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Wisdom at the source of the Blue Nile

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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 5, No.2 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to Emily Boersma who did the painstaking editorial work of this issue.

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

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

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

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Content

Appraisal of Plea-Bargaining in the Criminal Justice Policy of Ethiopia

Abebe Assefa Alemu[♣]

Abstract

The administration of justice in Ethiopia has been under reform for the past fifteen years. As part of the reform, the system of plea bargaining was introduced within the first ever criminal justice policy in 2011. The policy states that the prosecutor would drop (a) count(s) of a charge or alter a charge to a lesser crime or drop certain facts of a crime and guarantee an accused a lenient sentence in return for the plea deal. Theoretical and practical controversies on plea- bargaining is still ubiquitous among researchers and practitioners. Thus, the main objective of this article is to examine and weigh the advantages and the pitfalls of the system of plea bargaining so as to bring it to the attention of the legislature. In doing so, the writer examined the theoretical aspects of plea bargaining and the contexts of criminal justice administration in Ethiopia as well as experiences of some selected countries. It is identified that plea bargaining helps reduce case backlogs and reduce costs to the state and to the defendant. It also avoids pretrial detention and severe penalties to the defendant. However, the findings also indicate that the very nature of plea bargaining, particularly the informal negotiation, would worsen the existing corruption or perceived corruption in Ethiopia so that powerful criminals may avoid punishments or may be punished with a lenient sentence which may cause for impunity. This may also deteriorate public confidence on the formal criminal justice system which could consequently hinder crime reporting. The associated trial penalty of plea bargaining also likely coerces an accused to relinquish his due

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process rights. Therefore, the writer fears that plea bargaining would be a viable solution, at least for the time being, to the criminal justice problems of Ethiopia except may be for minor crimes.

***Key words**: corruption, criminal justice, plea bargaining, public trust*

Introduction

Maintaining law and order, as well as ensuring justice, are the main functions of a state.[1] Thus, designing a functioning criminal justice system remains a common practice of states. However, adopting a particular type of criminal process which is efficient, effective and capable of identifying truth is still a challenge for states due to the implications of different values and concerns of a country. Despite such challenges, various criminal justice policies have been put in place in various jurisdictions.

Plea-bargaining has been ubiquitous in the contemporary practical, as well as theoretical, spheres of criminal justice systems. However, controversies have persisted over its merits and pitfalls. Despite the debates, a numbers of countries, including those who were suspicious of it,[2] have adopted it for pragmatic reasons. Indeed, it is argued that plea bargaining is important to ensure efficiency of the criminal justice administration by reducing case

[1] Joseph, Rosie Arhulya, Plea Bargaining: A means to an end, 2006, P.1., at WWW <http://www.manupatra.com>, (accessed on 3 January 2015).

[2] Langbien, John H., Understanding the Short History of Plea Bargaining, Law and Society Review, Vol.13, No. 262, 1979, at 268. In the middle of the nineteenth century, when German criminal procedure was being given its modern shape, German scholars routinely studied English procedure as a reform model. They found much to admire and to borrow (including the principle of lay participation in adjudication and the requirement that trials be conducted orally and in public), but they were unanimous in rejecting the guilty plea. It was wrong for a court to sentence on 'mere confession' without satisfying itself of the guilt of the accused (Arnold, 1855:275; see also Walther, 1851; Goltdammers Archiv, 1870).

backlogs, maximizing conviction rate and enabling the prosecution to access evidences for some kinds of crime to which the perpetrator could not otherwise be identified and even to reduce costs for the accused. To the contrary, numerous studies criticize the use of plea bargaining in a criminal justice administration to the extent that some justice systems have abolished[3] it or some jurisdictions have limited its application to certain kinds of crimes. Plea bargaining is criticized for subjecting justice to barter and therefore violating the due process rights of accused persons.

Despite its controversial nature, plea bargaining was introduced in the criminal justice policy of Ethiopia in the first ever criminal justice policy in 2011. The system of plea bargaining is the process in which a defendant agrees to plead guilty to an offense in exchange for a reduced number of charge(s) or facts, a lower sentence, or other considerations. Moreover, the issue of human rights protection, particularly the due process rights, is a recent phenomenon to Ethiopia. Citizens are looking for the proper enforcement of fundamental human rights granted under the FDRE constitution. How can plea-bargaining be a suitable solution for the criminal justice problems of Ethiopia while it has even been a subject of criticism[4] in well developed legal systems where it was conceived and dominates the system is the focus of this article.

[3] Some states and counties in U.S. including Alaska and some counties in Louisiana, Texas, Iowa, Arizona, Michigan and Oregon have abolished plea bargaining.

[4] Wan Tina, Unnecessary Evil of Plea Bargaining: an Unconstitutional Conditions, Problem and a Not-so-Least Restrictive Alternative, Review of Law and Social Justice, Vol.17, No.1., 2007, at 33.

The first section of this article discusses the notion and development of plea bargaining. As the plea bargaining originated in the USA, how and why it was conceived is examined in this part. Furthermore, the meaning, basic forms and elements of plea bargaining is also discussed here. The second section provides the merits and shortcomings of plea bargaining and deals with the inherent problems of plea bargaining, particularly in relation to corruption, public trust of the formal criminal justice administration, the protection of due process of rights, the trial penalty, its basic feature of subjecting justice to barter etc. The practices of some selected countries are highlighted; including USA, where plea bargaining originated. Germany and Italy, civil law countries, more or less resemble the Ethiopian legal system. The practice of Nigeria, a country which introduced plea bargaining while there is serious corruption, is also briefly examined to see the practical impacts of plea bargaining on the crusade against corruption. The third section briefly examines the situations in Ethiopia against the very nature of plea bargaining so as to see if plea bargaining is a viable solution to the problems in the administration of criminal justice. The ever first criminal justice policy dealing with plea-bargaining and other relevant laws incorporating ideas resembling plea bargaining are also discussed here. Finally, the author concludes by showing the incompatible features of plea-bargaining, in majority of the cases, to the criminal justice administration of Ethiopia; however, perhaps not to less serious crimes.

1. The Notion, Genesis and Development of Plea-bargaining

"Plea" in the legal phraseology refers to the accused persons' formal response of "guilty," "not guilty" or *nolo contendere* to a criminal charge,

and the phrase to "bargain" refers to "negotiate" or to "agree".[5] The combination of these two concepts gave the phrase "plea-bargain". Therefore, plea-bargaining is defined as "the process in which a defendant agrees to plead guilty to an offense in exchange for a lower charge, a lower sentence, or other considerations."[6] Plea- bargaining is also defined as "the process by which the defendant in a criminal case relinquishes the right to go to trial in exchange for a reduction in charge and/or sentence."[7] This definition is narrow as the only return to plea-bargaining seems to be reduction in charge or sentence or both. More importantly, Black's Law Dictionary defines plea-bargaining as "a negotiated agreement between a prosecutor and a criminal defendant whereby a defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or dismissal of the charges."[8] This definition is more comprehensive which consists of the foundational elements as well as forms of plea bargaining.

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[5] Ted. C Eze and Eze Amaka G., A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria, Global Journal of Politics and Law Research, Vol.3, No.4, 2015, at 42.
Yekini, A. Olakulehin, The Practice of Plea Bargaining and its Effect on the Anti-Corruption Crusade in Nigeria, at WWW < http://dx.doi.org/10.2139/ssrn.1279003>, (accessed on3 April 2015).

[6] Del Camen and Rolando V., Criminal Procedure: Law and Practice, 7th edition, Wadsworth Publishing Co., USA, New York, 2007, at 48, (hereinafter Del Camen, Criminal Procedure: Law and Practice)

[7] McCoy, Candace, Plea Bargaining -as- Coercion: The Trial Penalty and Plea Bargaining Reform, Criminal Law Quarterly, Vol. 50, No.41, 2005, at 450.

[8] Garner, Bryan A., Black's Law Dictionary, 7th edition, West Publishing Co, United States of America, 1999, at 1173.

The evaluative genesis and development of plea bargaining is mostly associated with the U.S. criminal justice system. Legal historians agree that plea bargaining evolved in the nineteenth century in America as it "…first emerged in force from deep within the bowels [of] urban American courts. [9] Teeming with case load, tainted by corruption, and staffed largely by ethnics with little professional training, these courts were considered to be ideal breeding grounds 'for bargaining with crime'."[10]

Before the eighteenth century, there was little problem of inefficiency in the administration of justice in the common law tradition in general and in the American justice system in particular as the then jury trial was a summary proceeding when dozens of cases were processed within a day. For this reason, adjournment of cases was not known until the year 1794.[11] During those times, professional policing and prosecution were unknown so that there was no fear of abuse of power by such organs. The right of accused to have legal counsel was also unknown, and there was no *voire dire* against the prospective jurors.[12] In addition to absence of appeal right, the only efficient evidentiary resource was procured through the confession of a defendant that may not require time and resource. Through time, the development of the adversarial system and the law of evidence with the view to provide safeguards to the defendant transformed the nature of trial by jury; as a result, the summary proceeding of trial by jury diminished.[13] Consequently, trial by

[9] Langbien, Supra note 2.
[10] Padgett John F., Plea Bargaining and Prohibition in the Federal Courts, 1908-1934: Courts as Complex Organizations, Law & Society Review, Vol. 24, No. 2, 1990, at 414.
[11] Langbien, Supra note 2, at 263.
[12] Ibid, at 265.
[13] Ibid, at 261.

jury became more complicated and expensive which caused the American criminal justice system to become "unworkable". [14]

Jury trial, after such transformations, has been complex and burdensome to the U.S. criminal justice system.[15] It involves the summoning of prospective jurors among whom twelve jurors are selected with two backups and followed by *voire dire*, extensive instructions by a judge, jury sequestration for weeks in a locked session and the stringent voting requirement where there is high possibility of *jury nullification*, *missed jury* or *hung jury* all which are time taking and resource intensive.[16] For instance, the number of people summoned for jury service in each year in U.S. is estimated to be 32 million.[17] One can imagine how the resources needed and what procedural hurdles may be confronted.

One may ask why the Americans insist on such burdensome criminal justice process of jury trial instead of bench trial. Due to the long lasting British colonial administration in America, the American legal system absorbed the British model of trial by jury. [18] Though independence was proclaimed in 1773, trial by jury has been preserved as "a centerpiece of its justice system" due to its ideological role to which the Americans have strong sentiments.[19] Their historic persistence on jury trial by their own "peers" served them as a

[14] U. S. Department of State, Anatomy of Jury Trial, at WWW <http://www.america.gov/publications/ejournalusa.html>, (accessed on 15 April 2015).
[15] Ibid, at 17.
[16] Langbien, Supra note 2.
[17] U.S. Department of State, Supra note 14.
[18] Ibid.
[19] Ibid.

"shield" to resist the oppressive British administration and even guaranteed them certain fundamental rights including the right to Freedom of Press since 1735.[20] It is for this reason that trial by jury is said to have been "…serving as rallying point for American colonists against unpopular British laws".[21] Thus, the patriotic role of the jury led the "founding fathers" of the U.S. to make trial by jury a constitutional right.[22]

The writer has devoted time and space on the issue of trial by jury not because it is the focus of this article but to make clear that trial by jury is a root cause for the rise of plea bargaining in USA which is helpful for the purposes of this article.[23] Hence, plea bargaining is a means to maintain the popular sentiment to jury trial at least for very few cases.[24] Studies confirm that 90% of the worlds' trial by jury exists in the U.S. criminal justice system, and 90% of cases also end up through plea-bargaining in that country. [25] Hence**,** the transformation of trial by jury into its adversary nature and the insistence of Americans on it can be taken as a root cause for plea bargaining. Howe identified that "[l]arge caseloads and the promise of cumbersome and expensive jury trials help explain the appeal of plea bargains from a societal perspective".[26]

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[20]American Bar Association (ABA), History of Jury Trial, at WWW <http://www.jstore.org/stable/4187109>, (accessed on 20 September 2014).
[21] Ibid.
[22] Langbien, Supra note 2, at 269.
[23] McConville Mike et al., Jury Trial and Plea Bargaining, Hart Publishing, Oxford, London, 2005.
[24] U.S. Department of State, Supra note 14.
[25] Ibid.
[26] Howe, Scott W., Value of Plea Bargaining, Oklahoma Law Review, Vol. 58, No. 599, 2005, at 611

The ruling of the U.S. Supreme Court in 1978 [27] is considered as a "watershed" precedent for plea bargaining in US. The decision of the court, though it has been criticized, upheld the constitutionality of plea bargaining and followed by various policies whereby general principles have shaped the operation and elements of plea bargaining. [28]

2. Advantages and Disadvantages of Plea-bargaining

2.1. Advantages of Plea Braining and the Underlying Factors

Proponents justify plea-bargaining based either on theories or other pragmatic reasons. According to routineization theory, the professionalization of police and prosecution and transforming them to serve full time is what made the practice of plea bargaining inevitable.[29] Supporters claim that the accustomed acts of 'repeat players' of the full time working groups in a courtroom make them able to foresee trial outcomes and set sentences based on probabilities of what would happen if the cases went through trials. Thus, it is meaningless to pass through criminal trial process if the outcome of the process is predictable.

Another theoretical justification is on the basis of either Utilitarian[30] or Deontological[31] points of view. From the deontological perspective, if a

[27] United States of America, Federal Supreme Court, Bordenkircher v. Hayes, Judgment 434 U.S. 357, 1978, at WWW http://supreme.justia.com/cases/federal/us/434/357/case.html > (accessed on 31 March 2015.

[28] Vinegard Alan, Department's New Charging, Plea Bargaining and Sentencing Policy, New York Law Journal, Vol. 243- No.110, 2010, at 2.

[29] McCoy, Supra note 7, at 8.

[30] Ibid, at 7.

[31] Ibid.

defendant has pleaded guilty, after negotiation, he is assumed "blameworthy".[32] This perspective includes that the defendant is remorseful while he is pleading guilty. Such justification assumes that it is out of his own free will to repent to the crime committed and believes that he "deserves punishment" through pleading guilty. According to this view, there shall be leniency of penalty or framing a lesser charge and a chance to clean-up his sin on others as a reward for the defendant's willful repentance. If so, trial is meaningless while the defendant is sincerely willing to accept the punishment which is the goal of the extended trial.[33]

The utilitarian theory (justification) claims that plea bargaining is essential because of its greater good to save court time and money which outweighs the costs associated with the loss of due-process of rights.[34] It is claimed that plea-bargaining is most efficient and expeditious type of criminal justice system.[35] It is this economic analysis of law that dominates the argument in favor of plea bargaining. Posner propounded that judges "…should use economic principles to inform their decision-making" so as to enhance the "economic efficiency of the law".[36] According to him, a judge is a forward-looking "rule-maker," from the common law legal perspective, who should decide cases on the basis of the "most efficient outcome". "Efficiency," from the economic perspective of law, refers to "…the allocation of resources in which value is maximized … [or] resources are in the hands of those who

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Langbien, Supra note 2, at 261.
[36] Zywicki, Todd J. and Sanders, Anthony B., et al.,'Posner, Hayek & the Economic Analysis of Law.' Iowa Law Review, Vol. 93, No., 1, 2008, at 4.

value them most."[37] The concept 'value' is also understood to be 'measured by willingness and ability to pay.' According to utilitarianism, if parties in a negotiation are willing to consent to it, it is reasonable to assume that the bargaining process is to the interest of the parties to maximize values. Thus, the accused and the prosecutor, in a criminal case have incentives to avoid the uncertainties of litigation through the help of plea bargaining. Therefore, the uncertainty of the prosecutor to secure punishment, the high costs of the trial process and the public's expectation on high conviction rates are the utility factors pushing the parties to resort to plea bargaining.

Moreover, plea bargaining helps defendants avoid the risks of a heavier sentence which is probable after the full trial process as long as the prosecutor has enough evidence to prove the case.[38] It is also believed to help defendants reduce pre-trial detention and its associated injustices.[39] Accordingly, proponents argue that plea bargaining advances the interests of both the state and the defendant and promote efficiency.

Other utilitarian thinkers also argue that the concept of individual autonomy and freedom of contract should not be confined to the civil matters but can also serve in the settlement of disputes between the criminal defendant and a

[37] McGregor, Joan L., The Market Model of Plea Bargaining. Public Affairs Quarterly, Vol 6. N0. 4, 1992, at 386.
[38] Bordenkircher, Supra note 27. In this case the prosecutor offered to recommend a sentence of 5 years imprisonment in exchange for a guilty plea. But, he was convicted, after full trial, for life imprisonment for Hayes refused to plead guilty.
[39] Joseph, Supra note 1, at 3.

state.[40] This understanding of plea bargaining has been supported in the common law courts' practices. For instance, in the Hayes case the U.S. Supreme Court described plea bargaining as 'give and take negotiation…"'[41] The court considered plea bargaining as a contract by which parties to it (the prosecutor and the defendant) are free to bargain, and in this respect the parties are assumed to have equal bargaining power. In doing so, consquentialists argue, plea bargaining benefits the state to conserve its limited resources and facilitates the rehabilitation of defendants.[42]

Another influential theory, a variant of utilitarian theory, is the theories of tort liabilities developed in response to the industrial revolution which has made courts overburdened due to the law suits associated with industrial hazards and product liabilities.[43] Hence, plea bargaining has predominated the criminal justice system in the common law industrial states as it would have been unlikely for courts to process cases with the limited time and resources. In fact, a recent study by the World Bank also shows that various jurisdictions have recognized that the fair and timely disposition of cases is an important condition for economic development.[44]

As the system of plea bargaining abridges the criminal process, it undeniably alleviates the work load of judges, prosecutors and defense lawyers as well as

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[40] McGregor, Supra note 37, at 388.
[41] Bordenkircher, Supra note 27.
[42] The Law Reform Commission of Australia, The Use of Alternative Dispute Resolution in the Criminal Justice System, 2002, at WWW <http:// www.restorative>, justice.org>, (accessed on 25 January 2015).
[43] McCoy, Supra note 7, at 9.
[44] The World Bank, Comparative International Study of Court Performance Indicators: A descriptive and
Analytical Account, The World Bank, Washington, D.C, U.S.A, 1999, at 1.

reduces the time spent to dispose every criminal case and increases the elasticity of courts' services at least to those limited number of cases when a defendant insists to his trial rights.[45] The longer a case is pending in courts (inevitable in U.S. if every case is brought for full trial process), the greater the drain on the judicial resources.[46]

Plea bargaining also enables prosecutors to concentrate power and resources on those limited and high profile cases which enhance the effectiveness of the prosecution's office in achieving higher conviction rates.[47] That means the prosecutor avoids the risk of acquittal and saves trial resources which can be used in other cases so that settlement costs are lower while the trial costs are higher.

2.2. Pitfalls of Plea-Bargaining and the Underlying Factors

Despite the advantages of plea bargaining as discussed so far, numerous studies have criticized the use of plea bargaining in the criminal justice administration. Most of the criticisms are founded on the belief that plea bargaining is a result of coercion and it offers justice as a commodity subject to barter. Opponents argue that the process of plea bargaining is a "…forced association…" as the option of the defendant is either to accept the offer by the prosecutor or to wait for more severe punishment after a full trial process;

[45] ABA, Supra note 20, at 24.
[46] World Bank, Supra note 44.

[47] Lynch Timothy, the Case against Plea Bargaining.' Cato Institute, 2003 (note), at WWW <http://www.Jstore.org>, (accessed on10 December, 2015).

and the mere fact that such an option is offered never excludes duress.[48] In this regard, McCoy raised an interesting question of whether "…a confession [plea of guilty after bargaining can] really be voluntary if it is given to avoid harsher punishment that will accrue after trial."[49] Indeed, it is inappropriate to extend the application of a contract theory to a situation where a powerful state is negotiating with the powerless individual. McGregor also identified that the disparity between what the state and the defendant would lose as a result of refusal to enter into plea-bargaining are incomparable. Because the defendant may lose his fundamental freedoms to the extent of loss of life while the prosecutor would loss nothing in "comparative value".[50] According to him, the prosecutor is conferred with an 'unfair bargaining advantage' over the defendant as a result of which the defendant would never have equal bargaining position with the prosecutor.

