, even if such conditions are not expressly included in the contract.[95] A renowned legal researcher holds that although this right of control may be modified in terms of how it is exercised, it cannot be excluded by contract. The risk of penalties being imposed cannot entirely be eliminated by a contract, which can, for example, require warning notices to be delivered to the contractor before penalties can be enforced.[96] The justification for giving the administration a sizable amount of authority stems from the tight relationship between administrative contracts and the idea of "service public," which refers to the delivery of public services for the benefit of public.[97]

H. Restrictions on Freedom of Contract

Administrative contracts are further regulated by the provisions outlined in the standard contract terms (SCT).[98] These terms are issued by various public authorities and contain model contractual provisions that should be included in relevant contracts. The standard contract terms serve multiple purposes, including establishing the procedure for awarding the contract and effectively regulating the actions of government officials involved in the contracting process. It is important to note that the contractor is only bound by the SCT if they are expressly incorporated into the contract.[99] By promoting a certain level of uniformity in contract terms, the SCT facilitate the development of jurisprudence and legal doctrine concerning administrative contracts. This allows for consistent interpretation and application of the law in this specific area, ensuring that administrative contracts are governed by established principles and providing clarity to both parties involved.[100]

IV. ADMINISTRATIVE CONTRACT LAW IN RELATION TO OTHER LAWS GOVERNING GOVERNMENT CONTRACTS

Government bodies have options to enter a contract governed by a different legal regime other than administrative contract law. The private contract regime, public private partnership, or public procurement law could be used either during the formation of the contract or the execution of the contract. Determination of the applicable law depends on the specification of the relevant law and nature of the contract. The relationship between Ethiopia's administrative contract law and its procurement, PPP, and investment laws is intricate and significant. These laws intersect in governing the engagement between the government and private entities, outlining the terms, procedures, and legal framework for their interactions. So, this section is devoted to examining different forms of government engagement with private parties and their interaction, compatibility, and consistency with the administrative contract legal regime.

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[95] Kanwal Puri, *supra* note 1, 316.
[96] *Id*.
[97] *Id*.
[98] *Id*., AT 162. See also Civil Code Art. 3135, 3136, 3137.
[99] Kanwal Puri, *supra* note 1, 321:322.
[100] *Id*., at 321:322.

A. Investment Laws of Ethiopia and Bilateral Investment Treaties

Investment Proclamation No. 1180/2020 enacted on 2nd April, 2020 is the recent investment law of Ethiopia.[101] Ethiopian investment law aims to encourage and attract both domestic and foreign investment, boost economic growth, generate job opportunities, facilitate technology transfer, and contribute to the nation's overall development.[102] The law offers incentives, guarantees, and protections to investors in an effort to create a favourable investment environment.[103] Additionally, it aims to promote ethical and sustainable investment practises and to guarantee the fairness, predictability, and transparency of investment processes.[104] The law also aims to encourage collaborations between domestic and foreign businesses and the involvement of Ethiopian citizens in investment operations.[105] Furthermore, Ethiopia has signed bilateral agreements with several countries and multilateral agreement such as Multilateral Investment Guarantee Agency (MIGA).[106] These agreements provide a framework for reciprocal cooperation, promotion, and protection and protections that can encourage foreign investment. By signing these agreements with over 30 countries, Ethiopia is demonstrating its commitment to creating a favourable investment climate and attracting more investors, which can lead to increased economic growth and development for the country.[107]

However, the concern of this article is the nature of relationship between investment law and the law on administrative contract of Ethiopia. The relationships between the Ethiopian Investment Proclamation and the Law of Administrative Contract can be understood in the context of investment activities in Ethiopia. As stated above, the Ethiopian Investment Proclamation is a legal framework that governs investment activities in Ethiopia. The proclamation sets out the rights, obligations, and benefits for investors, as well as the procedures for investment registration, licensing, and dispute resolution. However, there is no clear stipulation regarding the regulation of contractual relationship with an administrative bod. The investment proclamation states that there is a need to observe the requirements of pertinent laws by government body designated to conclude PPP agreement when an offer made by an investor.[108] In addition, Article 54 (1) of the same Proclamation stated, *"all investors shall carry out their investment activities in compliance with the Laws of the country.''* However, such stipulations are not good enough to clarify the interaction of the two laws especially where the BITs are part of laws of the country. Hence, investment laws should be reformed to decrease legal risks. In its important study International Institute for Sustainable Development (IISD) remarked:[109]

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[101] Investment Proclamation of Ethiopia, Proclamation No. 1180/2020, FED. NEGARIT GAZETTE, No 28 April 2nd, 2020, Addis Ababa (hereafter, Investment Proclamation)

[102] *Id*., at Art. 5. See also the preamble of the Proclamation.