The administrative theory of plea bargaining also supports the above assertion that plea bargaining is not a real consensual result of a defendant with the prosecutor. It is rather the prosecutor who "dictates the terms of the plea agreement" that the prosecutor, who unilaterally determines the extent of blameworthiness and the "appropriate" punishment for it.[51] According to Dervan, the practice of plea bargaining is similar to shopping for a commodity from a supermarket but with no freedom to search for a lower price than to accept the only leniency offered by the prosecutor to escape

[48] Klein, Richard, Due Process Denied: Judicial Coercion in the Plea Bargaining Process, Hofstra Law Review, Vol.32 No.1349, 2004, at 1352.
[49] McCoy, Supra note 7, at 8.
[50] McGregor, Supra note 37, at 394.
[51] Dervan, Lucien E., The Surprising Lessons from Plea Bargaining in the Shadow of Terror, Georgia State University Law Review: Vol. 27: No. 2, 2010, at 9.

from the harsh sentence.[52] It is true that the leniency offered by the prosecutor is a payment to the defendant to induce him not to go to trial. Moreover, the current practice of plea bargaining is considered as a 'refined version of torture' by which the defendant is induced to waive the complex and expensive trial rights to which Langbien equates with the medieval European law of torture.[53]

The desire and practice of a state to reduce the cost of trial may also lead to inaccurate outcomes regarding wrongful convictions which may, in fact, make the system cost efficient but at the expense of innocent persons' interest.[54] It is clear that the evidence a public prosecutor alleges to have against the innocent defendants is always weaker when compared to the evidence to be presented against the truly guilty defendant. Thus, such weaker evidence urges the prosecutor to offer more elaborate incentives to the innocent defendants which in turn induces him/her to plead guilty.[55] That is the reason plea-bargaining can result in wrongful conviction as both the prosecutor and the defendant are not sure as to the outcome of the trial.[56] The acts of prosecutors may result in unwelcoming consequences on the justice system. On the one hand, wrongful conviction in itself is unjust which counters the very purpose of criminal justice system. It also counters the

[52] Ibid, at 11.
[53] Langbien, Supra note 2, at 13.
[54] Klien, Supra note 48, at 7.
[55] McGregor, Supra note 37, at 393.
[56] Joseph J. Senna, and Larry J. Siegel., Introduction to Criminal Justice, 9th edition, Wadsworth, Washington DC, USA, 2002, p.135, (hereinafter Joseph J. Senna, and Larry J. Siegel, Introduction to Criminal Justice)

whole purpose of the theories of punishments as the wrongfully convicted persons are being punished without mental culpability. On the other hand, if a system puts the innocent person in its custody, the truly guilty person is left free and perhaps committing more crimes and also may be encouraged by the thought that the criminal justice system is too inefficient to apprehend him. In such instances, both the wrongfully convicted and the truly guilty person would develop distrust on the criminal justice system.

Furthermore, studies also found that legislatures who are aware of the practice of plea bargaining incline to assign an undeserving or heavier penalty to a crime.[57] A defendant who demands his or her trial rights may encounter more severe and disproportionate punishment after being convicted.

Another inevitable downside, somehow similar to the above one, at least in effect, of plea bargaining is sentencing disparity between/among similarly situated defendants who differ only in the willingness or refusal to enter into plea bargaining. In this regard, chief judge William G. Yong described that plea bargaining results "…stark, brutal and incontrovertible… sentencing disparity of about 500%" between similarly situated persons but one entered into plea negotiation and the other demands his due process rights.[58] Timothy Lynch, similarly, argued that such sentencing disparity is a form of retaliation by a state against defendants who demand their constitutional rights. This is, therefore, a clear case of psychological coercion which makes the system of plea bargaining undesirable. Analogizing such sentencing disparity with the

[57] McGregor, Supra note 37, at 390.
58 Lynch, Supra note 47.

medieval continental torture system,[59] Langbien described it as "…limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind; hence, plea bargaining, like torture, is coercive."[60]

Even the lenient sentence that may be offered by a prosecutor is always below the level of the deserved penalty to which the legislature is supposed to stipulate. In principle, the prosecutor is duty bound to make the outcome "just" by ensuring that the defendant receives a sentence that "appropriately reflects the seriousness of the offense."[61] However, practically speaking "…only when improper bargaining tactics are employed by the prosecutor to secure a guilty plea can a proper sentence be meted out."[62] Here, if the prosecutor is lying to make the sentence proper, the act prejudices the interest of the defendant and it becomes injustice. On the other hand, if he does not employ such improper methods of persuasion, the system fails to impose a deserved punishment against the defendant. This is the greatest evil of the economic analysis of criminal law in general and the utility perception of plea bargaining in particular.

[59] Langbien John H., Torture and Plea Bargaining, The University of Chicago Law Review, Vol. 46, No. 1, 1978, at 12. He analyzed the medieval history of Europe when torture was legally administered to procure confession which he analogized it with the current practice of plea bargaining.
[60] Langbien, Supra note 2, at 13.
[61] Hails, Judy, Criminal Procedure, 3rd edition, Copper house Publishing Company, Boston, United States of America, 2003, at 17, (hereinafter Hails, Criminal Procedure)
[62] McGregor, Supra note 37, at 390.

It can also be argued that interests protected under the criminal and civil law vary due to the nature of those interests and their respective sanctions. As far as their basic difference is concerned, Hart describes that "[t]he core of the difference between a confined mental patient and an imprisoned convict" is that the patient has not incurred the moral condemnation of his community, whereas the convict has.'[63] It is true that every criminal act contemplates the moral judgment of the general public. Social condemnation refers to "[d]eciding that particular actions should be criminally punishable is an act of collective moral judgment and condemnation."[64] Thus, theories of punishments are important guidance to those stakeholders in charge of enforcing the criminal law thereby achieving its purpose. A criminal law has its own objectives, the realization of which requires the adherence of those governing principles of criminal law. The principle of legality, in this case, is not in line with the nature of plea-bargaining. It is because the principle requires a state for advance specification of crimes and the corresponding penalties to which a potential criminal shall take notice of it. [65] In doing so, most criminal laws aim to prevent crime through deterrence by means of notifying the probable consequences. If such purpose fails, it also justifies in making offenders answerable for their acts by imposing proportional punishment to the crime committed which is already notified to him.[66] But, if

[63] Langbien, Supra note 2, at16.

[64] Andrew Ashworth, Conceptions of Over criminalization, Ohio state journal of criminal law, Vol.5, No. 408, 2008.

[65] Wetsen, Peter. Two Rules of Legality in Criminal Law, Law and Philosophy, Springier, Vol. 26, No.3, 2007, at 236-238.

[66] See e.g., Federal Criminal Code, Proc. No. 414/2004, Fed. Neg. Gaz, 2004. The preamble part and Article 1 of the 2004 FDRE Criminal Code stipulates its aim of preventing crimes both by notifying crimes and corresponding penalties to potential offenders and by imposing proper punishment to those who transgressed the law.

the murderer is convicted for wounding, or the thief for attempt or a rapist for battery, the purposes of the principles of legality, particularly the purpose of advance notice, remain meaningless.

The very purpose of a state to induce/coerce a defendant either through leniency (peaceful means) or through a threat of a highly disparate sentence is to realize the defendant's waiver of his constitutional rights.[67] Many ask whether coercing defendants to waive their due process rights is just to the state. The defendant "has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury[judge] through its own resources….the defendant has a fundamental right to remain silent, in effect challenging the State at every point to 'Prove it!'"[68]

The defendant who entered into plea negotiation is also denied of the right to confront prosecution evidences. In general, all the constituent fair trial rights of a defendant are denied due to the practice of plea bargaining. Above all, the right of public trial by an impartial tribunal is lost through the process of plea bargaining. As far as the due process rights are concerned, scholars have defended the practice of plea bargaining by arguing that there are good reasons by which contractual freedoms must be restricted. To this effect, they maintain that those inalienable rights cannot be bought or sold and it is not

[67] Lynch, Supra note 47.
[68] Ibid.

legitimate for a state to buy the inalienable rights of individuals as "voluntary slavery contract" is a prohibited act.[69]

Interestingly, the very nature of plea bargaining and the receiving countries' legal culture, the value choices of the society as well as the state of criminal justice administration are also important as far as plea bargaining is concerned. Similarly, the level of development of rule of law and the state of corruption in the criminal justice administration including the perception and trust of the public towards the same are also crucial concerns.

As is pointed out above, every criminal act contemplates the moral judgment of the general public. According to Hickman, "…deciding that particular actions should be criminally punishable is an act of collective moral judgment and condemnation."[70] To the contrary, plea bargaining is a clandestine and private negotiation between the offender and the prosecution so that charges may be altered, a numbers of counts or facts, possibly the most relevant part that determines the seriousness of a crime, may be dropped in exchange for the plea deal. A charge containing a strong negative label may even be altered to a more socially acceptable one in exchange for the plea bargaining.[71] Consequently, a dangerous offender may be sentenced, after some of the charges or counts are dropped and some important facts are disregarded, to the most lenient or disproportionate penalty. Such negative effects of plea bargaining would be problematic where public legal literacy is very low and the value for the "truth" during criminal proceeding and public condemnation

[69] Ibid.
[70] Andrew, Supra note 64.
[71] Josep J Senna and Larry J. Siegel, Supra note 56, at 350-351.

of crime is very high. It further erodes the public confidence when the offender is given favors, in the process of plea bargaining, for his/her misdeed against the public interest for the mere fact that s/he entered to plea bargaining .

Another disadvantage of plea bargaining is related to the transparency and corruption or perceived corruption in the administration of criminal justice. Although lack of transparency is a problem in criminal justice administrations in general, "it is also of particular importance when it comes to plea bargaining."[72] Plea bargaining is an informal negotiation behind closed doors and with little transparency. Alkon, in his study, identified that plea-bargaining carries the potential to change how the general public views the criminal justice administration and the legal system in general with a serious concern in countries struggling to establish the rule of law. He found that the informal negotiation during a plea deal "may look like another form of corruption in countries whose legal systems already suffer from endemic corruption and serious legitimacy problems."[73] According to him, plea-bargaining itself can also contribute to a public perception that the legal system is corrupt and that powerful people are not bound by the law. From the outside, this process may look like the same informal, extralegal practices

[72] Shivani Pal, Issues and Controversies Surrounding the Use of Plea Bargaining in International Criminal Tribunals, University of Central Lancashire Publishing, Preston, England, 2013.

[73] Cynthia Alkon, Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems? 19 Transnational Law & Contemporary Problems, Vol. 19, No. 355, 2010, at 356-357.

in countries that are highly corrupt.[74] Thus, Alkon warned that countries with "troubled criminal justice" should abstain from importing plea bargaining. To him, a troubled criminal justice refers to a system where the judiciary is not independent or is widely perceived not to be independent; or a country suffers from endemic corruption and the public widely perceiving that government officials, including law enforcement personnel, act contrary to the law. [75]

3. Concerns and Lessons from Some National Systems

We have seen that plea bargaining is still controversial in the practical and theoretical spheres. Irrespective of the debates, some states which have already introduced the system, like the U.S., have relegated the due process rights to a secondary position for the mere fact that an accused waives the same. The U.S. Supreme Court admitted that "…for reasons of expediency American criminal justice cannot honor its promise of routine adversary criminal trial…"[76] To the contrary, some of the American states have abolished the system for its various downsides to the criminal justice system. However, other states which have adopted plea bargaining have been trying to maintain the concern of due process rights, the views of the public to crime and the search for truth as well as other contexts so that legitimacy is said to be maintained..[77] Some other states are yet at the stage of proposing the system of plea-bargaining as a policy alternative, such as Ethiopia.[78]

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[74] Ibid.
[75] Ibid, at 359.
[76] Langbien, Supra note 2, at 20.
[77] The Italy system of plea bargaining allows only sentence bargaining, and no explicit admission of guilt as they think that it undermines presumption of innocence and also allows

Legal reformers, who are determined to adopt plea-bargaining, can take valuable lessons from Langer's works on how some selected civil law countries "translated"[79] plea bargaining into their criminal justice system. Despite the fact that plea bargaining has been imported in many jurisdictions, the practice has not been simply "transplanted", instead it is "translated" into the "languages" of the respective criminal justice systems. Policy makers should take into account the importing states' prevailing social, economic, political and legal culture rather than to "copy and paste" the American system. This is what countries can take as lessons from Germany, Italy, France, and Argentina regarding how and why the system of plea -bargaining has transformed in such jurisdictions.

The system of plea-bargaining translated in each of these jurisdictions manifests "substantial differences from the American model, either because of decisions by the legal reformers in each jurisdiction or because of structural differences between American criminal procedure and the criminal procedures of the civil law tradition." [80] The reason is that such jurisdictions

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only the form of nolocontendere; In Germany, a judge should involve in the process and plea bargaining process does not avoid trial. See e.g., Langer, infra note 79, at 39 & 50 and 63.

[78] Ministry of Justice, The Comprehensive Criminal Justice Policy of the Federal Democratic Republic of Ethiopia. (Unpublished policy document), Addis Ababa, Ethiopia, 2011, at 35 & 36.

[79] Langer, Máximo, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure Plea Bargaining in Capital Cases, Harvard International Law Journal, Vol. 45, No 1, 2004, at 64. .According to him, the circulation of legal concepts from one jurisdiction to another jurisdiction requires translation by the legal reformers as the languages of importing country in terms of contexts and values are quite different certain than the exporting country of the concept. It is to mean that prevailing situations of a country to which a new legal rule is imported should not be overlooked.

[80] Langer, Supra note 79.

have "translated" plea-bargaining into the "languages" of their respective criminal justice systems is dictated by concerns of due process rights, difference in legal cultures between the exporting and importing countries and the countries' prevailing conditions and values. Langer, warned that if reformers fail to take into account the merits of "translation" in situations of legal circulation by simply confining oneself into the traditional metaphor of "transplantation," the imported system of plea-bargaining would act as a "Trojan horse that can potentially bring, concealed within it, the logic of the adversarial system to the inquisitorial one."[81] In Germany, a judge is an active player in the process of criminal proceeding to search for the truth. Such a role of a judge has been maintained even after the introduction of plea-bargaining into the system as the bargaining process has made it mandatory to involve a judge together with the prosecutor and the defendant. In doing so, the practice of plea-bargaining in Germany maintain legitimacy by checking the possible encroachment of the rights of defendants by the executive organ during the process of plea negotiation. Similarly, as a unique feature to the inquisitorial system, a confession by the defendant never terminates the trial process. Hence, legal reformers in Germany do not apply the practice of the American plea-bargaining to convict the defendant automatically after pleading guilty.

Not only has each of these jurisdictions adopted a version of plea-bargaining different from the American model, but also, the forms of plea bargaining each one of these jurisdictions has adopted are also different from one

[81] Ibid, at 38.

another.[82] This shows that how such jurisdictions are careful concerning their respective country's circumstance and the values of their communities.

Unlike the U.S. system, in Italy plea-bargaining is applicable only on those offenses entailing not more than seven years term of imprisonment and also not applicable on economic crimes, crimes entailing death penalty and crimes related to domestic violence and children.[83] This means, in most cases, plea-bargaining is limited to minor crimes – similar to the practice in most countries in the civil law traditions. Furthermore, like Italy, the only legally accepted type of plea bargaining in India is "nolocontendere," which does not amount admission believed to have taken into account the social and economic prevailing contexts conditions of the country.[84]

The very purpose of plea bargaining in Nigeria is found to have been undermining the crusade against corruption and has even resulted in more corruption. Many of corruption cases by higher officials end up with plea deals and consequently with substantially reduced and disproportionate terms of imprisonment or fines which benefit the criminals at the expense of the public interest in Nigeria.[85] The recent case on Cecilia Ibru, in 2010, the former Chief Executive Officer and Managing Director of Oceanic Bank, ended-up with a six month term of imprisonment for the whole of three

[82] Ibid, at 3.
[83] Joseph, Supra note 1, at 3.
[84] Ibid, at 2.
[85] Egwemi, Victor, Corruption and Corrupt Practices in Nigeria: An Agenda for Taming the Monster, Journal of Sustainable Development, Vol. 14 No. 3, at WWW <http://www.journals.iimu.edu>, (accessed on10 February 2015), p.82.

counts he pleaded guilty after the prosecution dropped 22 other corruption counts (a total of 25 counts). Similarly, in the case of John Yusuf who embezzled N27.2 billion, with two counts, he was sentenced to two years imprisonment or a fine of N750, 000.00, after pleading guilty that being the maximum punishment provided in the law. Serving a two year term of imprisonment or alternatively forfeiting N750, 000 is nothing for the public compared to the looting he did. Surprisingly, Lucky Igbinedion who was formerly charged with 191 corruption counts, after plea-bargaining, was charged with only one count charge of corruption so that he was sentenced for only six months imprisonment or alternatively N3.5m fine.

4. Overview of Plea-Bargaining in the Criminal Justice System of Ethiopia

The judicial and legal sectors of Ethiopia have been manifesting a variety of challenges.[86] This does not mean, however, that the country is doing nothing to reform the criminal justice administration. There have been reforms including conducting studies as well as legal and institutional improvements. In 2002, the Justice System Reform Program (JSRP) was established 'to assess the performance of justice institutions and to propose appropriate reforms.' Following the initiation by JSRP, comprehensive and substantial studies were conducted and many intertwined problems were identified concerning the justice system of the country in general and the criminal justice system in particular. Thus, three core problems in the Ethiopian justice system were identified: (1) the system was neither accessible nor

[86] Ministry of Capacity Building, Comprehensive Justice System Reform Program Baseline Study, (unpublished), Addis Ababa, Ethiopia, 2005.

responsive to the needs of the poor (2) serious abuse of power and political interference as well as serious corruption offenses exist, and (3) there is inadequate funding and meager resource allocation for the justice system.[87] The program made reforms in the justice system.

The Federal Government criminal justice administration business process was established as part of Business Process Re-engineering (BPR) so that important activities, actors and the time required for investigation, trial and decision were identified in 2010.[88] The BPR study suggested that there needs to be the system of plea-bargaining so as to overcome the identified problems. Accordingly, the first ever comprehensive criminal justice policy was introduced as a response to those problems and incorporates some recommendations from the prior studies. The policy is meant to foster "efficiency, expediency and fairness" in the slow and weak administration of the criminal justice system.[89] For this reason, the policy introduces alien concepts and processes among which the concept of plea bargaining[90] is of utmost importance. The policy states that every actor is interested to get a defendant admit his act. The policy stipulates that plea bargaining would reduce the number of criminal caseloads which would pass through the full process of the criminal proceeding and to lessen backlogs so that the criminal

[87]Vibhute K.I., Federal Democratic Republic of Ethiopia comprehensive Justice System Reform Program: Baseline study report, 6 US-China Law Review, Vol. 6, No. 8, 2009.
[88]Ministry of Justice, Criminal Justice Administration: Investigation, Litigation and Judgment, (unpublished BPR Study), Addis Ababa, Ethiopia, 2010.
[89] Supra note 78, See Section4.5.4.2.

[90] Ibid, See Section4.5.3.

justice administration will be effective and efficient.[91] It specifically states that plea bargaining, between a defendant and a prosecutor, shall be conducted to prosecute the defendant for a lesser charge, or to drop some of the charges or imposing lenient sentences or intentionally missing some of the facts or on all of them.[92] It also provides that the prosecution by no means continues in any court if the process of plea-bargaining ceases without achieving the intended result for any reason or if a court refuses to approve, for any reason, the plea agreement submitted to it.[93]

4.1 "Plea-Like" Procedures in the Various Laws of Ethiopia

To start with, the 1960 "obsolete" Criminal Procedure Code of Ethiopia,Articles 98 and Articles 132- 135 stipulate some sort of "pleas" of the accused. However, such "pleas" are referring to the accused person's formal response of "guilty" or "not guilty" to a criminal charge before the court. According to Article 132, the trial court to which the charge shall be submitted is required to ask the accused whether he is willing to admit or not to the court regarding the crime he is charged. It does not allow a prior agreement between the prosecutor and the defendant regarding certain promises/ benefit by the former and agreement of the latter to plead guilty. No chance for the accused to negotiate with the prosecutor and to know what benefit s/he will be granted in advance. The role of the court, in this case, is to use the plea of the accused as evidence to convict the accused and mitigate the penalty instead of ascertaining the prior agreement. [94] Though plea of

[91] Ibid, See Section4.5.4.1.
[92] Ibid, See Section4.5.4.2-D.
[93] Ibid, See Section4.5.4.2-E
[94] Criminal Procedure Code, 1961, Art 123, Proc 185/1961, Neg. Gaz. (Extraordinary Issue No. 1), year 32, No.1.

guilty may have a predisposition effect, "plea of guilty" under the Ethiopia criminal procedure code by no means is similar to plea-bargaining because none of the elements of the later are satisfied in those provisions.

Another area of law worthy of inquiry is article 8 of the anti-corruption Proclamation No. 881/2015. The law provides immunity to a co-offender who discloses "substantial" evidence concerning another co-offender. If so, the commission or the "appropriate organ" may offer to him/her immunity not to be prosecuted at all and such offer is required to be certified by those same organs. However, for enforceable plea -bargaining to exist, the defendant should have knowingly waived his trial right and agreed to plead guilty without coercion and after thorough negotiation that would enable the defendant know what advantage he would get.[95] Furthermore, no literature or practices recognize an agreement as a plea-bargaining if concluded between persons other than a prosecutor and a defendant (or his defense). It is also identified that "…unlike most contractual agreements, it [plea-bargaining] is not enforceable until a judge approves it."[96] A judge should effectively determine the factual basis of the agreement to protect the defendant's, the victim and the publics' interest.[97] It is upon the satisfaction of such bedrock elements that a plea-bargaining is said to be concluded and can be enforceable. The provision under discussion, of course, shows the possibility

[95] Scheb, John M., et al., Criminal Procedure, 4th edition, Wadsworth, Washington DC, United States of America. 2006, (hereinafter, Scheb, Criminal Procedure)
[96] Ibid.
[97]Starkweather, David A.,(nd) The Retributive Theory of 'Just Desserts' and Victim Participation in Plea Bargaining, Indiana Law Journal, Vol. 67, No. 3, at 869, at WWW http://www.repository.law.indiana.edu/ilj/vol67/iss3/9 , (accessed on23 April 2015).

where the person would be exempted from prosecution provided that s/he is willing to provide substantial evidence. But, with whom such person is required to enter into agreement is not clear. What if the defendant is required to negotiate with the Commissioner or head of the organization? The authority who is empowered to approve the agreement is also the Commissioner or the Head of the organization who offered immunity. The ascertainment and approval of the agreement by the court is lacking. This is against the elements of enforceable plea bargaining as there is no requirement of courts' approval of the deal to safeguard the rights of individuals from encroachment by the executive organ. Therefore, as far as the writer is concerned, the Anti-Corruption law does not satisfy those minimum elements of enforceable plea-bargaining.

In this regard, the practice of Pakistan in its Anti-Corruption law, which is the only law allowing plea-bargaining, stipulates that the agreement between the suspect and prosecutor/investigator should be endorsed by the National Accountability bureau and must be approved by the court to be enforceable.[98]

Another Law of the Country worth of assessment is the Anti-Terrorism proclamation No.652/ 2009 which allows mitigated punishment if the accused is willing, upon request by the prosecutor, to repent and cooperate according to the manner of the commission of the crime as well as the identities of other participating criminals. [99] However, the prosecutor is

[98] National Accountability Bureau, "The Plea-Bargain in Pakistan.", at WWW <http://www.icac.org.hk/newsl/issue14eng/button3.htm>, (accessed on3 May 2016).
[99] Anti-Terrorism Proclamation, 2009, Art 33, Proc No. 652/2009, Fed. Neg. Gaz, year 15, No.57.

not required to make sure whether the defendant is aware of the returns of his plea in advance so that willing to agree to disclose the facts of the case. The law simply guarantees the suspected person mitigation if he agrees to enter into plea deal.

4.2 Implications of Plea-Bargaining to the Criminal Justice Administration of Ethiopia

Unlike the adversarial system, the inquisitorial systems make identification of truth the concern of official investigation instead of a matter of parties' negotiation. Much literature claims that "criminal trials in civil law countries are often viewed as a truth-telling process and plea bargaining rarely contributes to a deeper understanding of the "truth" of the events of the crime itself, therefore, it may not fit well in a legal culture that looks to formal trial processes to determine the truth of the events underlying a criminal case."[100] This is true in the Ethiopian criminal justice system as the search for truth is given emphasis in the criminal proceedings. It is clear from the policy that fact bargaining allows defendants to plead guilty to only to some of the facts which substantially affects not only the ultimate penalty but also the search for truth.

Moreover, the FDRE Constitution is meant to further the due process aspect of the criminal justice administration i.e., determination of the truth, as the

[100] See International Network to Promote the Rule of Law (INPRL), Introducing Plea Bargaining into Post-Conflict Legal Systems, 2014, at WWW <http://www.inprol.org/system/files force/.../introducing_plea-bargaining_0.pdf?>, (accessed on 31 March 2015).

foundation of justice, in the events of a crime. According to Article 19, an arrested person have the right to remain silent and shall not be compelled to make confessions or admissions which could be used in evidence against that person so that any evidence obtained under coercion shall not be admissible.[101] Additionally, the constitution provides that a court shall ensure that the responsible law enforcement authorities carry out the investigation, in searching for the truth, respecting the arrested person's right to a speedy trial. This is a clear stand of the law towards truth and the due process rights. The due process rights are recent phenomenon in the Ethiopian criminal justice system. If the government "buys" these constitutional rights in return for the defendant's consent to plead guilty, it may deteriorate the hope of the individuals for the protection of human rights in the country. It is indicated above that plea bargaining may be viewed like coercion which induces a defendant to waive his constitutional rights. Investigating police officers and prosecutors may always focus on inducing a defendant to plead guilty instead of diligently investigating crimes. The nature of plea bargaining, therefore, would make the fundamental due process rights futile.

Furthermore, pursuant to Article 20, accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged and they have the right to be informed with sufficient particulars of the charge brought against them. Interestingly, they have the right to be presumed innocent until proved guilty as well as not to be compelled to testify against themselves. As explained above, letting an accused to choose either lenient sentence or stricter penalty for the fact that

[101] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art 9, Proc. No. 1/1995, Fed. Neg. Gaz, year 1, No.1.

the defendant insists on constitutional due process guarantees an amount of coercion, and if so, coercing an accused to plead guilty is contrary to the due process rights of an accused which may also result in wrongful conviction.

A similar emphasis is also given, in many provisions of the FDRE Constitution, to the detection, apprehension, prosecution, and punishment of offenders so as to promote public security. In doing so, the constitution tries to balance the interest of arrested/accused persons and the public in general. Such constitutionally guarantees interests may be affected by the process of plea bargaining as dropping of some of the charges or prosecuting a defendant with a lesser crime than the facts testifies or/and intentionally missing some of the facts of a crime is contrary to such constitutional guaranteed interests of the public. Furthermore, imposing disproportionate and more lenient sentence for a serious crime is contrary to the very interest of public order and security. The private negotiation between prosecutor and the defendant may not balance the interest of the community with the defendant so that the public may believe that the prosecutor is not representing the community and justice is not achieved.[102] What the public might feel if the negotiation does not reach to an agreement, for any reason, is that it is not effective and the suspect is set free as provided in the policy despite that there exists sufficient facts to which the public knows. This is a clear instance of causing insecurity to the public which may also encourage citizens to break laws. There is also a concern that plea bargaining defeats

[102] Jay S. Albanese, Criminal Justice, 3rd edition, Pearson Education, Inc. United States of America, 2005, pp 332 & 339, (hereinafter Jay, Criminal Justice)

the essence of the constitutional duty of the state to prove each ingredient of a crime.

The implication of plea-bargaining shall also be seen in relation to corruption. Transparency International reported that corruption is a problem for every country, though may vary in terms of magnitude.[103] The same organization, in its 2014 published annual corruption index, reported that Sub-Saharan African countries have been suffering from severe corruption crimes.[104]

Ethiopia has been striving to tackle corruption by providing legal and institutional frameworks such as the establishment of the Federal and Regional Anti-Corruption Commissions and the laws criminalizing corruption. Measures have also been started against corrupt officials or individuals as well as organizations. Yet, the effectiveness of the crusade against corruption remains to have been ineffective. For instance, the Office of Global Financial Integrity (GFI) reported that the amount of money that Ethiopia lost to smuggling of cash out of the country, both by the government and private sector between 2001 and 2010, was worth of 16.5 billion US dollars.[105] Similarly, according to Transparency International, 44% of surveyed respondents in Ethiopia, who had come into contact with one of the surveyed public service institutions, paid bribes.[106] A recent report by the same organization also reported that Ethiopia ranks 110 out of 175 surveyed

[103] See. e.g., Transparency International, Corruption Perceptions Index, at WWW <http://cpi.transparency.org/cpi2013/>, (accessed on 3 December 2014).
[104] Ibid.
[105] "How big is Corruption in Ethiopia?" Tadias Magazine, May 13th, 2013.
[106] Transparency International, Supra note 103.

countries.[107] The report, in fact, indicated improvements compared to the previous records though some have challenged this stand as the level of corruption in the country is still serious.[108]

The impact of corruption particularly in the criminal justice administration undermines not only the peaceful resolution of conflicts but also destabilizes the control of corruption in other sectors and makes the rule of law futile.[109] The World Bank added that many judges and court officials were taking advantage of the procedural deficiencies to the point that, in terms of probity, more corruption occurs then than before 1991 in Ethiopia. [110] The FDRE comprehensive justice system reform program baseline study also identified that there was serious corruption offenses.[111] Recent studies similarly reported that corruption in the administration of justice is still rampant even after the justice reform programs since 2002.[112]

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[107] Ibid.

[108] Ibid, the report clearly states that countries scoring less than 50 out of 100, about 70 percent countries, are perceived to have serious corruption problems. As Ethiopia scores 33, it is one among those countries which are perceived to have serious corruption.

[109]Gloppen Siri, Courts, Corruption and Judicial Independence, at WWW <http://www.cmi.no/publications/publication/?5091=courts-corruption-and-judicial-independence> ; See also Plummer, Janelle, Diagnosing Corruption in Ethiopia: Perceptions, Realities, and the Way Forward for Key Sectors, in Plummer Janelle, (ed), Justice Sector Corruption in Ethiopia, The World Bank, Washington DC, USA, 2012, at WWW <http://www.worldbank.org.>, (accessed on15 February 2015).

[110] World Bank, Ethiopia Anti-Corruption Report, 6, site resources.world bank.org/CFPEXT/.../ETHIOPIA Justice_Ireland.pdf/.

[111] Vibhute, Supra note 87, at 36.

[112] In 2002, the Government of Ethiopia established, under the authority of the FDRE Ministry of Capacity

The Ministry of Justice and Justice Bureaus, in 2010, confirmed that criminal investigation, by the police and the public prosecutor, was not effectively undertaken and disciplinary problems in prosecution process remains widespread.[113] According to the report, the most common form of corruption involves bribes solicited by or offered to police to ignore a criminal offense, not to make an arrest, or not to bring witnesses or suspects to court.[114]

The private negotiation between a suspected individual and a prosecution makes the criminal justice administration vulnerable for abuse in the context of already existing corrupt practices. It also looks like defendants are negotiating their way out of criminal responsibility. Thus, introducing plea bargaining in Ethiopia in the current state of corruption, though in majority of the cases are petty, in the justice administration may create the impression that plea bargaining allows defendants to "pay their way" out of jail or drastically reduce prison time or lesser charges. Studies identified that countries facing larger governance and rule of law deficits like corruption, poor respect for human rights, or lack of independence in the judiciary may find that plea bargaining reflects and amplifies these problems.[115] Thus, introducing plea bargaining in such situations in the criminal justice administration of Ethiopia may reinforce the existing corruption in the criminal justice administration.

Building, the Justice System Reform Program (JSRP) "to assess the performance of the various institutions of

justice and to propose appropriate reforms". The government has been doing lots of reforms though the perception of corruption and transparency is still very high.

[113] Ministry of Justice & Region Justice Bureaus (Justice Sectors), Five Years (2010/11-2014/15), Strategic Plan, 2010, at 24.

[114] Ibid.

[115] INTRL, Supra note 100, at 11.

It is undeniable that plea bargaining is important to get evidences which otherwise would be unlikely but through the help of a co-offender after plea negotiation. Yet, the informal negotiation between the prosecutor and the accused and consequently dropping of some of the charges or missing some facts of a case or granting disproportionate sentence may counter the crusade against corruption.

Another issue to be considered is the state of public confidence on the criminal justice administration. If a criminal justice system permits perpetrators to go unpunished, victims of crimes are denied access to justice and inequality would be amplified. This undermines good governance, fuels impunity, undercut the rule of law and ultimately erodes public trust.[116] Public trust may be lost also due to the low quality of criminal justice as a public service, the incapacity of legal institutions to exact retribution from offenders and expressively condemn crime, and the disparities in the administration of criminal justice.[117] It is claimed that "the justice system is one of those public institutions that inherently relies on public confidence…. the crisis of public confidence is almost as serious as a breakdown in the system itself…"[118] If the system is not trusted, people do not prefer to go to the justice institutions when they are injured so that crimes may continue to go unreported. Instead, people may get angry, cynical to the system and jaded of it as well as needlessly afraid of it. In

[116] Ibid.
[117] Wesly G.Skogan, cited in Jeffrey Fagan, Legitimacy and Criminal Justice, Ohio State Journal of Criminal Law, Vol. 6, No.123, 2008, at 124.
[118] INTRL, Supra note 100.

this regard, Harvey Sims identified that criminal justice system that has lost public trust is itself a lost system.[119]

Wandell found that there is very low public trust in the criminal justice system of Ethiopia.[120] Similarly, the Ministry of Justice BPR study indicates that the level of public trust on the criminal justice system is 33%.[121] The Ministry of Justice and Justice Bureaus also indicated that it has been impossible to ensure the interest of government and the public from crime threat so that the public feels a lack of credibility toward the justice administrations.[122] These examples show that the majority of the people do not have confidence in the justice system. The general public lacks confidence in the justice system because crimes are not properly investigated so that criminals are not brought to justice in return for bribes or other kinds of corruption or reluctance of the police and the prosecution. There is no room for the public, unlike the court trial, to observe while the accused agrees with the prosecutor.

The clandestine negotiation between the accused and the prosecutor may tempt them to get into some kind of unwanted negotiation or people may not trust such kinds of deals even though parties acted properly. Studies found that plea bargaining is vulnerable to abuse of power by the investigating

[119] Sims Harvey, Public Confidence in Government, and Government Service Delivery, at WWW < http://www.ginareinhardt.com/.../Public-Confidence-in-Government-and-Gove>, (accessed on 31 March, 2015).
[120] Rasmus Wandall, Trust, Law, and Functionality in Criminal Justice, at WWW <http://www.uib.no/prosjekt/srf/73199/trust-law-and-functionality-criminal-justice>, (accessed on 31 March 2015).
[121] Ministry of Justice, Criminal Justice Administration, Supra note 88.
[122] Ministry of Justice & Region Justice Bureaus, Supra note 113, at 26.

officers.[123] Prosecutors may concentrate on inducing suspected individuals rather than to properly investigate the crime which may backfire if plea bargaining is entered after proper investigation[124] so that the role of the public prosecutor may be under question. More importantly, prosecuting a criminal with less serious crime than what the fact manifests or dropping some of the charges or some of the counts as well as intentionally missing some facts of a crime make people to develop distrust towards the criminal justice system. If so, crimes may not be reported and self help could dominate the system. Thus, the informal nature of plea bargaining in such a state with low public trust in the criminal justice administration could have a serious impact on the overall perceptions of the legal system as it helps reinforce existing lack of trust in the criminal justice administration. Tyler found that people who distrust the justice institutions and their decisions are less likely to obey it.[125] While the police, the prosecution and the courts depend heavily on the voluntary cooperation of citizens to fight crime, a decline in public trust and confidence would undermine such cooperation so that law breaking could worsen.

An interesting issue that shall be considered while talking about plea bargaining is the tendency of the general public towards customary justice systems. As pointed out above, the formal justice sector has been viewed as corrupt, as removed from local sensibilities and solutions, and as failing to

[123] Josep J. Senna & Larry J. Siegel, Supra note 56.
[124] Jay S. Albanese, supra not 102, at 332
[125] Tom Tyler, Why People Obey the Law, cited in Jeffrey Fagan, Legitimacy and Criminal Justice, Ohio State Journal of Criminal Law, 2006, Vol. 6, No. 123, at 126.

act due to chronic inefficiency. There has been deep rooted mistrust of the formal justice system in Ethiopia.[126] To the contrary, local customary justice system is considered as accessible, cost effective, appropriate and more trusted to the majority of the public. Thus, studies hold that if plea bargaining is introduced in a criminal justice system where there is low public confidence due to corruption or perceived corruption, the public view it, due to its very nature discussed so far, as another example of the failure of the formal justice system.[127] The International Network to Promote the Rule of Law (INPRL) warned that "…countries with a tradition of using customary justice processes for criminal cases may face additional challenges in adopting and implementing plea bargaining".[128]

Similarly, the study by Macfarlane indicated that the criminal justice system was highly inefficient as it took second place to informal systems in many parts of the country. Moreover, he found that most of the rural and village communities did not refer complaints to the police or prosecuting authorities, but preferred to deal the matter using traditional tribal processes.[129] Even in many parts of the country, neither the commission of crime is reported to the police nor are witnesses willing to testify against the offender due to strong attachment of the public with the customary justice system.[130] Thus, introducing plea bargaining in the formal criminal justice system of Ethiopia,

[126] Macfarlane Julie, Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System, Cardozo J. of Conflict Resolution, Vol. 8, No., 487, 2007, at 497.
[127] INPRL, Supra note 100, at 19.
[128] Ibid.
[129] Macfarlane, Supra 126, at 500.
[130] Jetu Edossa, Mediating Criminal Matters in Ethiopian Criminal Justice System: The Prospect of Restorative Justice System, Oromia Law Journal, Vol. 1, No. 99, 2012, at 125 .

where there is low public confidence and high inclination to the local customary criminal dispute resolution, would not only amplify the public's distrust towards the formal criminal justice administration but also amplify the existing state of low level of crime report. This is extremely counterproductive to the role of the formal criminal justice system at least in those serious crimes.

4.3. The Choice of Viable Solution to the Criminal Justice Problems in Ethiopia

The major reason that is always mentioned for plea-bargaining is in relation to its role to reduce caseloads and contributes to reduce backlogs so that enhance efficiency and effectiveness of the criminal justice administration. The same justification is clearly provided in the criminal justice policy of Ethiopia as far as the adoption of plea bargaining is concerned.[131] Based on the very nature of plea-bargaining as discussed so far, INPRL in its study warned that importing plea- bargaining may not remedy the criminal justice problem if case backlogs are due to delayed investigations, or lack of cooperation or meager resources allocation etc.[132] As reaffirmed in the policy, studies found that high backlogs of cases have been common in the criminal justice administration of Ethiopia.[133] Thus, the criminal justice administration remains to have been costly, ineffective and inefficient. However, this does not mean that the justice system is as it was. Studies have shown that improvements have been observed, especially when BPR

[131] CJP, Supra note 78.
[132] INPRL, Supra note 100, at 20.
[133] Ministry of Justice, Criminal Justice Administration, Supra note 88.

was introduced, in various aspects of the justice administration including from the perspective of time, cost, quality, accessibility etc.[134] However, the root causes to court backlogs is due to various factors; not necessarily and exclusively relating to court time shortage for trials. In fact, the writer is not dismissive of the real time shortage of court time for trial at least in some courts in Ethiopia. However, the problem of caseload and the consequent backlogs is, in majority of the cases, a function of various other factors. Even studies came up with a surprising finding that caseloads pressure is not a necessary factor for plea bargaining as courts with low case loads were found to have higher plea bargaining instances than courts with higher caseloads.[135] This is to mean that plea bargaining appears to come from other factors, at least partly, than caseloads. Studies, commissioned by the FDRE government or international research institutions, confirmed that case backlogs is the function of delayed investigations, weak institutional capacity and limited resource allocation. According to CJSRP baseline study, the response of the police, while ordered by the prosecutor for further investigation manifested prolonged delay to the extent of five years time span.[136] This is also confirmed in the Ministry of Justice BPR study that about four years and a month could take for investigation, trial and conviction a criminal.[137] There was, in practice, "…a permanent lack of PPS [Public Prosecutors] supervision over the police during the investigative process."[138] The study further reported that at the High Court and First

[134] Ibid.
[135] Jay, Supra note 124, at 332; and see also Joseph J. Senna and Laay J. Siegel.
[136] World Bank, Supra note 110, at 100.
[137] Ministry of Justice, Criminal Justice Administration, Supra note 88.
[138] World Bank, Supra note 110, at 100.

Instance Court levels, there were no formal communications and cooperation about problems of the criminal justice administration such as backlogs and the summoning of witnesses. Instead, it was reported that, the relations were often negative and lacking mutual respect.[139]

The Ministry of Justice five year strategic plan study document, even after considerable years and so many reforms, also admitted that criminal investigation, by the police and the public prosecutor, have not yet been effectively undertaken to meet deadlines of the standard time.[140] To believe that there is no real court time for trials resulting in case backlogs, there must be proper resource allocation and coordinated effort with in the criminal justice process so as to meet deadlines within the standard time. However, the study acknowledged that citizens used to spend on ample-time without responses to their cases owing to lack of cooperation among the justice organs, especially, the police and the prosecutors so that the number of cases discontinued due to the non appearance of the accused and witnesses before a court have been increasing so that inefficiency and ineffectiveness would come.[141] It added that the system designed to enable prosecutors work with police in collaboration is not sufficient. Additionally, failures of prosecutors to appropriately examine police files and prepare quality charges are important factors for inefficient criminal justice administration. The study document further makes clear that, for a long time, prosecutors' performance

[139] Ibid, at 99.
[140] Ministry of Justice & Region Justice Bureaus, Supra note 122, at 26.
[141] Ibid, at 26 and 24.

has been ineffective and inefficient.[142] Nonetheless, readers should note that the writer does not disregard the improvements particularly after BPR though the measures taken were not based on binding legal frameworks.