[103] *Id*., at Art. 17.

[104] *Id*.

[105] *Id*., at Art. 5 (7).

[106] *Foreign Direct Investment in Ethiopia: Challenges, Opportunities and Policy Options for Effective Use to Stimulate Industrialization,* FDRE, POLICY STUDY AND RESEARCH CENTER INDUSTRIAL DEVELOPMENT POLICY STUDY AND RESEARCH DEPARTMENT, Addis Ababa, Ethiopia, 2017, at 144.

[107] *Id*.

[108] *Id*., at Art. 7, Investment Proclamation.

[109] International Institute for Sustainable Development, Rethinking National Investment Laws: A study of past and present laws to inform future policymaking, 38 (International Institute for Sustainable Development 2023). For instance, to minimize such risk *"Section 8 of South Africa's Investment Act includes a general guarantee of national treatment, subject to a range of specific exceptions, including in relation to government procurement, subsidies, and affirmative action measures taken to redress historic discrimination and disadvantage."*

> *Poorly designed laws can create significant legal risks, particularly if they include investment protection and dispute settlement as functions… failure to reduce these risks can result in costly investment disputes, and undue narrowing of the state's policy space to regulate in the public interest.*

Investors may enter into a contract with relevant public entities for various purposes, such as land lease agreements, infrastructure development contracts, or public-private partnership agreements. However, whether these contracts would be governed by the Law of Administrative Contract or not is not clear. The interaction between the law of administrative contract and BITs is very complex.[110] The regulatory problems that arise when dealing with state contracts[111] (which may fall within the definition of administrative contract) in the context of investment treaties and administrative contracts.[112] State contracts, which involve agreements between a state entity and a foreign investor, often have unique characteristics and implicate state interests unlike ordinary contracts.[113] State contracts concluded by Ethiopia incorporates provisions that stipulate "the governing law for operations under the agreement shall be the laws of Ethiopia".[114] Then the doubt is to which law does the investment contract referring to.

Thus, one of the regulatory problems is the extension of investment treaty protection to state contracts. The coverage of investment agreements typically depends on the definition of "investment" within the agreement.[115] If the definition is broad enough to encompass state contract obligations, disputes arising from state contracts could fall within the jurisdiction of the international investment dispute settlement body.[116] In this regard, most of the BITs concluded by Ethiopia adopted a broad asset-based approach that defines investment:[117] "concessions conferred by law, by an administrative act or under a contract by a competent authority, including concessions to search for, develop, extract, or exploit natural resources."[118] The

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[110] United Nations Conference on Trade and Development, State Contracts, UNCTAD Series on issues in international investment agreements, UNITED NATIONS New York, and Geneva, 2004, pp. 26, 31, 44, 47.

[111] Id. at 2. UNCTAD defined 'state contract' as; *a contract made between the State, or an entity of the State, which..., may be defined as any organization created by statute within a State that is given control over an economic activity, and a foreign national or a legal person of foreign nationality.*

[112] Agreement for the Promotion and Protection of Investments between the Government of the Republic of Finland and the Federal Democratic Republic of Ethiopia. Addis Ababa, 23rd of February 2006. Accessed October 5, 2023.

Definition of investment is similar in almost all the BITs Ethiopia has signed. For instance, Article 1(1) of this BIT defines investment as every kind of asset including but not exclusive:

'(a) movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar rights; (b) reinvested returns; (c) shares in and stocks and debentures of a company or any other forms of participation in a company; (d) claims to money or rights to a performance having an economic value; (e) intellectual property rights, such as patents, copyrights, trademarks, industrial designs, business names, geographical indications as well as technical processes, know-how and goodwill; and (f) concessions conferred by law, by an administrative act or under a contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources.