All these examples show that what exists as a problem in the criminal justice administration of Ethiopia is inefficient investigation, meager resource, and lack of cooperation among justice organs. Though there may be shortage of time for trials in some instances, this is not well supported by the aforementioned studies or may not be a significant problem, at least for the time being. Studies identified that even though plea bargaining was introduced in some jurisdictions as a means to lessen caseload, so many courts have practiced plea bargaining in the absence caseloads.[143] In this case, plea bargaining by no means is a solution to ease caseloads, instead the justice machineries may be encouraged not to handle their responsibility as diligently as possible or it may encourage the government to allocate the required resource and infrastructure. If so, other kinds of alternative way outs, with insignificant potential downsides, may be suitable to overcome the existing problems. Indeed, since recently substantial improvement on court backlogs in the criminal justice administration has been recorded wherever BPR and RTD (Real Time Dispatch) systems have been properly administered in the criminal justice administration of Ethiopia.[144] This

[142] Ibid, at 28.
[143] Josep J. Senna & Larry J. Siegel, Supra note 56
[144] Supra note 68: according to the report some Supreme Courts in five states in Ethiopia including Harari, Gambella, Tigray, Amhara and Benshangul and the state of case backlogs in High and First instance courts in Tigray, Amehara and Bensgangul Gumz did not have backlogs and have no cases pending longer than a year respectively owing to the introduction of BPR and RTD.

indicates the possibility to minimize or even avoid case backlogs in the criminal justice administration so that efficient and effective justice administration could be achieved without exposing the system for serious risks through plea bargaining.

If root causes of huge caseloads and backlogs are relating to the aforementioned problems, plea-bargaining can by no means be a solution to such critical problems. Importing plea-bargaining, in the context of diverse problems in the current Ethiopian criminal justice administration may backfire and destabilize the system. Langer, in his well known article, cautioned that legal reformers must carefully consider the situation and context of the receiving criminal justice administration and the legal cultures before introducing plea bargaining.[145] He suggested that careful analysis concerning both the original and receiving legal systems must be made. According to him, plea-bargaining may potentially act as a Trojan horse by bringing the logic of a foreign system concealed within it to the receiving system may be quite different from the former one in various aspects.[146] The power relations among justice organs, the societal conception of crime, the criminal justice administration, and the overall value choices is quite different in Ethiopia from America where plea-bargaining was originated and developed. Thus, in addition to being not a real solution to the problems, introducing plea bargaining in the FDRE criminal justice system may counter, with unbearable social consequences, everything relating to the

[145] Langer, Supra note 79, at 30.
[146] Ibid, at 38.

criminal justice administration. However, it may be possible to apply plea bargaining at least to minor crimes which may help the prosecutor to concentrate energy and resource on serious crimes and where the negative effect of the system may not be as such significant.

Conclusion

The policy of plea bargaining allows the prosecutor to prosecute defendants with less serious charges or may drop some of the charges or may intentionally miss some of the facts as well as to guarantee with the defendant more lenient sentence. The policy urges the legislature to amend the existing laws in order to incorporate plea bargaining into the upcoming draft criminal procedure code.

Letting defendants negotiate with the prosecutor to waive constitutionally protected due process rights is not proper to the government and would be against the various rights of accused persons including the right to presumption of innocence, the right to public trial, and prohibition against self incrimination. Furthermore, prosecuting a criminal for a lesser charge while the facts support for more serious crime in return for a plea negotiation, such as homicide for bodily injury or rape for assault is quite against the principle of legality. This also hinders the societal role of condemning a criminal act and culpability. Interestingly, the improportionality of the seriousness of a crime and the corresponding penalty, after plea bargaining, is an instance of deterrence and may serve as a breeding ground for repeat offenders. It may also cause a public to be cynical to the formal justice system as such more lenient and disproportionate sentence disregards the just

desert function of punishment and such lenient sentence is a result of informal negotiation between a defendant or his counsel and the prosecutor.

That is the reason why many empirical studies have warned governments to be careful for the potentially negative outcomes of plea bargaining to the existing administration of justice. Principally, plea bargaining, by its nature, should not be taken as a proper solution to the problem of caseloads and the consequent backlogs in the Ethiopian criminal justice administration in the face of corruption or perceived corruption within the sector and in the state of very low public confidence on the same. In addition, the general public has a trend to resort to customary criminal dispute which is highly incompatible with the nature of plea bargaining. Needless to say, the problem of efficiency and effectiveness in the criminal justice administration is mainly due to lack of proper investigation of crimes, lack of coordination among the justice machineries and meager resource and inadequate infrastructure. Moreover, problems relating to poor case management, poor resource allocation, lack of integrity within the justice organs and executive interference might have resulted in the existing caseloads. Shortage of time for court trial is not a significant problem at least for the time being. It is likely to have effective and efficient criminal justice system if concerted efforts will be excreted to improve the aforementioned root causes of inefficient justice administration together with restorative justice on some kinds of crimes. Allowing informal negotiation between the accused and the prosecutor and letting the suspect free if the negotiation is not ended with agreement would push the public to insist on customary justice systems in which there may be a possibility of

achieving retribution through forgiving the perpetrator or if it fails self-help may take the system away. Therefore, the writer suggests that plea bargaining is not a viable option for Ethiopia at least for the time. If legislatures insist on it, it must be limited to minor crimes which must also be made after thorough public discussion.

Apprising Constitutional Amendment in Ethiopia: Vexing Questions and Qualms

Zelalem Eshetu Degifie♣

Abstract

The Federal Democratic Republic of Ethiopia (FDRE) Constitution sets forth procedures to guide actions concerning constitutional amendments. This study examines the nature of amendment procedures adopted under the Ethiopian legal system based on comparative and analytical approaches and finds that they are not clear and sufficient enough to guide the process. Moreover, the study demonstrates that the amending provisions of the Constitution has left many issues pertaining to constitutional amendments perplexing and unanswered, which in turn creates uncertainty in the process of formal constitutional changes. Finally the study strongly recommends the amending clauses of the FDRE Constitution to be revisited and a detailed law dealing with constitutional amendment procedures to be enacted, in order to correct the gaps on the issues of initiation, ratification, publication, timeline for actions, public participation and reversals.

Key words: Amendment procedure, constitution, Ethiopia, initiation, public participation, ratification

Introduction

A constitution is the supreme law of a state and embodies the fundamental

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choices made by the people on political life of the country. A constitution establishes the system of government and it also distributes and limits power, protects the rights of citizens and deals with various additional issues considered as foundational in the specific context of that particular country.[1]However, while a constitution is intended to be foundational, it is not projected to bind the country for all times to come. A constitution adopted at one time in a particular political context may be found insufficient in another time. As a result, there may be a need to change its provisions to make it suitable to the new changing circumstances and reality.[2]

Formal constitutional amendments which are carried out based on constitutionally stipulated rules and procedures are one of the mechanisms for such changes.[3] This enables each generation to acclimatize a constitution with the contemporary needs in a proper and peaceful manner without

[1] A.V Dicey, An Introduction to the Study of the Constitution, 10th edition, Universal Law Publishing Corporation, New Delhi,2008, pp. 1-39. England, Israel and New Zeland are the only countries without a written constitution in the sense that their constitutional principles are dispersed throughout ordinary legislations.

[2] Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law, Public Law and Legal Theory Working Paper Series, University of Chicago, September 2004, pp.1-15.

[3] Besides the formal constitutional amendment mechanism, constitutional change can also be brought informally through constitutional interpretation and political adaptation. Constitutional interpretation brought gradual revision of the constitutional framework. By judicial interpretation, the existing provision of the constitution may get a new meaning without there being any formal amendment to the constitution. Besides, unintended revision of the constitutional framework can also be brought through political adaptation by the legislative and executive bodies. According to Donald Lutz, when we compared these modes of constitutional changes, political adaptation and judicial interpretation reflects declining degree of commitment to popular sovereignty. For more see; Donald Lutz, Towards a Theory of Constitutional Amendment, The American Political Science Review,Vol.88, No.2, June ,1994, pp.355-370.

recourse to a forcible revolution.[4] The principle of popular sovereignty[5] is one of the basic assumptions behind the existence of amendment rules for formal constitutional changes. This principle requires a constitution to be made based on the consent of the people. As long as the constitution emanates from the consent of the people, it is certain that the people themselves should amend and change its provisions.[6] Moreover, the nature of a human being also justifies the need for amendment procedures. As fallibility is part of a human nature, subsequently, amendment procedures need to be made to compensate flaws and limitations on the constitution that may be experienced through time and practice.[7] On this point of view, Sir. Ivor Jennings provides that "… *it is impossible for the framers of a constitution to foresee all the conditions in which it would apply and the problems which will arise. They have not the gift of prophecy.*" [8] Thus, the very nature of a constitution necessary requires formal procedures to be made for its amendment. As a result, constitutions explicitly provide an amendment procedure that would allow it to stand the test of time.

This article examines the formal amendment procedures adopted by the

[4] Ibid, See also: Vicki Jackso and Mark Tushet, Comparative Constitutional Law, Second edition, Cambridge University Press, New York, 2006, pp. 201-203 & 309-310.

[5] Popular sovereignty is one of the principles in constitutional law .This principle requires constitutions to be written by a popularly selected convention rather than the legislator and ratified through a process that obtained popular consent-ideally-in a referendum. The principle implies that all constitutional matters should be based up on some form of popular consent, which in turn implies a formal public process. Thus, the principle requires the making of a constitution as well as its change to be rested on popular consent.

[6] Vicki Jackson and Mark Tushet, Supra note 4 at pp.310-12.

[7] Ibid and see also; Donald Lutz, Supra note 3 at pp.357-359.

[8] Ashok Dhamija, Need to Amend a Constitution and Doctrine of Basic Features, Revised 1st edition, Wadhwa and Company Nagpur Law Publisher, New Delhi, 2007, pp. 13-14.

FDRE Constitution from a comparative perspective and highlights some issues worth considering. The first section presents constitutional amendment procedures adopted under the Ethiopian legal system. The second (and main) section, discusses dubious issues pertaining to amendment procedures. Under this section, doubtful and baffling issues relating to initiation and ratification of amendment proposals, public participation, timeline and publication, reversals and the nature of institutions engaged in the process are discussed thoroughly; thereafter, final conclusions are drawn.

1. Constitutional Amendment Procedures in Ethiopia: A Descriptive Approach

The FDRE Constitution under Article 104 and 105 sets forth the procedures for formal constitutional changes. These provisions, based on a multi-track approach[9], lay down rules which have to be observed in the process of constitutional amendments. Accordingly, Chapter Three of the Constitution, which deals with human rights and fundamental freedoms, and the amending clauses themselves, are amended with a two-thirds vote in both House of Peoples' Representatives (HPR) and House of Federation (HF) and the

[9] In a uni-track approach, the same procedures are used for amending all provisions of the constitution. Where as in multi track approach, different amendment procedures are used depending upon the subject matter of a proposed amendment. Then, all amendment issues have not been addressed based on the same procedure. One of the rationales for adopting such approach is to increase public attention and deliberation up on amendment of some political matters. By providing a stringent procedure, for amending such issues, the constraint increase public attention and improve deliberation up on the decisions. All these, in turn, promote the role of reason in the process of constitutional amendment, and create a delay that can give passions time to cool dawn. For more see: Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective, The University of Chicago, Chicago Public Law and Legal Theory working paper No. 347, May, 2011, pp. 102-105.

support of all state councils with a simple majority.[10] Other provisions of the Constitution can be amended with a two-thirds vote at the joint session of both houses, and with the support of two-thirds of the state councils by a majority vote.[11] Moreover, the Constitution requires submission of the proposed amendment to the general public for discussion and decision.[12]

The same multi-track approach is employed in South Africa where the Constitution sets forth three sets of procedures for its amendment. Amendments that purport to change the constitutional principles found in Section 1 require the uphold of three-fourths of the members of the national assembly and six provinces in their national councils, which vote as a block.[13] The values of human dignity, non-racialism and non-sexism,

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[10] The Constitution of the Federal Democratic Republic of Ethiopia,1995, Article104 and 105, Proc. No. 1, Neg. Gaz. Year 1st , No.1 (Here in after the FDRE Constitution)

[11] Ibid.

The Ethiopia legislature consists of two houses, the House of Peoples' Representatives and the House of Federation which is the second chamber composed of representatives of Nations, Nationalities and Peoples. Moreover, the federal system consists of nine regional states; each has their own state councils, which is the legislative body at regional level.

[12] Article 104 of the FDRE Constitution.

[13] Article 74 of the South African Constitution is the amending clause which sets forth the procedures for constitutional amendments. This provision was debatable during the constitutional making process. The procedure agreed for the making of the new constitution required it to be passed by a 2/3 vote of the legislature and then reviewed by the constitutional courts to determine whether the constitution fully complied with the 34 basic principles. On the process of certification, the constitutional court provided that "the constitution did not sufficiently comply with the (34) principles. Among these, the court found that the constitution's provisions permitting parliament to amend the bill of rights provisions by a two thirds vote is not adequately sufficient to entrench those rights: something beyond a mere large majority in the ordinary parliament is required" and finally, the court refused to certify it and found that the draft constitution is not constitutional. Latter on the amending clause was reconsidered. For more details on the matter see: the Certification Case; in re-certification of the Constitution of the Republic of South Africa

supremacy of the constitution, the rules of law, universal adult suffrage, regular election, multiparty system, and the democratic character of the government are the principles which are amended in the aforementioned manner.[14] The second set of procedures is for changing Chapter Two of the Constitution, which deals with the Bill of Rights. This can be amended by a minimum two-thirds vote in the assembly and with the support of at least six of the provincial national councils.[15] The same procedure is also applicable if the amendment relates to matters that affect the national council of provinces, the boundaries, powers, functions and institutions of the provinces, and a provision that deals with the provincial matters.[16] If the change affects a specific province, it must be approved by the legislature of the province concerned.[17] Other provisions of the Constitution require the prop up of two-thirds of members of the national assembly without any further requirement.[18]

The Ethiopian and South African experiences suggest the existence of more than one procedure for amending constitutions, which signals the special protection accorded for certain provisions and indicates the wish of the

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1996, (4) S.A. 744, 776-79(Constitutional Court Sept. 6, 1996) South Africa. For more on the area see: Vicki Jackson and Mark Tushet, Supra note 4 at pp. 326-329.

[14] Article 74(1) of the South African Constitution (1996).
South Africa has a bicameral parliament consisting of the national assembly and the national council of provinces. The national assembly consists of 400 representatives elected on the base of proportional representation. The national council of provinces consists of 90 members representing the particular interests of the nine provinces and ensures that those interests are not seriously abrogated by the central government. (See: See Section60-72, 42(4) of the South Africa Constitution).

[15] See Section74(2) of the South African Constitution.

[16] See Section74 (3) of the South Africa Constitution.

[17] See Section74 (2) of the South Africa Constitution.

[18] See Section74 (2) of the South Africa Constitution.

framers to create a hierarchy among constitutional clauses according to their importance.[19] As a result, framers attached special protection for certain provisions through prescribing more stringent procedures for their amendment. In South Africa, the stringent procedure is the three-fourths majority requirement in the national assembly and two-thirds of province's support in the national council of provinces.[20] Therefore, those parts of the constitution amended in pursuance of these procedures are considered as having special protection under the South African constitutional system.

The same is true for the FDRE Constitution, which forwards more stringent procedures for amending Part Three of the Constitution dealing with the Bill of Rights and the amending clauses.[21] This stringency reveals that the framers of the constitution intended to accord special protection for those provisions recognizing fundamental rights and freedoms. In addition to this general connotation, the stringency used under the Ethiopian amending clauses has some specific implications. As the Minutes of the Constitutional Assembly that ratified the constitution reveals, the stringent procedures have been inserted to protect a provision which specifically deals with nations, nationalities, and people's right to self- determination to secession.[22] So, the

[19]Carlos Closa, Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States, at WWW <http:// www.academia.edu>, (last acceded on 13 May 2013), pp.296-297.
[20] See Section74 (1) of the South African Constitution.
[21] Article 105 of the FDRE Constitution.
[22] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.

multi-track approach adopted by the FDRE Constitution on its amendment demonstrates the deep desire of the framers to accord special protection for human rights in general, and the rights of nations, nationalities and peoples in particular. Moreover, it also signifies that the human right provisions in general and the provision that deals with the rights of nations, nationalities and peoples in particular are the more important ones and they are at the first rank in terms of hierarchy when compared to other provisions of the constitution.

2. Troublesome Questions About Amendment Procedures in Ethiopia: Critical Observations

Some form of formal amendment procedures are a near-universal feature of contemporary constitutions. In consequence, for constitution makers, the relevant question is not so much whether there should be a provision addressing formal amendments, but what needs to be considered while drafting it.[23] As the study conducted by Dhamija revealed, amendment procedures, which are formulated as per the condition of the particular country, are different among constitutions. Nevertheless, whatever the difference may be in terms of its nature, a satisfactory amendment procedure demands at a minimum clear and understandable rules which must be certain, stable and reliable to guide actions concerning formal constitutional

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As the minutes indicate much of the debates during the constitutional making process were on the right of nations, nationalities and peoples self-determination to secession, which is incorporated under Article 39 of the current FDRE Constitution.

[23]Ashok Dhamija, Supra note 8 at pp. 7-17 & 281. The level of development, the heterogeneous or homogeneous nature of the society, the multicultural character, the past history, and the size of the population are important variables considered on designing the amendment formula of a country.

changes.[24]

Article 104 and 105 of the FDRE Constitution which govern the amendment process are designed to ensure an orderly constitutional change by reducing uncertainties on the process of constitutional amendment. Unfortunately, these provisions themselves create uncertainties and ambiguities. The procedures stipulated under these provisions are not sufficient to guide the course of action and therefore they do not give answers for many questions that might be raised on the route of constitutional amendments.

2.1 Rules for Initiating Constitutional Amendment Proposals

Although a rule of initiation that defines the organs legitimately authorize to kickoff the amendment bill is important component of an amendment procedure, it may not be necessarily provided and determined by constitutional provisions. In Germany and South Africa, for instance, the issue is not addressed through their constitutions.[25] In such cases, initiation of constitutional amendment proposal is assumed to be carried out in the same manner as to ordinary legislations. And consequently the parliamentary working procedures for amending ordinary laws will be applied.[26] However,

[24] Walter Dellinger, The Legitimacy of Constitutional Change; Rethinking the Amendment Process, Harvard Law Review ,Vol. 97:386, 1986, pp.386-432 ; Lynn A. Fishel, Reversal in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Right Amendments , Indiana Law Journal, Vol.49 Issue 1, article 8,1973, p.148.
[25] Carlos Closa, Supra note 19 at p. 291; Charles M. Fombad, Limits on the Powers to Amend Constitutions: Recent Trends in Africa and their Potential Impact on Constitutionalism, Paper Presented at the World Congress of Constitutional Law, Athens, Greece, 11-15 June, 2007, pp. 20-21.
[26] Ibid.

some like the United States of America (US) and the Indian Constitutions make available the issue of initiation under their texts. In such scenarios, proposing an amendment is carried out based on the rules set under the constitutional provisions.[27]

As the legislature is considered the representative of the people, a sufficient role has to be placed on it in order to ensure the indirect participation of the citizens in the process of initiating amendment proposals. In addition, the people may take part in the process directly by presenting before the national assembly a petition containing the proposals for an amendment.[28] Both of these means of initiations are squaring with the principles of democracy that demands the citizens to take an active role in the political affairs of their country.[29] Hence, constitutional amendment proposals may be initiated either by legislatures or directly by the citizens themselves.

In the US, for instance, the Congress with a two- thirds majority or a convention may initiate constitutional amendments.[30] Application for a convention is made by two-thirds of the states and Congress calls it for considering and proposing amendments.[31] The Indian Constitution also

[27] Article V of the US Constitution and Article 368 of the Indian Constitution.
[28] Carlos Closa, Supra note 19 at p. 291; Charles M. Fombad, Supra note 25 at pp. 20-21.
[29] Ibid.
[30]Article V of the US Constitution. In the USA, all the 27 constitutional amendments are proposed in this way.
[31] Ibid, Convention is a deliberative body capable of assessing, from a national perspective, the need for constitutional change, and drafting proposals for submission to the states for ratification. This Article V conventional method has never been used and many questions exist about the its use. Some of the questions related to the scope of the convention, the role of the congress, the relevancy of the method and the way how state applications can be entertained. Practically this method of proposing an amendment has never been used in the US. More on the area see: James K. Rogers, The Other Way to Amend the Constitution: the

provides that amendment can be proposed by either House of the Parliament.[32] As the US and Indian Constitutions demonstrate legislative initiation is the primary means for making constitutional amendment proposals. Some constitutions, as further examples, like that of Burkina Faso and Switzerland also use popular initiation as a means for initiating amendments. In Burkina Faso at least 30,000 citizens qualifying to vote can present before the national assembly a petition containing the proposals for an amendment of the Constitution.[33] The same is true for Switzerland, where the people may initiate a partial or complete revision of the Constitution by collecting 100,000 signatures.[34]

However, in federal countries whose constitutions represent an agreement between the various units maintaining the democratic principles of popular participation is not sufficient. The federalism principle should also be retained by enabling constituent units to initiate amendments.[35] In Brazil, for instance, amendment proposals may be initiated by more than half of the legislative assemblies of the states. In Spain, the legislatures of the constituent units have also the power to initiate amendments.[36] However, in some federations, the power to initiate proposals is not directly given for the

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Article V Constitutional Convention Amendment Process, Harvard Journal of Law and public policy, Vol. 30, No.3, pp. 1006-1022.

[32] Article 368 of the Indian Constitution.

[33] Charles M. Fombad, Supra note 25 at pp.6-20.

[34] Article 104 of the Switzerland Constitution.

[35] Anne Twomey, The Involvement of Sub National Entities in Direct and Indirect Constitutional Amendment with in Federations, at WWW http://www.camlaw.rutgerg.edu?statecon/workshop11 grecce97/workshop11/Twomey; pdf >, (last acceded on 12 May 2013).

[36]Article 60 of the Brazilian Constitution: See Section69 of the Spain Constitution.

constituent units. Rather it is given to the second chamber, which mostly comprises their representatives. In India, for instance, the council of the states that consists of representatives of the constituent units who are elected by their legislative assemblies has the power to initiate constitutional amendments.[37]

In Ethiopia, the rules on initiation of constitutional amendments are provided under Article 104 of the Constitution, while the organs having the power are not clearly apparent from it.[38] Much of the confusion comes from the ambiguous language of the constitutional provision. Although its title is about initiation of amendments, the content of the provision gives an impression that the power proclaimed under it is to vote on proposals, made by other bodies, for the purpose of submitting them to discussions and further decisions. The literal interpretation of Article 104 of the Constitution dictates that the House of Peoples' Representatives, the House of Federation and one-thirds of the state councils have the power to rule on (support or not to support) proposals made by others for the purpose of tabling them for discussion. This way of literal interpretation has been endorsed by some scholars. For instance Dr. Monga Fombad argued that the Ethiopian Constitution is silent on defining the bodies who can initiate constitutional amendments and then he concludes that the normal procedures for amending ordinary laws are applicable.[39]

However, this is not what was conceived by the framers of the Constitution

[37]Article 368 of the Constitutions of India.
[38]Article 104 of the FDRE Constitution.
[39] Charles M. Fombad, Supra note 25 at pp. 10-11.

who intended to give the power to initiate constitutional amendment for the HPR, HF and state councils.[40] Ironically, this intention has not been clearly reflected in the final text of the Constitution that has been, later on, replicated through the Joint Working Procedure Regulation, which empowers both the HPR and HF with a two-thirds majority to initiate constitutional amendments.[41] In addition, one thirds of regional state councils can also initiate amendments. Therefore, it is possible to conclude that in Ethiopia, the HPR, the HF or one-thirds of state councils of the regional states have the power to initiate constitutional amendments.

Another confusion on the rule of initiation results from the apparent discrepancy between the Amharic and English version of the constitutional provision.[42] In the English version of Article 104, HPR and HF are listed alternatively. The provision uses the conjunction 'or', which implies that either the HPR or the HF with a two-thirds majority vote can initiate amendment proposals. However, this alternative approach is not adopted under the Amharic version of Article 104 of the Constitution, which has the final legal authority.[43] The Amharic version uses punctuation (፡) which may substitute the coordinating conjunction 'and'. And consequently, it gives an impression that a cumulative vote of both HPR and HF is required for

[40] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.
[41] The House of People's Representatives and the House of Federation Joint Organization of Work and Session Rules of Procedure, 2008, Regulation, No. 2, Neg. Gaz. Year 14th, No. 2 (Herein after Joint Working Procedure Regulation).
[42] Article 104 of the FDRE Constitution.
[43] Article 106 of the FDRE Constitution. According to Article 106 of the Constitution, the Amharic versions shall have a final legal authority

initiating constitutional amendments. In other words, an amendment proposed by either of the institutions need to be supported by the other in order to be deemed as initiation and presented for further discussions. Hence, each house has a veto power against the other at the stage of initiation as per the Amharic version of the provision.

This part of the confusion is not merely speculative nor merely an academic exercise. Practically it was the cause of debate during the second constitutional amendment on Article 103(5) of the Constitution.[44] The amendment was initiated in the HPR and then the proposal was sent to the HF. On the floor of HF, there was a debate on the respective role of the members. Some of the members argued that since the HPR can by itself initiate amendments without the supporting vote of HF, there is no a need to debate and vote on the proposal made by HPR. This group argued that the process of initiation is completed at the floor of HPR and the proposal can be tabled for further actions without the vote of the HF. This group believed that the initiation stage had been accomplished by the vote of HPR alone and the next step should be ratification of the proposal which must be carried out at joint secession of the two houses as per Article 105 (2) of the Constitution.[45] The other group, on the contrary, argued that because HPR and HF are not mentioned alternatively under Article 104 of the Constitution (the Amharic version), the HPR alone cannot initiate an amendment without additional support from the HF. The proposal made by the HPR should also be supported by the HF with a two-thirds vote in order to be considered as a

[44] Minutes of the 2nd HF 1st Regular Secession at the 4th Working Year, Unpublished, the Archive of HF, Addis Ababa, Ethiopia, Sep. 19, 2004.
[45] Ibid.

full-fledged initiation of an amendment proposal and to be tabled for further steps and discussions.[46]

Finally, after a long and hot debate, the HF voted in favour of the second argument which understands the involvement of the two chambers as a cumulative requirement for initiating proposals and thereby rejecting the alternative approach envisaged by the English version of the provision. This way of interpretation has been recently endorsed by the Joint Working Procedure Regulation.[47] It has copied Article 104 of the Constitution by omitting 'or' from the English version of the provision and substituted it with punctuation (;). This may delete the discrepancy that exists between the Amharic and English version of the constitutional provisions. But mere omitting of the word 'or' does not create clarity on the matter and then, the regulation also sustained the confusion which surrounds the issue of constitutional amendment in general and initiation in particular.

As the history of Article 104 of the constitutional provision demonstrates, the framers intended to give each house the power to initiate constitutional amendments alternatively.[48] The English version of the provision is, therefore, in line with the intent of the constitutional framers. This way of

[46] Ibid.

[47] Article 9 of the Joint Working Procedure Regulation No.2/2008 which reads: In accordance with Article 104 of the Constitution the initiation of a proposal for constitutional amendment shall be in the following manner: when supported by a two–thirds majority vote in the House of Peoples' Representatives; when supported by a two – thirds majority vote in the House of Federation; or when one–third of the state councils of the member states of the federation, by a majority vote in each council have supported it.

[48] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.

interpretation is also inconsistence with the principles of democracy and federalism. The power to initiate is given for HPR based on the principle of democracy, in order to enable the people to take part in the process through their representatives. The power to proposing an amendment is also given for HF based on the concept of federalism, in order to enable regional states to take part in it through the second chamber, which is considered as their representative.[49] Thus, the framers tried to maintain both principles of indirect democracy and federalism by giving the power of initiation for both houses without cumulative requirement and so that either HPR or HF can propose amendments without one's power of blocking the move of the other.

2.1. Rules for Ratifying Amendment Proposals

In addition, rules for ratification are other components of an amendment procedure which are so crucial that proposals can be approved only by following methods provided under them. However, there is no a universally agreed rule for ratifying a proposed amendment. As a result, different constitutions endow with great varieties of rules for approving an amendment proposal.[50]

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[49] Article 61(1) of the Ethiopian Constitution provides that the HF is composed of representatives of nations, nationalities and peoples. However, since the Constitution defines the regional states in terms of ethno-linguistic identities, the claim that what represented are the nationalities is merely rhetoric and it is the regional states which are truly represented at the HF. For instance in (2001-2005) the seats of HF distributed as follow : Amhara 15, Harari 1, Somalia 4, SNNPR 51, Oromia 18, Benshangul-Gumuz 3, Gambela 3, Afar 2, Tigray 3. More on the area see: Assefa Fiseh, Federalism and Accommodation of Diversity in Ethiopia; A Comparative Study, 3rd edition, Netherland, Eclipse Printing Press, 2010, pp. 174-180.

[49] Carlos Closa, Supra note 19.

[50] Different scholars used different modes of categorization. Elster categorized them under 6 heads as absolute entrenchment, adoption by super majority, higher quorum than for ordinary

The FDRE Constitution also provides two different kinds of rules, each relating with different matters, for ratification of an amendment proposal. [51] Proposals relating with human rights and fundamental freedoms provided under Chapter Three of the Constitution and the amending clause itself can be ratified by the HPR and the HF, sitting separately, with a two-thirds majority vote at each house. Moreover, the Constitution requires such amendment proposals to be ratified by all regional state councils with a majority vote.[52] However, amendment proposals pertaining to other provisions of the Constitution can be ratified with two-thirds of majority vote at joint session of the two houses and with a support of two-thirds of the state councils with a majority vote.[53]

From this it is possible to understand that amendment proposal is ratified in a combination of the national legislature, which comprises of the HPR and HF, and the regional state legislatures. The two-thirds majority requirement used in the two houses is common and is also prevalent in other constitutions like

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legislation, delays, constituent units' ratification, and referendum. Hylland also categorized them under four heads as: Delays, confirmation by second decision, qualified majorities, and participation from other than the parliament. Lane also lists delay, referendum, confirmation by a second decision, qualified majorities and confirmation by sub-national government as mechanisms. On this point Lutz also pointed out legislative supremacy, intervening election, legislative complexity and referendum as ratification strategies. Dr. Ashok Dhamija, (Supra note 8 at pp. 252-281) also uses its own categorization which the author of this paper prefers than others to its simplicity and comprehensiveness. (For more detail on the area See, Bjorn Erik Rasch, Foundation of Constitutional Stability: Veto Points, Qualified Majorities and Agenda Setting Rules in Amendment Procedure, University of Oslo, Paper for Presentation at ECPR Joint Session of Workshops, Rennes,France,April11-16,2008 ; Donald Lutz, Supra note 3.

[51] Article 105 of the FDRE Constitution.

[52] Article 105(1) of the FDRE Constitution.

[53] Article 105(2) of the FDRE Constitution.

German and US.[54] As the comparative study demonstrates, the simple majority requirement used in state councils is also commonly used by other federal constitutions.[55]

However, the Ethiopian Constitution is unique and odd in its unanimity requirement on the number of regional state councils which need to support an amendment proposal relating with human rights and freedoms, and the amending clause itself.[56] It is not commonly found in other federal constitutions. As comparative study demonstrates, constitutions may require half, three-fourths or two thirds of the constituent units to ratify the proposed amendment. In order to ratify an amendment proposal no constitution demands unanimity, on the number of the constituent units. In federation, a majority or super majority of the constituent units' approval is sufficient for a valid constitutional amendment.[57] However, the Ethiopian Constitution requires the unanimous consent of all the constituent units of the federal system in order to ratify amendment proposals on Chapter Three of the Constitution and the amending clause itself.[58] As Delinger provides, this unanimity requirement is not associated with federal systems. Rather it is

[54] It is widely used in many constitutions like German, Chinese, Japanese, Latvian, Portuguese, Georgian, Croatian and Zimbabwean.
[55] Ashok Dhamija, Supra note 8 at pp.263-264.
[56] Article 105 (1) of FDRE Constitution.
[57]Canada may be an exception which requires the support of the legislative assemblies of each province for amending some fundamental issues like the office of the Queen, the amendment process and the composition of the Supreme Court of Canada. However, what makes the Ethiopian position to be the worst is that a bundle of issues like land ownership rights and electoral systems which related to party programme and ideology are subjected for such unanimity vote.
[58] Article 105(1) of the FDRE Constitution.

more closely related with confederacy.[59] Thus, the unanimity requirement gives a con-federal feature for the Ethiopian federal system.

Moreover in the ratification process each regional state is counted as one and the amendment provision does not provide votes to be weighted by population. It does not require regional states approving an amendment to contain even a bare majority of the national populace. For this reason, the number of population of the regional states ratifying a proposal is immaterial. Thus, the degree of national popular support is not a critical issue on the process of constitutional amendment in Ethiopia. For instance, an amendment proposal supported by the Amhara, Oromia, and Southern Nations, Nationalities and People's (SNNP) regional state councils, which totally represents more than 75% of the Ethiopian population, will not be approved if it is rejected by Tigray, Somalia and Harari regional state councils, which totally represents less than 25% of the national population.[60] On the contrary , on areas other than Chapter Three of the Constitution, amendment proposals supported by the six less populous regions will be valid even if objected by

[59] Walter Delinger, Supra note 24, at pp.301-302. In confederations, the central government is dependent on the will of the confederated units whose unanimous consent is important to pass decisions within the union. Similarly, the consent of every member state is needed to amend a confederate constitution. More on the features of confederal structure see: Ramesh D. Dikshit, The Political Geography of Federalism: An Inquiry in to Origins and Stability, Macmillan Company of India Ltd., India, New Delhi, 1975, pp.1-10

[60] The figures are computed based on the official 2007 National Population and Housing Census results.

the Amhara, Oromia and SNNP States that account more than three-fourth of the total population. [61]

These figures actually reflect the inevitable conflict between democracy and federalism.[62] On this point, the Canadian Constitution is helpful. It tries to balance federalism and democracy by requiring proposals to be approved by the majorities in both houses of the Canadian parliament and in the legislature assemblies of two-thirds of the provinces having in aggregate at least fifty percent of the Canadian population.[63] Thus, the Canadian Constitution requires the number of provinces which support the amendment to represent in aggregate at least 50% of the Canadian population. On the contrary, under the Ethiopian Constitution the principle of federalism is more pronounced on the amendment procedures and therefore, the ratification rules reflect equality of regional states, rather than equality of citizens.

2.2. Alternative Mechanisms for Initiation and Ratification

The US Constitution provides an alternative means for proposing and ratifying an amendment proposal by setting forth two kinds of procedures. The first method is congressional method. This method enables congress to propose amendments with the support of a two-thirds majority vote in both houses.[64] The second method is the "Article V Conventional" method. This

[61] Based on the 2007 National Population and Housing Census Result, the (6) less popular regional states- Gambella, Afar, Somalia, Harrari, Benishagul and Tigray together represents less than 35% of the National population of Ethiopia.

[62] Walter Dellinger, Supra note 24. The federalism principle requires equality of states, whereas, the democracy principle requires equality of individual citizens.

[63] See Section38 and 42 of the Canadian Constitution.
This procedure is known as 7/50 procedure since the requirement number of provinces is seven totally constitute more than 50% of the total population.

[64] James K. Rogers, Supra note 31 at pp. 1006-1022.

method requires congress to call a constitutional convention to propose amendments when two-thirds of the states apply for such a convention. All amendments proposed either through congress or conventions have to be ratified by three-fourths of the states.[65] Moreover in the US, Article V authorizes congress to choose the method of ratification. The options are ratification by ad-hoc conventions called by the states for the specific purposes of considering the ratification, or ratification by the legislatures of the states. However, the three fourths requirements are applicable in both instances.[66]

Thus in the US, amendments can be enacted without the involvement of the Congress's power of initiation, and the state legislature's power of ratification. It can be proposed by a national convention, up on the petition of two-thirds of the states, which is free of congressional control and can be ratified by conventions in each state, which is free of state legislature's control.[67]Hence, it is possible to reform congress through amendments proposed by national convention, and ratified by either legislatures or conventions in each state. Similarly, it is also possible to reform state legislatures through amendments proposed by congress and ratified by

[65] Ibid.

[66] Ibid, State conventions for this purpose have only been used once, which is on the ratification of the 21th amendment. More on the area see : Thomas H. Neale, The Article V. Convention to Propose Constitutional Amendments: Contemporary Issues for Congress, Congressional Research Service Report for Congress, Prepared for Members and Committees of Congress, July, 2012, pp. 2-32.

[67] Walter Dellinger, Supra note 24 at pp. 290-302.

conventions in each state.[68] Therefore, the US Constitution affords a significant possibility of reforming the existing powers of institutions which play a critical role in the amendment process.

In Ethiopia, an amendment proposal changing the powers of HF or HPR may be proposed by one thirds of state councils. And similarly changes on the existing powers of the state councils can be proposed by either HPR or HF. Thus alternative mechanisms for proposing amendments against the existing institutions which take part in the process can be made in Ethiopia. But when we come to ratification, unlike the US Constitution, the FDRE Constitution does not provide an alternative means for ratifying a proposal that allow amendments to be ratified over the opposition of both houses and state councils. Consequently it does not secure the possibility of a reform through constitutional amendment which restricts the existing powers of the HPR, HF and state councils. There is no alternative amendment ratification rule which is free from the control of both houses and state councils. An amendment reforming the powers of HPR, HF and state councils cannot be ratified without the participation of the institutions themselves. All of them are veto players on all kinds of constitutional amendments including those affecting their powers and interests. Therefore, the FDRE Constitution does not create a conducive environment to bring reform and change, which may run against the existing vested interest of HPR, HF and state councils and their members.

2.3. Rules on Reversal of Resolutions

As we have seen, particularly in federal states, a certain number of ratifications by state legislatures are required for the inclusion of the

[68] Ibid.

amendment proposal on the constitution. For instance, nine and six regional state ratifications are required in Ethiopia for amending Chapter Three and the amending provisions and the rest parts of the Constitution respectively.[69] In the US federal system the ratification of thirty eight states is necessarily required for adopting an amendment proposal.[70] When the number of state ratifications nearing the minimum required for adopting the amendment proposal, both opponents and proponents of it may exert pressure on state legislatures to reverse their previous ratification or rejection.[71] As a consequence, an amendment procedure must deal with the rules on reversals that determine the effect of a ratification which has been passed after a vote of rejection, and the effect of a ratification which a state is purporting to rescind.[72]

The issue of reversal has been more prevalent under the US constitutional system. The ratification process for the fourteenth, fifteenth and nineteenth constitutional amendments was marked with reversal issues by state legislatures.[73] During these ratifications, state legislatures fall under pressure from both opponents and proponents of the amendment proposal to reconsider their earlier ratifications and rejections. In the fourteenth amendment, for instance, states namely Ohio and New Jersey had passed a resolution to withdraw their previous ratifications. On the other hand, North

[69] Article 105 of the FDRE Constitution.
[70] Article V of the US Constitution.
[71] Lynn A. Fishel, Supra note 24 at p.148.
[72] Id, pp. 148-154.
[73] John R. Vile, A Companion to the United States Constitution and Its Amendments, 4th edition, United States of America, 2006, pp. 111-115.

Carolina and South Carolina had ratified the amendment proposal over prior rejections.[74] However, the amendment was declared as adopted with a resolution that includes Ohio, New Jersey, North Carolina and South Carolina under the list of ratifying states.[75] During the ratification process of the fifteenth amendment, New York had withdrawn its ratification and Georgia had ratified the amendment proposal despite its previous rejection. But the amendment proposal had been adopted, albeit the action by New York and Georgia, which was considered to be among states which ratified the amendment.[76] The nineteenth amendment was also adopted, although both Tennessee which claimed to have rescinded ratification and West Virginia which had ratified over prior rejection were tallied among the ratifying states.[77]

All these situations present important questions on the process of constitutional amendment and its procedures. How should the actions of states which change their previous decisions be treated? A state that once ratified an amendment proposal may rescind and pass a resolution for rejecting the amendment and a state that once rejected an amendment proposal may later re-consider its decision and pass a resolution in favor of proposal. Thus the effectiveness of the reversals by state legislatures of their earlier actions concerning an amendment proposal must be regulated to eliminate uncertainties on the process of constitutional amendments.[78] When we look at the amendment procedure in Ethiopia, it does not settle on the

[74] Walter Delinger, Supra note 24 at pp. 396-397.
[75] Ibid.
[76]Ibid.
[77] John R. Vile, Supra note 73 at pp.190-196.
[78] Lynn A. Fishel, Supra note 24 at pp.148-166.

effect of a ratification which has been passed after a vote of rejection, or the effect of a ratification which a regional state is declaring to withdraw.

As scholars in this area suggest, there may be three ways of dealing with the matter of reversal issues. The first view considers the initial action of the state legislatures as conclusive. It supposes both ratification and rejection so binding that cannot be reassessed again by the state legislatures.[79] The second view considers the initial action of state ratification as conclusive. But initial vote of rejection may not be regarded as final.[80] This view believed that the constitution creates only the positive power to ratify amendment proposals. Consequently, initial act of ratification by state legislature will exhaust that power granted under the constitution, but failure to ratify or rejection of the amendment proposal will leave the positive power to ratify which is granted by the constitution intact to be exercised again at any time with in the specified time limit provided under the procedure.[81] Thus ratification once given cannot be rescinded. However, as long as the rejection does not exhaust the positive power to ratify, it cannot be conclusive and then a state may cancel its previous resolution of rejection.[82] The third view provides that neither rejection nor ratification by state legislatures may be considered as final until the required numbers of states have ratified and the amendment adopted. This view enables state legislatures to be free to reverse their

[79] Id, pp. 148-155.
[80] Ibid.
[81] Ibid.
[82] Ibid.

previous positions whether it is rejection or ratification until the adoption of the amendment proposal.[83]

The second position which views ratification, but not rejection as conclusive is the prime view particularly in the US constitutional system. Although the US Supreme Court does not develop certain jurisprudence on the matter of reversal, congressional precedents during the fourteenth, fifteenth and nineteenth amendments are consistence with the view that ratification, but not rejection is binding and final.[84] During these ratification periods, congress did not invalidate the ratification of those states which had first rejected the amendments, and it did not also recognize the withdrawal of ratifications by state legislatures.