[113] *Id*.

[114] Ministry of Agriculture and Rural Development of the FDRE and Saudi Star Agricultural Development PLC, Land Lease Agreement, 29/09/2009, Art. 12. See also, Ministry of Agriculture and Rural Development of the FDRE and Karuturi Agro Products PLC, Land Lease Agreement, 04/08/2008, Art. 12.

[115] UNCTAD, State Contracts.

[116] *Id*., at 26.

[117] Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments, Art. 1(1), ratified by Proclamation No. 518/2007, 19th February 2007, 13th year No. 18.

[118] Ethiopia-Finland BIT. *Supra* note 114.

inclusion of administrative contracts under the ambit of BITs, which entail the application of substantive and procedural provisions. UNCTAD underlined the consequence as follows:[119]

> *These clauses, either together or independently, can "internationalize" the transaction rather than subject it to the domestic law of the host country. The ability of such clauses, especially the stabilization clause, to fetter the legislative sovereignty of the host country is often doubted.18 But arbitral awards have given effect to such clauses as indicating that they seek to achieve contractual stability at least for short periods.*

Though investment regime aims to preserve national discretion in regulating investments made through state contracts, investment treaties incorporate provisions that neutralize the application of sovereign powers under administrative contract and other domestic regimes.[120]

B. Public-Private Partnership

1. PPP in Brief

Public - Private Partnerships (PPPs) are contractual agreements between a public authority and a private supplier. These partnerships are formed to deliver certain services like; the construction or improvement of infrastructure that supports these services. Under PPP, the private supplier assumes the responsibility of building or upgrading the infrastructure required for the services. Once the facility is established, the private supplier is then responsible for managing and maintaining it. PPPs are often used when governments want to leverage private sector expertise, resources, and efficiency to deliver public services. They can be applied to various sectors, including transportation, energy, healthcare, education, and more. The specific terms and conditions of a PPP agreement can vary depending on the nature of the project and the parties involved.[121]

Ethiopia's PPP Proclamation outlines the main tenets and goals of PPPs.[122] The PPP scheme aims to improve transparency, fairness, efficiency, and long-term sustainability,[123] as well as the quality of public service activities, and maintain macroeconomic stability by reducing public debt.[124] Privately financed projects are encouraged to be promoted in order to support economic growth.[125] The government agency in charge of providing the infrastructure service through the partnership is known as the Contracting Authority for a PPP project.[126] The appropriate Contracting Authority is chosen from among the participating public entities in a PPP project if there are several.[127] The responsibility for choosing the contract type that best reflects the desired distribution of risks and obligations for each agreement is the responsibility of the Contracting Authority.

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[119] UNCTAD, State Contracts, 27.

[120] *Id*., at 31. For instance, 'protection against indirect taking', FET of BIT clauses.

[121] Anais Fabre, The Impact of Public-Private Partnerships (PPPs) in Infrastructure, Health and Education, Toulouse School of Economics, working paper, University of Toulouse Capitole, September 14, 2021, 1-108, 1.

[122] Public Private Partnership Proclamation, Proclamation No. 1076/2018, FED. GEGARIT GAZETTE 24th Year No. 28, Addis Ababa, 22nd February, 2018 (hereafter PPP Proclamation)

[123] *Id*., at Art. 3(2).

[124] *Id*., at Art. 3(4).

[125] *Id*., at Art. 3(1).

[126] *Id*., at Art. 2(2), A Contracting Authority refers to a "Public Body or Public Enterprise which intends to enter into a Public Private Partnership Agreement with a Private Party."

[127] *Id*. Contracting Authority for a PPP shall be the Public Entity legally mandated to be responsible for the infrastructure. Article 6(2) states, in the event that a PPP project involves infrastructure/services the responsibility of more than one Public Entity, the PPP Board shall select the appropriate Contracting Authority.

The PPP Directorate General evaluates PPP project applications, and this process includes both technical and financial analyses. The financial proposal is only opened and considered once the technical proposal has been reviewed and determined to be responsive. Based on the standards and procedures outlined in the request for proposals, the evaluation will be conducted. Direct negotiation may be used in the negotiating and implementation of PPP contracts under certain circumstances, with the Board's agreement. The Project Agreement outlines the duties and responsibilities of the public and private parties, assess how assets are allocated as either public or private property and specifies out the obligations of the public partner in terms of granting the project site's requisite rights.