Unlike the US, the amendment procedure adopted under the Canadian constitutional system is so instructive that it clearly incorporates the concept of reversal. Accordingly, any ratification may be revoked at any time by the provinces, which are the constituent units under the Canadian federal system, before the issuance of a proclamation declaring the adoption of the constitutional amendment.[85] Similarly, a province which has rejected an amendment proposal may reverse its resolution and ratify the amendment proposal.[86] Accordingly, the Canadian system adopted the third view which considers both initial actions of ratification and rejection not conclusive until the adoption of the amendment proposal. However, the amendment

[83] Ibid.
[84] Ibid.
[85]See Section38 of the Canada Constitution Act. For more detail on the area see Walter Dellinger, Supra note 24 at pp. 299-300.
[86] Ibid.

procedure in Canada denies provinces the right to reversal of their positions after the adoption of the amendment proposal.[87]

The FDRE Constitution is so silent on the issue of reversal that the amendment procedures adopted does not deal with the matter and whether regional state legislatures have the power to reverse their prior actions of ratification or rejection is not clear. If we assume the regional state legislatures as having the power of reversal, the effect of a ratification which has been passed after a vote of rejection and the effect of a ratification which a regional state is purporting to withdraw remains controversial and doubtful. Furthermore, Ethiopia has no existing precedent in this area. Hence, all these make the issue of reversal inconclusive under the Ethiopian legal system.

2.4. Referendum and Public Participation

Referendum is the most effective way of ensuring that the citizens are actively involved in the process of constitutional amendment. It is a useful way to invite the people, and obtain their consent in the process.[88] Constitutions that prefer a national referendum to stimulate public participation recognized it as an additional or alternative means to parliamentary approval, or they may provide it as a sole method for amending the constitution. [89] For instance, in Australia a referendum is

[87] The procedure is silent on the issue whether it is possible to reverse after the adoption of the amendment. W. Dellinger argued the constitutional silence to be understood as denial of power to reverse after the adoption of the amendment.
[88] Ashok Dhamija, Supra note 8 at pp. 298-310.
[89] Ibid.

required in addition to parliamentary approval.[90] The same is true for Algeria, where the bill is submitted for a referendum after parliamentary approval.[91] However, in Malawi and Senegal it is provided as an alternative means for adopting constitutional amendments.[92] However, in some constitutions it may not have a binding nature, and used only for indicative purpose. Austria is typical example where voluntary referendum has been conducted in order to consult the people on matters of fundamental national importance.[93]

The Ethiopian Constitution under Article 104 requires a proposed amendment to be submitted for the general public. As the reading of the provision reveals, the purpose of this submission is for discussion and decision.[94] The provision states that "Any proposal for constitutional amendment… shall be submitted for discussion and decision to the general public…." [95] However, the phrase "… submitted for the general public for discussion and decision" is not understandable whether it denotes referendum or not. On this point although the Minutes of the Constitutional Assembly which ratified the final draft is not clear enough, it may give some clues to understand the spirit of the provision. At the discussion of constitutional making, the Chairman of the Constitutional Committee provided that *"as long as the houses are the representatives of the people, then the people- the general public- is not directly required to participate in the amendment*

[90] Article 128 of the Australian Constitution.
[91] Article 174-178 of the Algerian Constitution(as amended on Nov.28,1996)
[92] Article 195 -196 of the Constitution of Malawi and Article 103 of the Senegal Constitution
[93] Article 49(b) (1) of Austria Constitution. Also, see Anne Twomey, Supra note 35 at p. 11.
[94] Article 104 of FDRE Constitution.
[95] Ibid.

process." [96] *Other members of the assembly also argued that "the people have the right to be consulted on the amendment."* [97] From these and similar debates made at the time of constitutional making, what we understand is that the role of the people is not giving binding decision in the form of referendum. Rather their role is mere consultation and discussion on the proposed amendments so as to contribute significant inputs to the decision making bodies. Thus the FDRE Constitution has a tendency to invite the people to take part in the progression of constitutional amendment through consultation and discussion. However, their participation is limited in the sense that they have no power to give binding decisions and veto an amendment proposal. Therefore, a referendum as a means of giving binding decision is not envisaged under the Ethiopian Constitution.

Although the FDRE Constitution requires the people to be notified and consulted on the amendment proposals, the constitutional provisions as well as the subsequent working procedure regulations does not indicate the means through which discussion and consultation can be set. Who submits it to the general public? How it is submitted? When it is submitted? These are vexing questions which have no clear answers from the text of the Constitution and the regulations. As comparative constitutional law scholars in this area demonstrate, constitutions allow for public comments to be made on amendment proposals. The Constitution of Zimbabwe, Zambia and South Africa, for instance, require the text of the proposal to be published in the

[96] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.
[97] Ibid.

governmental gazette for public comment for thirty-days before the first reading in the legislature.[98] Furthermore, the South African Constitution provides that the person (committee) introducing the amendment bill must submit written comments received from the public and the provincial legislature to the speaker for discussion in the national assembly.[99] As these experiences suggest, publicizing the proposed amendments on the official governmental gazette and effectively disseminating it to the public at large is an important means of creating public awareness. Moreover, public awareness and consultation can also be created through electronic medias by using indigenous languages.[100] Moreover, it can also be created formally by holding indicative plebiscites at the national level.[101]

2.5. Publication and Timeline Requirements

Some constitutions require the amendment proposal to be published in the official governmental gazette, prior to tabling it before the legislature. This enables citizens to have knowledge of the proposal and to contribute meaningfully to the discussion on the matter.[102] Additionally, some constitutions prescribe a specified timeline which indicates a minimum period between which amendments could be introduced and approved. This timeline for carrying out different activities helps to check over hasty

[98] See Section52 of the Constitution of Zimbabwe, See Section79 (3) of the Constitution of Zambia and See Section74 of the South Africa Constitution.
[99] See Section74 (6) of the South African Constitution.
[100]John Hitchard, Muna Ndulo, & Peter Slinn, Comparative Constitutionalism and Good Governance in the Common Wealth: An Eastern and Southern African Perspective, Cambridge University Press, 2004, pp.44-54.
[101]Article 49 (1) of the Austria Constitution.
[102] See Section52 of the Constitution of Zimbabwe, See Section79(3) of the Constitution of Zambia and See Section74 of the South Africa Constitution require the text of the proposal to be published in the governmental gazette for public comment for thirty-days before the first reading in the legislature.

constitutional amendments and give enough time as well as opportunity for the citizens to add their contributions to it.[103]

In South Africa, for instance, the proposal amending the Constitution may not be put to the vote in the national assembly within thirty days of its introduction.[104] In Botswana, a strict set of time lines are also provided for all constitutional amendments dealing with the Constitution. A bill containing a constitutional amendment may not be put into the parliament before thirty days of its introduction. There should be also a thirty days gap between the first and the second reading.[105] The experiences of South Africa and Botswana suggest that the specified timelines stimulate the creation of public awareness and used to ensure that constitutional amendments are not hastily carried out without enough time and opportunity being given to the people along with concerned bodies which need to be consulted.[106] Therefore, the requirement of publication and timelines provided in the amendment procedures are crucial to control constitutional changes that can be made swiftly without full knowledge and active involvement of the public.

The FDRE Constitution does not provide specified time lines for each action that need to be done in the amendment process. Besides it does not require the proposal to be published on the official governmental gazette for

[103] Charles M. Fombad, Supra note 25 at pp. 5-6; John Hitchard etl., Supra note 100 at pp. 52-53.
[104] Article 74 (5) of the South African Constitution.
[105] See Section89 of the Botswana Constitution (1966). Such specified timeline requirements are also required under the Constitution of Algeria, Ghana, Mozambique and Swaziland.
[106] Charles M. Fombad, Supra note 25 at pp. 5-6; John Hitchard etl., Supra note 100 at pp. 52-53.

disseminating it to the general public for discussion and comments. As a result, in Ethiopia there is a possibility of making hasty amendments which are beyond the knowledge of the general public. Practically, this was also observed during the first constitutional amendment on article (98) of the Constitution.[107] The process was so speedy that it was completed within two months. Some decisions were made successively without giving enough time for parliamentary members and the public for discussion.[108] On the other hand, the second constitutional amendment that is made on article 103(5) of the Constitution relatively took a long period of time which is more than two years.[109] Both of these amendments are beyond the knowledge of most of the general public.

The Ethiopian Constitution also does not give a timeline for the ratification of the proposed amendment by state councils. The same is actually true in India and US. In India, no specific time limit for the ratification of an amendment bill by state legislator is laid dawn. However, the resolution

[107] Proclamations, Discussions and Resolutions made by the FDRE HPR, vol.2, Unpublished, the Library of HPR, 1997. The first constitutional amendment changes the spirit of concurrent power of taxation in to revenue sharing which allows the specified taxes to be determined and administered by the federal government while the constituent units share the proceeds from it. The proposal was tabled for discussion on March 6, 1997 and approved unanimously on April.10, 1997 at the joint session of the two houses.

[108] Ibid, as the parliamentary working procedures requires, at a minimum an ordinary bill may take sixty working days to be a law. Then from this what can we understand is that the constitutional amendment which is the supreme law is expected to need more times at least longer than ordinary legislations.

[109] The second constitutional amendment which is made on Article 103(5) extended the period for conducting National population census to more than 10 years. It was initiated on the last of 2003 and approved on Sep. 25, 2005. Proclamations, Official Discussions and Resolutions made by the 2nd HPR at its 3rd Working Year , Volume 8, Un published, The Archives of HPR , Addis Ababa, Ethiopia, 2003 ; Proclamations, Official Discussions and Resolutions made by the 2nd FDRE HPR at its 5th Working Year ,Volume 1, Unpublished, The Archives of HPR, Addis Ababa,Ethiopia,2005.

ratifying the proposed amendment should be passed before the amending bill presented to the president for his assent.[110] In the US Constitution, Article V does not prescribe any time limit for ratification of amendment proposals by state legislatures. But the US Supreme Court held that the ratification must be within a reasonable time after the proposal. However the court refused to determine what reasonable time is since it believed that the issue is a political question that must be determined by congress.[111] Later, congress specifies that the amendment must be ratified within seven years after being proposed in order to become effective.[112] On this point, the Canadian Constitution is clear. Accordingly, amendments once initiated, it remains open for ratification or dissent of provinces at least for a year. This period of time runs from the application of the amendment within the province. A proposed amendment will be dropped unless it is not ratified by the required number of provinces' assemblies within three years of its initiation.[113]

2.6. Institutions Involved in the Amendment Process

Amendment procedures provided in constitutions mention the bodies that are competent to exercise the amending power. A typical amendment procedure

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[110] Paylee M V, Constitutional Amendment in India, Universal Law, New Delhi, 2003, p. 250.

[111] The seven-year requirement was incorporated in the body of the amendment in the 18th and 20th through 22th amendments. For subsequent amendments, congress concluded that incorporating the time limit in the amendment itself "cluttered up" the amendment. Consequently, the 23rd through 26th amendments placed the limit in the authorizing resolution, rather than in the body of the amendment. See: James K. Rogers, Supra note 31 at pp. 1012-1015; Thomas H. Neale, Supra note 66 at pp. 1-5.

[112] Walter Delinger, Supra note 24.

[113] Id, p. 299.

always nominates such a body that can exercise the power of amendment. The body nominated may consist of one or more institutions which concurrently exercise the power in association with one another. However, the nature and the number of institutions involved on the amendment process are different across constitutions. The participation of the national parliament on amending the constitution is almost a universally accepted trend. Most commonly, the national legislature is considered as the appropriate institution to debate and consider constitutional amendment issues. As a result, in most of constitutions, the national legislature that has never been excluded is concerned in the process of the amendment.[114]

The principle of federalism also requires constituent units to play a critical role in the process of constitutional amendment which is considered as one of the common features of federations.[115] However, their mode of participation is different across federations. As the experiences of federal countries reveal constituent units can engage in the amendment process directly through their legislative assemblies or indirectly through the second chambers.[116] In the US, for instance, they have an active role in the process of ratification which

[114] Carlos Closa, Supra note 19 at pp. 287-289, 298; Vicki Jackson and Mark Tushet, Supra note 4 at pp. 319-322.

[115] Rigidity is one of the common features of a federal constitution which requires the participation of both the federal government and the states for its amendment. Since the federal constitution contains the basic principles governing the relationship between the two levels of governments and the authority of both derives from it, then, the constitution should not be subject to unilateral alteration by either order of the government alone. Both the federal government and the states must participate in the amendment process in order to maintain their 'federal bargain' which is enshrined in the document. More on the area see: Assefa Fiseh, Supra note 49 at pp. 106-146.

[116] Carlos Closa, Supra note 19.

is directly exercised by the state legislatures.[117] Whereas in Germany, the constituent units participate in the process through the second chamber that voted in block up on their instruction to approve a constitutional amendment proposal.[118]

The head of the state is also taking part on the course of action, although, in most of the cases, its role is so nominal that it is required to give formal assent to the amendment bill.[119] In the US, for instance, the president has no role in the formal amendment process and cannot veto an amendment proposal or ratification.[120] However, there are some constitutions which give more formal and direct power to the head of the state on the issue of amendment. France is a typical example in which the president has the power to initiate amendment, and determine the appropriate place of its ratification.[121]

In Ethiopia, different institutions engage on the process of constitutional amendment. The HPR is the first institution which participates on the

[117] Article V of the US Constitution. An amendment proposal needs to be ratified by three-fourths of the state legislatures.

[118] Article 79 of the German Basic Law.

[119] Ashok Dhamija, Supra note 8 at p. 252.

[120] Holling Sworth V. Virginia, 3 U.S. (3 Dall) 378 (1798) was a case in which the United State Supreme Court ruled early in Americans history that the president of the United States has no formal role in the process of amending the US Constitution.

[121] Article 89 of the French Constitution. Article 89(1) provides that: The President of the Republic, on the recommendation of Prime Minister, and members of parliament, alike has the right to initiate amendments to the Constitution.

89(3) … a government bill to amend a Constitution is not submitted to referendum where the president of the Republic decides to submit it to parliament convened in Congress…

initiation as well as ratification stages of the process.[122] Moreover, regional states have also mixed up on the process of constitutional amendments directly through their state councils and indirectly through the HF, which is assumed as representing their interests.[123] However the relevance of this dual participation of the constituent units was debatable during the constitutional making process. A significant number of members believed the ratification of the House of Federation as sufficient to protect the interest of regional states. Others, on the other hand, argued in favor of direct participation as it enables those nations, nationalities and peoples which have no representation in the HF to take part on the process of constitutional amendment.[124] Moreover, they argued that it will increase and improve deliberation and subsequently enhance the quality of the process.

Thus, in Ethiopia, the House of Peoples' Representatives, the House of Federation and regional state councils are primarily institutions for amending the constitution. However, there is no specific clear provision like India and South Africa, which empowers the head of the state to proclaim the ratified amendment on the official Negarit gazette. Nevertheless, the president has the power to proclaim ordinary laws on Negarit gazette.[125] As long as the ratified amendment bill is deemed as law, albeit a higher law, then, the power to proclaim may also extend to cover the constitutional amendment bills. However, this power of the president is not as such critical that determines the destiny of the bill since the analogy to ordinary legislation dictates that it

[122] Article 104 and 105 of the FDRE Constitution.
[123] Ibid.
[124]Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.
[125] Article 71 (2) of the FDRE Constitution.

will be published anyway even if the president does not sign it in two weeks time.

Furthermore, an ad-hoc joint committee also involve on the process of constitutional amendment. The function of the committee is to prepare a final draft law of the amendment and submit it to the HPR for publication, in the Negarit gazette.[126] Therefore, the HPR, the HF, the state councils, the president and the ad-hoc joint committee are important institutions playing a role in the amendment process. Among these, the involvement of HPR, HF and state councils is so mandatory that failure to comply with it may cause the process to be irregular and unconstitutional.

Concluding Remarks

Most constitutions have an amending clause setting forth procedures concerning constitutional amendments. In Ethiopia Articles 104 and 105 are the amending clauses designed to ensure an orderly change to the Constitution. As the experiences of different countries and scholarships on the area suggest a satisfactory amendment procedure at minimum must be clear, understandable, reliable and stable to guide such a process. When judged by such a standard, it is possible to conclude that the procedure in Ethiopia is not sufficient and clear enough to guide actions concerning amendments. More specifically, the existing amendment clauses have problems relating with ambiguity, gaps, lack of details, and the failure to

[126] Article 9 (7) of the Joint Working Procedure Regulation No. 2/2008.

strike balance between democracy and federalism which will negatively impact the legitimacy of future constitutional reforms.

Firstly, the issue of initiation is not clear from the reading of the Constitution. Although the framers intended to give such power to HPR, HF and state councils, their intention is not clearly reflected particularly in Article 104 of the Amharic version of the Constitution as well as in the practice of constitutional amendments which demands the involvement of both HPR and HF as a cumulative requirement. Therefore, it is imperative to clarify and understand the provision in accordance with the English version that allows each (HPR, HF and state council) without cumulative requirement to propose constitutional amendments.

Secondly, the issue of public participation is not clearly regulated under the Ethiopian legal system. Although the Constitution requires amendment proposals to be submitted for the general public for decision, the law has said nothing about the nature of the decision, the mode of submission, the manner of decision making and the body mandated to carry out the responsibility. Hence, this author recommends that the public participation envisaged under Article 104 of the Constitution to be understood as mere consultation without giving binding decision on amendment proposals. In addition, a clear legal provision regulating issues of public participation should be put in place by enacting a detail law dealing with amendment procedures.

Thirdly, the amendment procedure does not provide a time table for carrying out different actions of the amendment. As a result, the procedure is not conducive to prevent hasty and untimely constitutional amendments.

Furthermore, the amendment procedure does not specify the time limit for ratification of an amendment proposal by state legislatures. Therefore, it is the firm belief of this author that it is important to set a time table for each action that would be carried out on the process of constitutional amendments by enacting a detail law dealing with amendment procedures. This helps to avoid untimely constitutional amendments and enables each actor involved in the process to carry out enough debate on draft bills. More importantly, a reasonable time limit for ratifying an amendment proposal by state councils has to be clearly set.

Fourthly, the amendment procedure in Ethiopia does not provide an alternative means for ratifying proposals aiming at reforming the existing institutions which play a critical role in the amendment process. This will hold back future attempts of reforming these institutions through constitutional amendments. The author of this piece recommends that it is important to afford an alternative way of ratification by reconsidering the amending clause of the Constitution based on the US experiences so as to create the possibility of reforming the existing powers of HPR, HF and state councils.

Fifthly, the amendment procedure is silent and the issue of reversal has not yet been settled under the Ethiopian legal system. Consequently, whether regional states are allowed to ratify amendments that they previously rejected and whether they will be able to rescind ratifications still remains controversial. Thus, this author critically supposes that the reversal issues

must be regulated by enacting a detail law dealing with amendment procedures. On this point, the author recommends the view that deems rejection final, albeit ratification to be endorsed.

Lastly, the amendment procedure requires the unanimity support of regional states for amending Chapter Three of the Constitution. This unanimity requirement is unique for Ethiopia and it increases the confederal feature of the Ethiopian federal system. Moreover, the rule of ratification does not take into account the democratic principle of national population support for ratifying an amendment proposal. It is highly dominated by the federalism principle and for this reason the number of population supporting or rejecting a proposal is irrelevant in the process. Thus, the author of this paper found that the amendment procedure fails to strike balance between federalism and democracy. As a result, it is recommended that the rule of ratification, which requires unanimity on the number of regional states under article 105(1) of the Constitution, be reconsidered with a qualified super majority requirement particularly three fourths on the number of regional states. Additionally, it should be amended to take the democracy principle, which takes the national populations' support towards a constitutional amendment into account based on the experiences of Canada.

VAT and the FDRE Constitution: Is VAT Really an Undesignated Tax?

Gezachew Sileshi Chane[♣]

Abstract

There has been a growing interest in the application of value added tax (VAT) on a global level. Yet the adaptability of VAT in federal systems has come to be a subject of discourse and experimentation in several countries. Ethiopia introduced VAT in 2002, and thereby, as federal state, faced issues of how best to design VAT in a federal set up. The introduction of VAT in Ethiopia was allegedly justified under the constitutional clause of "undesignated powers of taxation." Though it was said to be undesignated tax power, practically speaking it has brought changes in the already existing distribution power of taxation by shifting part of states' power of taxation over sales tax to the federal government. This article explores how VAT is adapted in the Ethiopian case both from practical and constitutional perspectives. It begins by reviewing the salient features of the constitutional provisions on tax allocation and description of the actual division of power of taxation between federal government and the states in Ethiopia, and then proceeds to the survey of the features of the VAT introduced in Ethiopia. The main focus is to explore the question of whether or not VAT was designated in the FDRE Constitution. In other words, it enquires into the issue of whether the introduction of VAT as undesignated tax power is in line with the

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constitution or not? After due analysis, the author concludes that the Ethiopian VAT legislation is not in congruity with the FDRE Constitution.

Key Terms: Value Added Tax, Sales Tax, Undesignated Tax

Introduction

In a federal arrangement where two tiers of government operate side by side, responsibilities have to be properly shared and the power to raise the necessary financial power must also be divided. The assignment of revenue sources need to be carved out based on careful consideration. The interaction between taxation and federalism has assumed increasing importance.[1] This is especially true in regard to value added taxation (VAT), which is a relatively recent tax[2].

It is noted that the spread of Value Added Tax (also called Goods and Services Tax – GST) has been the most important development in taxation over the last half-century; while the number of countries that adopted VAT was less than ten (10) until the late 1960s,[3] it has been adopted and implemented in over 160 countries in more recent times.[4] In spite of VAT's widespread adoption, there has been continuing contention about the

[1]See Bird, Richard M. and Gendron, Pierre –Pascal, VATs in Federal States: International Experience and Emerging Possibilities, March 2001, p.3-4, [herein after Bird & Gendron, VATs in Federal States]

[2] Organisation for Economic Co-Operation and Development(OECD)- Centre for Tax Policy and Administration, International VAT/GST Guidelines, February 2006, see preface, at at WWW <http://www.oecd.org/tax/consumption/36177871.pdf>, (accessed on 21 March 2015).

[3]Ibid.

[4] Visser, Amanda, OECD's Guidelines on Value-Added Tax Find Widespread Support, 05 MAY 2014 at WWW <http://www.bdlive.co.za/business/2014/05/05/oecds-guidelines-on-value-added-tax-find-widespread-support>, (accessed 07/07/2015).

implementation of VAT in a federal system.[5] The central question is whether VAT lends itself to proper execution at the state level in federations. Conventionally, VAT is considered a central tax[6]and this conception renders the regional states devoid of power over sales tax. In contrast, a renewed has arisen and growing interest among member states of federations as well as national governments for state participation in VAT.[7] In many federations, sales taxes (VAT or other alternative sales taxes) are the main source of revenue for states within their limited revenue power.[8] For instance, the sales tax accounts for more than 50 percent of total states' revenue in Brazil.[9] The view advancing sub national level/state level VAT goes on to say that while states exercise of taxing power over VAT has costs, these costs can be kept relatively modest and are plausibly offset by the advantages of local control.[10]

While the controversy continues in this way, recently Ethiopia has introduced VAT that has brought changes in the power of taxation. The main issue in this work is then how the VAT is adapted in Ethiopia from practical and legal points of view.

[5]Bird & Gendron, Supra note 1, p.2
[6]Ibid.
[7]Ibid.
[8]Ibid, at 1.
[9]Ter-Minassian,Teresa, Reform Priorities for Sub-national Revenues in Brazil, Inter-American Development Bank, 2012, p.5.
[10]Bird & Gendron, Supra note 1, p.3.

Overview of the Tax Power Configuration under the FDRE Constitution

The 1995 Constitution of Ethiopia created a federal structure Ethiopia,[11] departing from the long established unitary state tradition. The Constitution established two levels of governments-Federal Government and State Members- each vested with legislative, executive and judicial power of their own as a manifestation of their sovereignty.[12] The Constitution demarcates the powers and functions of both levels of government; enumerating the federal[13] and leaving the others to states accompanied by some lists.[14]

Then, what follows such allocation of responsibility is the question of the means to finance the respective responsibilities of different tiers of government. The way intergovernmental fiscal systems are organized varies from country to country.[15] There is no ideal assignment of taxes between central and lower levels of government. However, a set of 'tax-assignment rules' has been developed in the traditional fiscal federalism theory. These principles relate to the respective responsibilities of central and lower tiers of government in macroeconomic stabilization, income redistribution and resource allocation.[16] Moreover, the administrative capabilities of local governments in tax design (i.e., deciding on revenue bases and setting rates),

[11] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 1, Proc.No.1/1995, Fed. Neg. Gaz., year1, No. 1, [herein after FDRE Constitution].
[12] Ibid, Article50 (1) & (2).
[13] Ibid, Article51.
[14] Ibid, Article52.
[15] Odd-Helge Fjeldstad, Intergovernmental fiscal relations in developing countries: A review of issues, Chr. Michelsen Institute Development Studies and Human Rights, CMI Working Papers, 2001, at WWW <http://www.cmi.no/publications/file/871-intergovernmental-fiscal-relations-in-developing.pdf>, (accessed 07/07/2015).
[16]Ibid.

and the issue of tax harmonization between jurisdictions is important when assigning taxing powers.[17]

The financial provisions of the FDRE Constitution have allocated revenue sources for the federal government and the states.[18] How the Constitution has dealt with perplexing task of assignment of taxes in federal systems is briefly addressed here. Under the FDRE Constitution, the scheme of tax power allocation displays important features: its fairly detailed provisions on revenue power division on designated taxes, and the manner it addresses the issue of future possible revenue sources (undesignated taxes) are the typical ones.

Tax Power Division of Designated Taxes in the FDRE Constitution

The provisions under the FDRE Constitution embodying dispensation of revenue powers are divided in to four headings: the federal power of taxation,[19] state power of taxations,[20] concurrent power of taxation,[21] and undesignated power of taxation.[22] The constitution has gone to this extent providing detailed allocation of taxes differentiating the exclusive domain of each level of governments and also taxes that are concurrently given. As much as possible it endeavors to avoid ambiguity and possible conflicts that

[17] Ibid.
[18] FDRE Constitution, Supra note 11, Arts.96-98.
[19] FDRE Constitution, Supra note 11, Arts.96.
[20] Ibid, Article 97.
[21] Ibid, Article 98. N.B: The word "companies" under Article98 (2) is used to mean any business entity having its own legal personality including partnerships and companies. See the Amharic version.
[22] Ibid, Article 99.

may arise there from while this is not the case at least for some federal systems such as that of Canada[23] and Germany.[24]

By way of summary, the constitutional distribution of the taxation power among the federal government and the states is tabulated below.

Federal power of taxation (Art.96)	States' power of taxation (Art.97)	Concurrent power of taxation (Art. 98)
Custom duties, taxes and other charges on imports and exports	Income tax on employees of states and private enterprising	Profit, sales, excise, and personal income taxes on enterprise jointly owned by states and federal government.
Income tax on employees of federal government and	Land usufructuary right fees	Profits, and sales taxes (see the Amharic version of art. 98(2) on private

[23] For instance, it is provided in the Constitution of Canada that the provinces (states) are permitted to levy and collect direct taxes while the dominion (federal government) possesses unlimited power of taxation. It can raise revenue by any mode or system of taxations. Such broad and general provisions have a potential to create ambiguity and uncertainty as to the jurisdictional limitation of tax power. See Laskin, Bora, Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power, 3rd ed., 1969, See Section91&92(see the appendix part).(herein after Laskin, Canadian Constitutional Law).

[24]The German Constitution confers on the federal government and the Lander (state) concurrent power of legislation with respect to considerable types of taxes. This concurrent legislative power is non-coexistent in such a way that federal government may preempt the states from such fields of taxation where it feels that, with subjective appreciation; some conditions (such as where regulation by one state affects another) are met. In short, the states have power till the federal government tasks it over. Absent political goods faith and willingness, such disposition of revenue power could be a bone of contention. See The Constitution of the federal republic of Germany: essay on the basic rights and principles of the basic law (1989), Article72, p.288.

international organization		enterprises
Income, profit sales and excise taxes on federally owned enterprises	Income tax on private farmers and those incorporated in cooperative association	Dividends due to shareholders
Income and winnings of national lotteries and other games of chance	Profit and sales taxes on individual traders carrying out trade within their jurisdiction	Income tax from large scale mining and all petroleum and gas operations and royalties on such operations.
Income of air, rail and sea transport services	Income tax from transport service rendered on waters within their territory	
Income tax on houses and other properties federally owned and rent from same	Income from private houses and other properties within the states and rents from same	
Fees and charges relating to licenses issued and services rendered by organs of federal	Profit, sales, excise and personal income taxes on state owned	

government	enterprises	
Taxes on monopolies and federal stamp duties	Income tax royalty and land rentals on small scale operations fee and charges relating to license issued and services rendered by states organs	

Table1. Taxes that are already allocated in the constitution per Articles 96, 97, and 98

The lists of revenue sources are exclusive except those under concurrent power. In other words, those listed under Art.96 are only and solely exercisable by the federal government while those under Art.97 belong to the states only. Each level of government is expected to act within their own competence and one many not meddle with the other's taxing power. Given this quite comprehensive account on the division of revenue sources, the disputes that can possibly arise in relation to tax jurisdiction have been considerably reduced. However, specificity of the Constitution would hinder substantive tax reforms. It is now almost unavoidable that any serious tax reform at the national level must be preceded by a measure of constitutional amendment.[25] Another feature of the FDRE Constitutional dispensation of

[25] Taddese Lencho, Income Tax Assignment under the Ethiopian Constitution: ISSUES to Worry About, Mizan Law Review Vol. 4 No.1, March 2010, pp. 50-51.

tax power lies in the manner it addresses the issue of future possible revenue sources.

Undesignated Powers of Taxation under the FDRE Constitution

Often federal constitutions allocate future revenue sources either to the federal government as in the Indian Constitution[26] or to the states as in the case of United States of America.[27] The FDRE Constitution framers refrained from advance disposition of taxes, and have opted for determination of revenue power on case by case basis. The Constitution has created a provision on undesignated taxes in which the House of Federation and House of Peoples' Representative, in joint session and by two third majority,[28] shall determine that the power over the new tax source in question. The houses may decide that the new tax source belongs either to the federal government alone or the states alone or else concurrently.

This scheme of designation of an undesignated tax power is even a departure[29] from the pattern of expenditure assignment under the Constitution. The mechanism could be viewed as a wise and far sighted arrangement. It provides the maximum flexibility in assigning new taxes by

[26] Basu, Draga Das, Commentary on the Constitution of India, 4th ed., Vol.4, 1963, p. 269,[herein after Basu, Commentary on the Constitution of India].
[27] Ibid.
[28] FDRE Constitution, Supra note 11, Article99.
[29] As per Arts.51 and 52 of the FDRE Constitution, the state possesses the residuary power and the power of the federal government is confined to those only expressly enumerated powers and functions. The logical deduction from such provisions gives the impression that residuary power of taxation is and should be vested to the states. However, Article 99 has done away with such inference.

weighing the attendant circumstances rather than rigid advance disposition. Taxes have not only revenue motives but also that they accomplish multitude of purposes. They are regulatory instrumentalities of a nation including redistribution and stabilization.[30] The nature of a tax as to its character (national/state) or its impact on economy and social welfare could not be ascertained in prophecy. Thus the mechanism of undesignated power affords the opportunity to evaluate each tax and dispose the power over there. Nevertheless, undesignated taxation creates uncertainty for both the federal government and the states. Moreover, such arrangement may also erode federalism either in favor of con-federal tendency or most probably towards unitary tendency since the states do not have direct access to control the decision making but the federal government that directly participates in the decision making through at least HPR. At any rate, the exercise of this power needs to be based on objective grounds. The revenue needs of the two levels of governments along with other factors must receive careful consideration by the houses.

Here are some taxes that have been allocated according to the joint decision of the two Houses.

Taxes allocated as per Art.99 (taxes that were undesignated)[31]

[30] Fjeldstad, Supra note 15, p.5.

[31]የኢትዮጵያ ፉዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ የፌደሬሽን ምክር ቤት፤ የፌዴሬሽን ድምጽ፣ ቅጽ 02፣ ቁጥር 01፣ ሚያዚያ 1998፣ገጽ 18 ይመልከቱ (ከዚህ በኋላ የኢትዮጵያ ፉዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ የፌደሬሽን ምክር ቤት፤ የፌዴሬሽን)።(Translation -The Federal Democratic Republic of Ethiopia, Voice of the Federation (Magazine), Issue 02, No.01,, April 2006, p.18)[herein after, Voice of the Federation (Magazine)]

Taxes allocated to Federal Government	**Taxes allocated to states**
• Income tax on interest from money deposit in bank. • Value added tax?	• Royalty from patent on individuals, • excise tax on individuals (traders),

Table 2. Taxes allocated as per Art.99 (taxes that were undesignated)

Excise tax on private enterprise and royalty from patent on private enterprises are disposed as concurrent power of taxation.[32] The assignment of these taxes follows the constitutional trend that confers revenues from private enterprise concurrently.[33] Income tax on interest income from bank deposits (of money) is allocated to the Federal Government.[34] On the other hand, three taxes; patent royalty tax on individuals, excise tax from individual traders and state stamp duty go to the taxation power of states.[35] Excise tax and royalty on individuals also follow the constitutional disposition that designates individuals as states tax subjects. This disposition based the constitutional

[32] Ibid.
[33] FDRE Constitution, Supra note 11, Article 98(2).
[34] Voice of the Federation (Magazine), Supra note 25. The regulation of bank deposits might have substantial implication on macroeconomic management. This consideration appears to have influenced this designation.
[35] Ibid.

trend would not be bad but strict adherence may not be advisable as the constitutional trend tends to be skewed to the center. [36]

The other tax disposed by virtue of Art.99 is value added tax. The two Houses conceived value added tax as undesignated tax. With that assumption, it has been decided that both the power of levying and collecting value added tax resides with the federal government[37] provided that the revenue collected by the federal government from regional sales tax payers would be refunded back to the states.[38] Whether VAT is really undesignated or not will be analyzed later.

Overview of Current VAT System in Ethiopia.

VAT may be defined as a tax assessed at each step in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price.[39] VAT belongs to the family of sales tax[40] (for details see section 2.1 below). It is an indirect tax.

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[36] Gizachew Silesh, The Problem of Value Added Taxation in Federal Systems, the Option Taken in Ethiopia and the Constitutional Issue Related to It, unpublished LL.B thesis, Addis Ababa University, 2006, p.32, [herein after Gizachew, The Problem of Value Added Taxation in Federal Systems].

[37]የኢትዮጵያ ፉዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ ሁለተኛዉ የህዝብ ተወካችና የፌደሬሽን ምክር ቤቶች ሁለተኛ ዓመት የስራ ዘመን 2ኛ የጋራ ስብሰባ ቃለ ጉባዔ፣ ሚያዚያ 3/1994 ዓ.ም፣ አዲስ አበባ፣ገጽ 2-6)(የተጨማሪ እሴት ታክስ የፌደራል መንግስት እንድሆን የተወሰነበት)። (Translation-the Federal Democratic Republic of Ethiopia, Minute of the Second Joint Session of the House of Federation and the House of Peoples' Representatives, the second year(of the parliaments') working season, April 2002 (the joint session in which VAT is decided to be within the exclusive power of taxation of the Federal Government), [herein after Minute of Joint Session of the Houses].

[38] Ibid, p.2 & 5.

[39] Garner, Bryan A.(ed.), Black's Law Dictionary, 7th ed., West Group, St. Paul, Minn., 1999(1st published 1891), p.1472[herein after Black's Law Dictionary].

[40] FDRE Constitution, Supra note 11, Article99.

As an indirect tax, the incidence finally falls on consumers.[41] To this effect, it operates though "tax credit mechanism" enabling firms to offset the tax they have paid on the input purchases of goods and services against the tax they charge on their sales of goods and service.

Though there is an increasing preference[42] for VAT to other alternative sales taxes, federalism and VAT constitutes an uneasy compromise due to cross border adjustment of input tax credit.[43] In a federal setting, the alternatives for state participation in VAT are:[44] (1) national VAT-uniform across the country with revenue sharing arrangement; (2) state VAT-levied and collected either with the origin or destination principle; or (3) joint national- state VAT with a national VAT uniformly imposed across the nation and the states set their own rates. Each of these alternatives has unique pros and cons.[45]

In the Ethiopian federal system, a national level VAT is chosen among the alternatives.[46] The VAT proclamation provides that the VAT is applied at a

[41] Black's Law Dictionary, Supra note 35.
[42] Visser, Supra note 4; Organisation for Economic Co-Operation and Development (OECD), Supra note 2.
[43] Keen, Michael, VIVAT, CVAT, and All That: New Forms of Value –Added Tax for Federal Systems, IMF Working paper (wp/00/83), 2002, p.3.
[44]…Options for VAT in the Indian Context, at WWW <http://www.nipfp.org.in/media/pdf/books/BK_39/Chapters/6.%20Options%20For%20Vat%20In%20The%20Indian%20Context.pdf>, pp. 47-56.
[45] Ibid, the first one affords significant advantages both economic and administrative owing to its simplicity while at the same time it involves cost that are both economic and political. The second option affords the maximum autonomy to states to determine the tax base as well as the rate but would markedly increase administrative and compliance costs. The last one allows states to set their desired rate while uniform base is maintained across the country. But still administration and compliance costs are high.
[46] Minute of Joint Session of the Houses, Supra note 31.

uniform rate of 15% on all goods and services except zero rated ones and exemptions[47]. The federal government has assumed all the powers of (levying and collection) with respect to VAT, and the states have lost control over the tax bases and on tax rates. Neither the FDRE constitution nor any subsidiary legislation requires such complete uniformity. Of course, harmonized and standardized tax base is legally required via the financial administration proclamation[48] but still with the involvement and assent of the states and the federal government. There is, however, no such requirement with regard to tax rates.

Federal Inland Revenue Authority[49] (later reorganized as Ethiopian Revenue and Customs Authority, hereafter Authority) has the power of administering VAT throughout the country; leaving the states without any legally recognized role with respect to administration of VAT as well. It seems that the Ethiopian scenario is more centralized even as compared to some countries, like Germany, that are alleged to have offered "only a very minimal level of sub-national revenue autonomy."[50]

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[47] Value Added Tax Proclamation, 2002, Article 7(1), Proc. No. 285, Fed. Neg. Gaz., Year 8, No. 33,[herein after Value Added Tax Proclamation, Proc. No. 285/2002].

[48] Federal Government of Ethiopia Financial Administration Proclamation, 2009, Article64 (1), Proc. No. 648, Fed. Neg. Gaz., Year 15, No.56, [herein after Financial Administration Proclamation, Proc. No. 648/2009].

[49] Value Added Tax Proclamation, Supra note 47, Article 30.

[50] Perry, Victoria J., International Experience in Implementing VATs in Federal Jurisdictions: A Summary Fiscal Affairs Department International Monetary Fund, June 2009, at WWW <http://www.citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.169.139&rep=rep1&type=pdf> , (consulted 21 March 2015) , p.5, [herein after Perry, International Experience in Implementing VATs in Federal Jurisdictions].

For instance, Germany has delegated the administration of the VAT to the lander (states) albeit the criticism for inefficiency and duplication of efforts. The task of administering the VAT on behalf of both levels of government falls to the Lander. However, the Lander can

In administering VAT, the Authority has been operating through branch offices in regions.[51] But as the number of VAT registrants has increased, there has come an adjustment in which the states have gained delegated power to administer VAT in their jurisdiction beginning September 2005.[52] Since then, new VAT registrants are retained with regions while those who had already been under the administration of the Authority remain with it.[53] The states administer and retain the revenue from these new VAT registrants. This new adjustment affords some control over VAT for the states. It enables better supervision and enforcement. The issue of whether the Federal Government has this power to be delegator in relation to VAT is a point awaiting exploration.

Another remaining issue pertains to revenue sharing arrangement. In a federation where national VAT is preferred, the manner in which the revenue from that is shared should also be designed. Some states, for instance Canada, rely on consumption statistics in apportioning the revenue VAT from

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choose only the form and operation of their tax administrations--they cannot alter the structure, base or rates of the VAT itself (or of the other taxes). Thus, The Landers collect and remit the revenue to the center for sharing the revenue there from.

[51] የኢትዮጵያ ፉዴራላዊ ዲሞክራሲያዊ ሪፑብሊክ የገቢወች ሚኒስቴር፣ ከክልል ግብር ከፋዮች የሚሰበሰብ የተጨማሪ እሴት ታክስ (VAT)፤ የቅድመ ክፍያ ታክስ(Withholding)፤ እና የጋራ ገቢወች ለክልሎች ፈሰስ ስለሚደረግበት አሰራር የወጣ መመሪያ፣መስከረም 28፣1996 ይመልከቱ።(Translation-The Federal Democratic Republic of Ethiopia, Ministry of Revenue, Directive Issued on How to Refund VAT Collected from Regional States, withholding taxes, and Revenue from Concurrent Revenue Sources, September 28, 1996 E.C), [herein after, , Ministry of Revenue, Directive(1996 E.C). Also see Minute of Joint Session of the Houses, Supra note 32.