2. PPP In Ethiopian Law

Administrative contracts may be relevant in the context of PPPs even if the PPP Proclamation focuses solely on PPPs. In the case of PPPs, the Project Agreement between the Contracting Authority and the Private Party serves as the contract that outlines the rights, obligations, and responsibilities of both parties.[128] The PPP Proclamation offers instructions to contracting and tendering methods, project proposal review, contract negotiation and execution, and dispute resolution systems. These rules apply just to PPPs and may not be as the same as the general guidelines and practices governing administrative contracts.[129]

According to the author's view, the PPP arrangement is not a new phenomenon in Ethiopia, at least as notion, except the adoption of a distinct legal regime. The Ethiopian Civil Code, Title XIX Administrative Contracts, under Article 3132 (b) defines administrative contract as…. *a contract which is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service…*[130] The legislative framework is intended to enhance the participation of private parties and finance in infrastructure development of the country. For that purpose, PPP was introduced in 2018 to achieve the development in accordance with fairness, economic viability, transparent infrastructure procurement award procedure.[131]

3. PPP's Relationship with Administrative Contract

According to the PPP Proclamation, the notion of PPP is defined as a long-term agreement between a Contracting Authority and a Private Party under which a Private Party and as such:[132]

a. undertakes to perform a Public Service Activity that would otherwise be carried out by the Contracting Authority;
b. receives a benefit by way of:
   1. Compensation by or on behalf of the Contracting Authority;
   2. Tariffs or fees collected by the Private Party from users or consumers of a service;
   3. A combination of such compensation and such charges or fees; and

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[128] PPP COUNTRY PROFILE – ETHIOPIA, ppp.worldbank.org, at 1-3.
[129] *Id*.
[130] In recent legal sense this is known as a public-private partnership (PPP). It involves a long-term collaboration between a government or administrative authority and a private party to provide a public service. In a PPP, the private party is responsible for the execution and management of the service, while the government retains oversight and regulatory control. This arrangement allows for the sharing of resources, expertise, and risks between the public and private sectors to deliver efficient and effective public services.
[131] Preamble of the PPP Proclamation.
[132] *Id*., at Art. 2 (12).

4. *Is generally liable for risks arising from the performance of the activity or use of the state property in accordance with the terms of the Project Agreements.*

In addition to the definition on the notion, the Proclamation has also defined 'PPP agreement' as: "a contract concluded between the contracting authority and a private party setting forth the terms and conditions of the public private partnership. "This definition tends to be similar with Article. 3132 (b) of the Civil Code, which define one aspect of administrative contract as

> *"…it is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service…*[133]*"*

However, it is not as such easy to determine the very complex relationship between the two. Based on this background the interaction between these laws can be examined as follows:

- ✓ **Which Contracts are PPP, and Which are Administrative, and When to Be Determined?**

There is no clear stipulation whether administrative contracts in the sense of the Civil Code are excluded from the PPP framework and nor there is an indication that the PPP projects could be governed and treated by the administrative contract law. Though the proclamation simply stipulates that the *"PPP Project Agreements are governed by the laws of the Federal Democratic Republic of Ethiopia."*[134] Without specifying the specific Ethiopian law. On the other hand, it lacks clarity and benchmark in the determination of activities subject to PPP arrangement. The law simply stated under Article 15 (3) "…*in conceptualizing, identifying and prioritizing potential projects, a Contracting Authority shall consider the strategic and operational benefits of entering into a Public Private Partnership compared to the development of the facility or the provision of the service by the Contracting Authority itself."* [135] This requirement is too technical and open to broad discretion in selecting the appropriate framework except for the excluded activities on oil, mines, minerals, rights of air space, and privatization or divestiture of public infrastructure or public enterprises.[136] Thus, the law does not identify or allow identification by reference to other laws or regulations about the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted and provides how the selection of projects for PPP project is made by Contracting Authority, a Public Entity or the PPP Directorate General.[137] In such ambiguous relationship between these laws, it would be difficult to the administrative body to determine the appropriate law and framework, which will be difficult to delimit the scope and application of the PPP law and administrative contract law.

- ✓ **Definitions**

The proclamation has adopted definitions that are similar with the administrative contract law of the Civil Code, which obscure the delineation between the two laws. For instance, Article 2(14) of the PPP Proclamation defines "Public Service Activity" like "concession of public service" defined under Article 3207(1) of the Civil Code as "… *any activity the government has*

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[133] PPP Proclamation, Art. 2 (14) "Public Service Activity" means any activity the government has decided to perform because it has deemed it to be necessary in the general interest of the public and considered that private initiative was inadequate for carrying it out."

[134] *Id*., at Art. 60.

[135] *Id*.

[136] *Id*., at Art.4 (2).

[137] *Id*., at Art. 15 (1).

decided to perform for the reason that it has deemed it to be necessary in the general interest of the public and considered that private initiative was inadequate for carrying it out." Both above rules are unclear, because they do not explain how to decide when a specific service is needed by the public, and when to determine a private initiative is inadequate. Furthermore, the difference between Article 2(14), 2(12) and Article 3132 (b) of the Civil Code is not also clearly delignated.

- ✓ **Police Power of the State**

Administrative body is a government organ that exercises sovereign rights and obligations to guarantee compliance with national laws, rules, and public policy goals. Regulatory monitoring is essential because it enables the contracting authority to keep an eye on legal framework compliance to serve and ensure public interest.[138]To direct the strategic aspects of partnerships, the contracting authority maintains sovereign control over project plans, budgets, and contractual arrangements.[139] However, other provisions of the PPP Proclamation do not ensure this cardinal principle rather the sovereign rights are exercised subject to the partnership agreement. For instance, takeover of the project may can be exercised "under the circumstances set forth in the Public Private Partnership Agreement" as per article 56 of the PPP Proclamation. Moreover, substitution of the contracting party can be made in consultation with funders of the project:[140]

"…Contracting authority may agree with the entities extending financing for an infrastructure project and the Private Party to provide for the substitution of the Private Party by a new entity or Person appointed to perform under the existing Project Agreements upon serious breach by the Private Party or other events…"

C. Administrative Contract Law Relationship with The Procurement Proclamation of Ethiopia

Ethiopia's procurement law establishes the rules for how the country's government and other public bodies must buy goods, services, and projects. The procurement law's main goal is to guarantee efficiency, justice, and transparency in public procurement procedures while encouraging competition and value for money [141] The Public Procurement and Property Administration Proclamation No. 649/2009 and Directive are the primary piece of legislations governing public procurement in Ethiopia. The legal framework for public procurement is established by this proclamation, which also lays forth the guidelines, rules, and specifications that government agencies must adhere to when carrying out procurement operations.

The role of administrative contract law in the procurement law and process and vice versa is not clearly articulated, according to the World Bank's assessment of the Ethiopian procurement system.[142] The relationship between the Civil Code and the specific legal framework for public procurement, such as the Public Procurement Law (PPL), Public Procurement Directive (PPD), and Public-Private Partnership (PPP) is unclear. The evaluation emphasized how the multiplicity

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[138] Ministry of Finance and Economic Cooperation, *Policy for the Use and Implementation of Public-Private Partnerships, Supporting Economic Development in Ethiopia* (Federal Democratic Republic of Ethiopia, August 2017), 7.

[139] PPP Proclamation, Art. 6(1).

[140] *Id*., at Art. 57.

[141] Ethiopian Federal Government Procurement and Property Administration Proclamation, Proclamation No. 649/2009, FED. NEGARIT GAZETTE No. 60, 9th September, 2009 (hereafter Procurement and Property Administration Proclamation), Art. 5.

[142] International Bank for Reconstruction and Development World Bank, Assessment of the Public Procurement System Volume I (2021), at 13:47.

leads to legal ambiguity, including a lack of definitions for what contracts qualify as administrative contracts. To promote consistency and prevent confusion, it is advised that the legal framework's requirements be clarified and coordinated.[143] However, it is worth mentioning that the relationship between the Civil Code and this proclamation is not one of complete exclusion. The general principles and provisions of the Civil Code, such as those related to contract formation, performance, and termination, still apply to administrative contracts in Ethiopia.

V. JUDICIAL CONFUSION BETWEEN ADMINISTRATIVE CONTRACT AND PROCUREMENT PROCLAMATION

The lack of consistency in courts decisions can lead to various problems in the legal system. These include legal uncertainty, unequal treatment, weakened precedent, reduced judicial efficiency, and diminished business climate. Such problems can be witnessed from various disputes in relation to government contracts in Ethiopian system. To understand the problem in relation to inconsistency of decisions in relation to administrative contract, some decisions by Federal Supreme Court Cassation Division are entertained in this section.

1. Federal Supreme Court, cassation bench has rendered decision on matters that involve administrative bodies in accordance with the provisions contract in general of the Civil Code and Procurement Proclamation. Neither of the parties or the court invoked the administrative contract legal regime. The mere existence of an administrative body does not make a contract administrative nature; however, the court has not made careful examination on the nature of the contract.[144]

On the other hand, the same court has pronounced a judgement in accordance with the administrative contract legal regime. In the case, Tesfaye Abebe vs. Maregu Worku Contractor the court has decided a contract between private parties in accordance with administrative contract legal regime, by the mere subordination to a contract concluded with a public body.[145] The dispute was regarding an assignment contract between the applicant and respondent. The respondent had assigned a contract for the construction of a health center, which was originally concluded with one of the West Arsi woreda's authorities. The respondent argued that the assignment contract had no effect because it was made without the knowledge of the woreda authority and that the contract violated provisions of the administrative contract regarding the assignment of public works, specifically the one under Article 3202.

The Cassation bench started off on a promising note by acknowledging the need to examine the nature of the contract between the respondent and the West Arsi Zone Health Department, as well as between the applicant and the respondent, along with its legal consequences. However, it appears that the bench ultimately classified the contract as an administrative contract based on

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[143] *Id.*

Civil Code includes provisions on administrative contracts. The extent to which the provisions of the Civil Code are in force or are applied in practice in public procurement and to contracts awarded under the procurement legal framework is unclear. The interplay between the Civil Code and the specialized public procurement legal framework, including the PPL, PPD, and PPP proclamation, is ambiguous, which creates legal uncertainty, including lack of clarity regarding which contracts are administrative.

[144] FDRE Supreme Court Cassation Decision, Eastern Wolega Zone Finance and Economic Development and Eastern Wolega Zone Health Office vs Mr. Tsegaye Nega, Cassation F. No. 53968, 13 November 2003 E.C. See also Ethiopian Road Authority vs. Country Trading PLC, File No. 60951, 19/9/2003E.C. and Bahir Dar University vs. Solomon Negash, file no. 56368, vol. 12, at 37.

[145] *Tesfaye Abebe vs. Maregu Worku Contractor*, File No. 56252, vol. 12, January 24, (2003), E.C. at 53.

the provision of Civil Code Article 3244(1) without thoroughly examining the elements of the contract. On the other hand, despite the reluctance of the court to consider matters within the ambit of administrative contract which are dubious to be so. For example, in one instance the court has considered a lease contract as an administrative contract.[146]

2. **Performance supervision and the power to impose additional obligation-** cassation court has determined a contract concluded by an administrative as administrative contract based on the manner of supervision of contract by the public body. In the case between *Kasahun Ayalew and East Gojjam zone Gozamn Woreda Health Office*,[147] the court has this criterion. The dispute was arisen out of a contract for construction of an outpatient treatment building. the cassation bench underlined the need to determine the nature of the contract to decide on the performance claim against the administrative body.

In its decision the court has introduced additional criteria, performance supervision by the contracting authority. To determine the nature of the contract the court found it necessary to examine the nature of the contract and content of construction contract as well as respondent appendices that are part of contract. The examination demonstrate that the administrative body allocate the work direct and give work orders in the construction process, decide course of the work and private party is obliged to carry out the construction work carefully according to the design provided by the public body as well prices and work notices provided under Article 3252 and Article 3266(1) of the civil code, according to civil code article. 3252, sub 1 and Sub (2) expressly provides. Art. 3252. Direction of works. (1) The administrative authorities shall regulate, by means at requisition orders, the development of the works and prescribe to the contractor the manner of performance of such works. (2) The contractor shall comply with the plans and models given to him by the administrative authorities in the execution of the specification. In this case, the consultant engineer appointed by the contracting authority imposed additional obligations that exceed 49% of the original agreement on the contractor. Based On the stated grounds the court decided, the existence of such special characteristics and content of the contract makes the nature of the contract concluded between the applicant and respondent an administrative contract in accordance with Article 3244 of the civil code.[148]

3. The Court considers object (purpose), identity of the contracting parties, and nature of the contract provisions. The court has stated the relevance of considering the permanent

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[146] America University of Ethiopia v. Addis Ababa City Administration, AA City Administration land development and administration board, and AA City Administration land administration and construction permit office, file no.77175, vol. 13, Hamle 19, 2004. The dispute was arising out of performance of lease contract; based on a lease agreement the applicant has got a land by the permit of *AA City Administration land development and administration board by a decision made on (Yekatit 11, 1997). However, on 08/02/2003 EC. AA City Administration land administration and construction permit office has cancelled the lease contract on the ground that the claimant has failed to start to commence the construction within the time specified on the land that it acquired without payment. The claimant has responded that there is no a contractual provision that enable the city administration to cancel the contract on the stated ground. In addition, the claimant has mentioned that the late performance was due to the failure of the city administration to compensate and clear the land. The respondents have stated it's the city courts that have a jurisdiction and objected the jurisdiction of regular court to entertain the matter. The court has decided that city courts have a jurisdiction on such administrative matters and the applicable laws are 3132 of the civil code, since it's an administrative contract and regulation no 29/2002, art 15. The contract was accepted as administrative contract.*

[147] Federal Supreme Court, 1. Mr. Kasahun Ayalew vs. East Gojam Zone Gozamn District Health Office, Federal Supreme Court Cassation Division Decisions Volumes, Cassation File No. 71972 (Vol. 14, 2014) at 90-95, 18 Jan. 2013

[148] *Id*.

participation of the administrative body and other factors including the nature and object of the contract, and identity of the contracting parties. However, the court has failed examine whether the contract in the case has fulfilled the alleged criteria.[149]

The issue raised by the current applicant was on the ground that the contract is not administrative since there was such determination by the parties during the conclusion of the contract. Accordingly, the court argued the criteria for determining whether a contract falls under the category of "administrative contract" is based on clear terms specified by the law or the parties involved. The case is related to the execution of public service work and requires constant participation from the administrative body as per Article 3132. Therefore, for a contract to be classified as an administrative contract, it must be clearly stated in the contract itself and consider the subject matter and parties' identities as specified by the relevant legislation. Given this, the Court of Appeal concluded that the current contract meets the criteria for being an administrative contract after considering the contracting party as well as the fundamental elements of the arrangement. Notably, the cassation court claimed that the Addis Ababa Municipal Courts had the authority to hear and rule on the issue because the respondent is an executive body under the government of Addis Ababa. But it's noteworthy that the Cassation Bench was unable to furnish a comprehensive elucidation of the terms "permanent participation" or the "execution of public service work" relevant to the case due to which it opted to reference the legal language without providing additional clarification. Furthermore, the court didn't even mention the subject matter of the dispute, and simply categorized the contract as 'administrative contract.'

4. Contracts Entertained in a Private Contract Regime. In a dispute arising from a contract for the construction of a primary school, the Ilu Aba Bor Zone Education Office and Zemzem PLC were involved.[150] When a disagreement arose between the two parties, the contractor decided to bring the case before an arbitration panel as stipulated in the arbitration agreement. However, the education office objected to the arbitration process. The lower courts ruled in favour of the office, prompting the contractor to appeal to the Cassation Division of the Federal Supreme Court.[151]

The Cassation Division, referring to Article 1731(1) of the Civil Code, which states that contracts formed in a lawful manner are binding between the parties, overturned the decisions made by the lower courts. The provision emphasized that the parties must adhere to the arbitration agreement. Interestingly, in this case, neither the parties involved, nor the courts questioned the nature of the contract based on the identity of the parties or the contract itself.[152] Similarly, in the case of *Ethiopian Roads Official vs. Country Trading Pvt. Ltd.*,[153] the respondent had won a bid to deliver inputs for road work as per a contract with the defendant office. However, the respondent only made a partial delivery, which was less than what was agreed upon in the contract. They claimed that unforeseen events had significantly disrupted the economy of the contract, events that were not anticipated at the time of contract conclusion. As a

[149] Woyera Wood and Iron works Limited partnership v. AA City Administration Trade and Industry Office, File No. 80464, vol.14, Tahisas 16, 2005, pp. 106.

[150] FDRE Supreme Court Cassation Decision (2005). Zemzem PLC v. Ilubabor Zone Education Bureau, Cassation F. No. 16896, at 105 and 106.

[151] *Id*.

[152] *Id*.

[153] Federal Supreme Court (2011), Ethiopian Road Authority vs. Country Trading PLC, Federal Supreme Court Cassation Division Decisions Volumes, Cassation File No. 60951 (Vol. 12, 2003 E.C) pp. 83-86. ማህበር, cassation file No. 60951, 27 May 2011.

result, the applicant deducted the price for the undelivered portion of the goods from the contractual security bond, citing procurement proclamation 430/2005. However, the respondent objected to this action, invoking Article 3200 of TITLE XIX of the civil code, which deals with administrative contracts. According to this provision, administrative authorities are not authorized to determine the liability of the other party or the amount of compensation due.

The Cassation Division of the Federal Supreme Court ruled on the basis of principles of interpretation of laws. The court stated that procurement laws and directives are specific laws that regulate government procurement processes. On the other hand, Article 3200 of the civil code is a general law. Therefore, the court decided that the former laws were relevant to the case. The interpretation of Article 3200 of the Civil Code and its relation to procurement laws can indeed be ambiguous. While what stated under Article 3200 of the Civil Code is general, it implies that the court has acknowledged the contract as an administrative contract. However, it is unclear why the court failed to examine the decisions of the lower courts that were made in accordance with the rules of general contract or civil contract.[154]

It is important to note that the section governing administrative contracts has its own set of rules regarding unforeseen circumstances (Articles 3183-3189) and provisions that regulate contracts of supplies with administrative bodies (Article 3297 and subsequent provisions). These specific rules should be taken into consideration when determining the implications of unforeseen circumstances in administrative contracts. Alternatively, if the court has decided that procurement laws are applicable, then the concept of unforeseen circumstances should be inferred from the procurement directive. This would be consistent with the argument put forth by the court. In general, the ambiguity lies in the court's failure to examine lower court decisions made in accordance with general contract rules and the need to consider the specific rules governing administrative contracts or refer to the procurement directive when determining the implications of unforeseen circumstances.

VI. CONCLUSION

Ethiopia's government contract laws faced, particularly those pertaining to the ambiguity of the legislation governing public contracts. These issues have a big impact on government contract efficiency, accountability, and transparency, which affects how well socioeconomic policies and mandates for public service delivery are carried out. The article underlined how important it is to thoroughly investigate the effects of differences in Ethiopia's legal system controlling administrative contracts and other types of government contracts. The delivery of public services, investment attraction and guarantee, accountability, and openness are all negatively impacted by the lack of consistency and clarity in these regulations. The inconsistencies among public-private partnership regulations, administrative contract rules, and procurement laws present significant obstacles to the efficiency of public service delivery and government spending.

The legal framework governing government contracts in Ethiopia, including administrative contract law, public procurement proclamation and directive, public-private partnership proclamation and directive, and investment proclamation and regulations, is highlighted. However, inconsistencies and lack of clarity in their application, coupled with regional procurement laws, contribute to confusion and non-uniform enforcement.

[154] The Federal High Court that entertained the case at lower level decided the issue on the force majeure as follows “the reasons listed by the plaintiff as grounds of force majeure are not consistent to 1792(2) of the Civil Code.

The integration and harmonization of administrative contract law with specific legislation are deemed essential for ensuring transparency, fairness, and accountability in government contracts and public-private partnerships. The understanding of both general principles and specific provisions is encouraged among legal practitioners, government officials, and private entities involved in these contracts.

The article also raises concerns about the impending privatization of major public services and questions the fair and equitable access by the public, particularly considering international commitments such as Bilateral Investment Treaties (BITs). It notes the drawbacks in the administrative contract legal regime, including the absence of a clear definition of administrative contracts and challenges related to the determination of public policy, potentially leading to arbitrary decisions by administrative bodies.

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