[52] Gizachew, the problem of value added taxation in federal systems, Supra note 36, p.59.

[53] Ibid.

the Harmonized Sales tax among the Maritime Provinces.[54] In Australia, the revenue from Goods and Services Tax/GST/VAT is distributed according to the grant formula from the common wealth to the state; a formula unrelated to the distribution of the base of the tax[55] while VAT revenues in Germany are split based upon redistributive equalization formulas.[56]

The revenue sharing scheme in the Ethiopian system is relatively straightforward. As discussed above, the revenue sources are assigned in three categories not by type of tax, but by the nature of taxpayer.[57] The sharing of VAT revenue follows this pattern. The Customs and Revenue Authority and its branch offices shall keep records showing the name of taxpayer and to which state or to federal government the taxpayer belongs.[58] The branches will segregate the taxes paid to each state and the Federal Government, and then they shall send to the Authority.[59] The Authority categorizes the VATs paid according to taxpayers, to each state and Federal

[54] Mclure, Chrles E., Coordinating State Sales Taxes with a Federal VAT: Opportunities, Risks and Challenges, at WWW <http://www.aaxadminorg/tta/FFS Symposium/mulure.pdf> (consulted 21 March 2015).

[55] Perry, International Experience in Implementing VATs in Federal Jurisdictions, Supra note 50. It is determined neither by the location of consumption nor of the production of goods and services, but rather by means of a formula determined from the estimated overall revenue capacity of each state, and, importantly, also based upon their expenditure needs.

[56] Ibid, p.3. VAT revenues are not split between each Lander and the federal government based upon the location of tax collection, consumer consumption, or production of taxable goods and services, but rather based upon redistributive equalization formulas. It is used to address equity concerns so as to diminish horizontal fiscal disparity.

[57] The Federal Government has the power to levy and collect sales taxes on imports and federally owned enterprises. States are empowered to levy and collect sales taxes on individual traders (unincorporated businesses) within their territory and on state owned enterprises. Both the Federal and State Governments possess concurrent power to levy and collect sales tax on jointly owned enterprises and private enterprises. See table 1 above. [refer to specific articles of the constitution]

[58] Ministry of Revenue Directive (1996 E.C), Supra note 51.

[59] Ibid, Article5.1.

Government; it then aggregates; and it will be sent to the entitled states, deducting administrative expenses,[60] within twenty days after the end of each month, accompanied by a letter informing the details.[61]

Likewise, the VAT from joint sources is distributed in a similar manner. The branch offices and the Authority record the name and address of the enterprise and aggregates the revenues accordingly.[62] The revenue will be shared among the Federal Government and the state in which the enterprise is incorporated if it is a private enterprise; or between the state and the federal government that are joint owners if it is from jointly owned enterprises.[63] The formula provided by the House of Federation for sharing joint sources will be applied.[64] The formula may change from time to time. But as an example, the 2006 formula provided by the House of Federation for sharing joint sources provides that with respect to sales tax (VAT)) 70% will be to the Federal Government while the rest (30%) goes to the state concerned.[65]

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[60] Five percent (5%) from the revenue of each state shall be retained by the authority for the purpose of refund to taxpayers; the 5% retention in excess of refund to taxpayers will be sent to the states within three month; the bank commission for the here and there of the revenue and other costs will be charged on the states, Ibid, Article4.1.

[61] Ibid, Article5.2

[62] Ibid, Article12

[63] Ibid, Article13. Although the term concurrent implies action in conjunction, the Federal governmental has in practice taken exclusive legislative and administrative power on these revenues.

[64] See Voice of the Federation (Magazine), Supra note 31, p. 18.

[65] Ibid, Equity concerns arise from the current revenue sharing arrangement. First, the VAT introduced is origin based VAT. Input taxes paid in the state of origin are not channeled to the destination state. By its nature VAT is a consumption tax. It implies that the state of consumption is entitled for the tax on consumptions in its jurisdiction. In Ethiopian case the

Having said this much about the current VAT in practices, taken as an option to the problem of which level of government should take the power over VAT, now let us consider whether the option taken, national level VAT, is in line with the Constitution or not.

The VAT and the FDRE Constitution: Is VAT Really an Undesignated Tax?

We have seen that VAT and some other taxes have been introduced as new sources of revenue by the decision of the two federal Houses. Taxes to be introduced in such manner should necessarily be new taxes that have not been given either to the Federal Government or to the States or concurrently. But is VAT really a new tax? Or does the Constitution embrace VAT in its tax provisions?

The Constitution has attempted to provide exclusive and distinctive division of power of taxation, as noted earlier. Nevertheless, this does not afford a complete guarantee that possible dispute would not arise. Indeed, disputes

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state of production takes the input taxes paid on its products. The states are at different levels of development. Some may be net exporters while others are net importers. The difference in input taxes paid in state of origin might not be marginal. The net exporters, which are relatively at higher level of development, would collect VATs more than its consumers consume while the net importers, the least developed ones, lose revenues from their consumers. This by itself could contribute to the divergence of level of development. While some countries use VAT to redress equity problems, the Ethiopian contributes to the disparity. The other equity concern arises from the formula for distribution of VAT revenue from joint sources. Only the state of incorporation and the Federal Government are entitled to the revenue. However, it is true that corporations have the potential to aggregate huge revenues from different jurisdictions particularly if they operate in more than one jurisdiction through branches. Such huge revenue (in this case VAT) should have been distributed to all states though the special interest of the state of incorporation needs to be considered.

appear to be inevitable in federations. In this regard, Laskin, writing on Canadian Constitutional Law stated:

No amount of care in phrasing the division of power in a federal scheme will prevent difficulty when division comes to be applied to the variety and complexity of social relationships. The different aspects of life in a society are not insulated from one another in such a way as to make possible a mechanical application of the division of powers.[66]

It is logically and practically visible that attempts to exercise the powers allotted by constitutions frequently raise questions as to its meaning in relation to particular circumstances. It might be difficult for the federal government to make laws with a view to achieve national objectives without affecting, in some way, one or other subjects which the states were given exclusive powers.[67] Conversely, laws made by the states under the heads of jurisdiction given to them as exclusive power might frequently have direct implication, in some unexpected way, upon the enumerated powers and function exclusively vested to federal government.[68]

Thus, in a variety of circumstances, the problem of what amounts to an invasion of the field of one by the other would raise difficult questions of interpretation. The replacement of the preexisting manufacturer's tax[69] by

[66] Laskin, Supra note 23, p.4.
[67] Ibid.
[68] Ibid.
[69] See The 'Sales and Excise Tax Proclamation', 1993, Proc.No.68/1993, Neg.Gaz., Year 2, No.61.

VAT has led the issue of constitutionality of the VAT legal bases in Ethiopian federal system. The issue could be reframed as: could VAT be subject to new allocation under Aricle 99 as undesignated power of taxation? The Houses have decided that VAT is undesignated tax. The power to levy and collect VAT is now vested to the Federal Government by the decision of the Houses.[70] Whether VAT is one of the alternative forms of sales tax that could be subsumed under the constitutional phrase "[s] ales tax" as provided in Arts. 96, 97 and 98 or is it nova species (new) one necessitating new allocation under Art.99 remains questionable.

During the joint session of the two Houses to allocate VAT, most of the members of the Houses held that VAT is a new tax.[71] For them, the Constitutional allocation of sales tax in to federal and state power of taxation could not be interpreted to include VAT because of its unique features.[72] On the other hand, there were few members of the Houses who questioned as to whether VAT is a new tax.[73] The majority had been heedless to voices calling for consideration of the constitutional and other legal implications of VAT and finally VAT was assigned to the Federal Government by unanimous consent of members of the Houses.[74]

The Constitutional division of power with respect to sales tax provides that the Federal Government has the power to levy and collect sales taxes on

[70] Minute of Joint Session of the Houses, Supra note 37.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid, p.6.

imports and on federally owned enterprises.[75] States are empowered to levy and collect sales taxes on individual traders (unincorporated businesses) within their territory and on state owned enterprises.[76] The Federal and state governments are concurrently empowered to levy and collect sales taxes on jointly owned enterprises and private enterprises (incorporated businesses in the form of business organization).[77] The Constitution provides this dichotomy of authority over sales taxes. But what sort of sales tax does the Constitution purport to mean remains questionable. The question then is one of constitutional interpretation. Constitutional supremacy necessarily assumes that a superior rule is what the constitution says it is. How, then, can an objective meaning of constitutional provision be ascertained?

This scenario leads to academic discourse on constitutional interpretation. In legal parlance, there are different approaches to constitutional interpretation[78]

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[75] FDRE Constitution, Supra note 11, Article96 (1) & (3). In relation to import and export, it simply reads taxes; which should include sales tax.

[76] Ibid, Article97 (4) & (7).

[77] Ibid, Article98. For clarity, see the Amharic version.

[78] For instance, Rober C. Post has identified three distinct theories of interpretation that compete for control of the
Constitution. He stated that "in one corner is a form of interpretation that strives to implement the Constitution through the articulation of explicit doctrinal rules. In a second corner is a form of interpretation that attempts to construe the Constitution to reflect the original intent of its Framers. In yet a third corner is a form of interpretation that reads the Constitution in a manner designed to express the deepest contemporary purposes of the people. Each of these three theories is immediately recognizable and familiar to those who practice constitutional adjudication. See Post, Robert C.,"Theories of Constitutional Interpretation" (1990). Faculty Scholarship Series. Paper 209, at WWW
<http://www.digitalcommons.law.yale.edu/fss_papers/209> , p.15, [herein after, Post, Robert C., Theories of Constitutional Interpretation]; Ducat, Graig R., Constitutional Interpretation, 6th ed., 1996, p.66

but two tools of interpretation[79]-the "plain meaning" rule and the "intention of the framers"- seem to be the general modes of interpretation. The former embodies the notion that the words of the constitution are to be taken at face value and are to be given their ordinarily accepted meaning while the latter requires fidelity to what those who wrote the constitution intended its provision to mean.[80] The writer will now analyze the place of VAT in the FDRE Constitution from these approaches and from the perspective of the effect of the allocation of VAT as undesignated tax. Attempts shall be made to elucidate what the term "sales tax" mean in the Ethiopian Constitution.

VAT as a Species of Sales Tax: In Search of the Plain Meaning of VAT within the FDRE Constitution.

What does "sales tax" ordinarily convey? We may resort to taxation literatures in search of how sales tax is normally understood. To begin with, Bernard P. Herber, in his book entitled *Modern Public Finance,* describes sales taxes as "in *rem* taxes imposed on a market transaction base. They are impersonal and use only a particular market transaction as its base".[81] He further provides a number of species under the generic term of "sales tax". He divided sales tax into single stage sales taxes and multistage sales taxes.[82] The former embraces manufacturer's tax, whole sales tax, and retail sales tax. Multistage sales tax includes turnover tax and VAT. The same classification is

[79] Ibid.
[80] Ibid.
[81] Herber, Berdinand P., Modern Public Finance, 5th ed., 1996, p.99, [herein after Herber, Modern Public Finance].
[82] Ibid.

adopted by John F. Due in his article entitled "alternative forms of sales taxation in developing country."[83]

In like manner, there is ample literature defining VAT as a species of sales tax. H.L. Bhatia, in his book entitled *Public Finance*, begins discussion of VAT by defining it as follows: "VAT belongs to the family of sales taxes."[84] "Therefore," he goes on to say, "it would be helpful if we briefly distinguish between different forms of sales taxes and note the place of VAT in them."[85] He maintained the above classification of sales tax. Bhatia's definition of VAT is also maintained by many others who have written in the field of taxation.[86]

However, it does not mean that someone scanning the literature would not face any confusing characterization of "sales tax" and VAT in the literatures. Herber, cited above, gives sales tax a much broader view to embrace even excise taxes.[87] The same understanding is upheld in some other books.[88] But it is clear that even such understanding of sales tax as inclusive of excise tax has the effect of broadening the scope of sales tax rather than narrowing down its reaches. It gives broader understanding without excluding VAT from the class of sales tax but still it denies the term sales tax exact meaning. Also,

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[83] Due, John F., Alternative Forms of Sales Taxation for a Developing Country, in Reading on Taxation in Developing Countries, 3rd ed., 1975, p.309.
[84] Bhatia, H.L., Public Finance, 23rd ed., 2002, p.152, [herein after, Bhatia, Public Finance].
[85] Ibid.
[86] Brashares, Eidth, et al, The distributional Aspects of Federal Value Added Tax, National Tax Journal, Vol., No.2, 1988, p.156.
[87] Herber, Modern Public Finance, Supra note 81, p.244.
[88] American jurisprudence, Vol. 47, 1943, p.195.

Bhatia, after defining VAT as a tax belonging to the family of sales tax, stated on the same page that "the basic difference between VAT and sales tax is that the tax liability under VAT is split up into stages."[89] He added that "like a sales tax, VAT can also be designed to have different forms..."[90]. Such phraseology gives the impression that sales tax and VAT belongs to different category of taxes instead of VAT being part of sales tax. It sounds a far stretched understanding of sales tax and VAT as mutually exclusive. These misleading descriptions often arise in writings whereby authors having specific type of sales tax in mind deal with sales tax *vis-à-vis* VAT.[91]

On the whole, in spite of the rare confusing description and use of the terms VAT and "sales tax", in essence, either VAT or any of the alternatives in sales tax refer to a consumption tax imposed on a person that carries a taxable transaction. The tax liability of a taxpayer arises from sale. The balance of the argument is in favor of the position that VAT is one form of sales tax.

This conception was asserted[92] during the Indian tax reform toward VAT in place of what the Indian Constitution calls "tax on the sale or purchase of

[89] Bhatia, Public Finance, Supra note 84, p. 153.
[90] Ibid.
[91] It seems that this author is arguing not based on the general conceptualization of sales tax but sticking on the sales tax that was in place in India by the time for call for reform. The Indian Sales Taxes were levied either at the 1st point /manufacturer's sales tax/ or the last point of sale or purchase/retailer's tax/. See Verma, L.C., Training Schedule with Material on VAT, Haryana Institute of Public Administration, Hipa Complex-76, Sector-18, Gurgaon, June-2002,p.10,at WWW <http://www.persmin.gov.in/otraining/UNDPProject/undp_modules/vat%20module.PDF> (consulted 24 March 2015).
[92] Ibid, p. 39. It was stated that"VAT is nothing but a form of sales tax only and is charged at each stage of sale on the value added to goods."

goods".[93] In practice, the State's Sales Tax Acts levied either at the 1st point (manufacturer's tax) or the last point of sale or purchase (retail sales tax) in the State.[94] At the time of transition from these sales taxes to the state level VAT, it was held that "VAT is nothing but a form of sales tax only and is charged at each stage of sale on the value added to goods"[95]; sales tax is a state subject and the introduction of VAT could have been within the states own competence but VAT's inter-jurisdictional implication compels resort to request the president's blessing as he is empowered to supervise check posts and transit passes pertaining to cross border trade.[96] In other worlds, this writer is saying that VAT is sales tax and it is for a different reason (the inter-jurisdictional implication of VAT) that the regional states (in India) resort to the president for replacement of pre-existing sales tax with VAT.

This conceptual exploration may be concluded by citing what Richard A. Musgrave and Peggy B. Musgrave stated in their joint work "…the VAT is not a genuinely new form of taxation but merely a sales tax administration in a different form."[97]

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[93] The Indian Constitution authorizes the States to levy tax "on the sale or purchase of goods other than …where such sale or purchase takes place in the course of inter-State-trade or commerce." See Constitution of India, adopted in 1949, 1949, see Entry No.54 of List II of the Seventh Schedule of the Constitution of India as per Article 246(3) of the Constitution of India.

[94] Verma, Supra note 91.

[95] Ibid.

[96] Ibid.

[97] Musgrave, Richard A. & Musgrave, Peggy B., Public Finance in Theory and Practice, 4th ed., McGraw Hill Book Company, 1989, p.339.

From this conceptual understanding it is clear that sales tax is broader than VAT and embraces VAT. We may then arrive at the conclusion that the term "sales tax" in the FDRE Constitution includes VAT and as such VAT is a species of the designated sales tax in the Constitution. As the states are allocated with sales tax power in the Constitution, it follows that they are given power over VAT; constitution that vests the genus may not be interpreted to deny the species. It is the discretion and mutual consensus of the states and the Federal Government that matter as to which of the alternatives are to be taken (manufacturer's tax, whole sales tax, retail sales tax, turnover tax or value added tax). And the mere fact that the Constitution does not mention VAT but the term sales tax would not make VAT undesignated tax. We could say that the Constitution has allocated sales taxes whichever form is preferred including VAT. Indeed, constitutional provisions are general by their nature. The details and form of sales tax among the alternatives is a matter to be determined by other laws. It could be said that the preexisting manufacturer's tax that was replaced by VAT was opted only as a matter of alternative among others, and thus VAT is a designated tax like the manufacturer sales tax. Therefore, the argument that VAT is already allocated in the Constitution could be said to be a well founded one.

But others may rely on constitutional interpretation based on the intention of the framers of the constitution and pose the question can we reasonable say that the framers of the constitution had VAT in mind?

Intention of the Framers of the Constitution

Evidence of extraneous facts existing at the date of the constitutional drafting may in some cases help to throw light on the intention of the framers of the constitution though not conclusive. In searching for the intention of the framers of the FDRE Constitution, this researcher consulted the minutes of the Constitutional Assembly. But minute of the Constitutional Assembly does not have anything to say on what the phrase "sales tax" was intended to imply.[98] It does not provide indications as to whether the provision on "sales tax" implies manufactures sales tax, whole sales tax, retail sales tax, turnover tax or VAT.

Pondering on the intention of the drafters of the constitution, during the joint session of the federal houses to introduce VAT, it had been argued that had the framers were to mean sales tax to include VAT, they would have explicitly provided for it[99] and held that VAT was not depicted at that time. But is it because the predecessor manufacturer's sales tax and the current turnover taxes are mentioned in the Constitution that we have these taxes without the issue of designation? Not at all; we infer these taxes from the generic "sales tax" provision. For instance, would a shift from manufacturer's sales tax to retail sales tax or whole sales tax raise the issue of undesignated tax? It is unlikely.

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[98] See Minute of the discussion on draft of the Ethiopian Constitution, Volume 5&6, November 1994. The author has revisited the Minute of the Constitutional Assembly. While lots of debates are documented on several of the draft provisions of the constitution including on the issue of royalty tax, no word uttered on the issue of sales tax.

[99] Minute of the joint session of the Houses, Supra note 37, p.6.

The FDRE Constitution does not prescribe sales tax to mean only manufacturer's tax or turnover tax or any of the alternatives observed in literature and in practice. Some unique technicalities in the administration of VAT might make it a bit unusual as compared to other sales taxes. In particular, interstate jurisdictional implication of VAT and input crediting scheme of VAT are notable peculiarities of VAT. The empowerment of states over VAT might result in market disintegration owing to the need for interstate border tax adjustment and the difference in rate set by each state.[100] A state may be required to provide credit for goods imported from other states at a higher rate than its own to which states are less likely to submit.

The unique aspect of VAT that requires input tax crediting may be radical and unexpected change for Ethiopia. The implementation of tax credit clearance system could be administratively costly and complex and even it might have been unknown to the framers. It has never been considered as alternative in our tax history; Ethiopian tax history, as can be gathered from proclamation No. 68/1993 and its predecessors,[101] reveals that previous taxes were manufacturer's tax and turnover tax or some other taxes. Applying the sales "tax clause" to VAT that might not have been imagined by the constitutional framers might appear to be odd.

Yet the stated peculiarities of VAT do not bring about conceptual fallacy; VAT is a sales tax in as much as it remains a tax based on sales of goods and services .i.e. the tax base is sale just like other alternative sales taxes. The

[100] Keen, Michael, VIVAT, CVAT, and All That: New Forms of Value –Added Tax for Federal Systems, IMF Working paper (wp/00/83), 2002, p.3.
[101] See The Sales and Excise Tax Proclamation, Supra note 69; see also Proclamation No. 205/1963.

credit system in VAT accomplishes the same goal that retail sales tax accomplishes through taxing only the final value of transaction transferred to the consumer so that there would not be cascading of tax.[102] Moreover, as any of sales taxes, VAT is a consumption tax measured as a percentage of sales price less purchase price. VAT's unusual features come into view only in relation to administrative technicalities which the constitutional framers need not be astute. If a VAT taxing the same value of goods as retail sales tax but by way of credit is held novel, retail sales tax that taxes the same base should also be held new.

Hence it is tenable to argue that the constitutional phrase "sales tax" in the Ethiopian Constitution should be interpreted broadly to include VAT. Most of all, it is a well-known principle that constitutions should be interpreted broadly. The general provisions of constitutions should be interpreted in such a manner as to accommodate new development. In this respect Justice Marshal once stated that "[i]t is a constitution that we are expounding."[103] Marshal propounds expansive interpretation of constitutions to accommodate circumstances born through time rather that mechanical application of provisions in constitutions. The FDRE Constitution has depicted tax on sales transaction, which is what VAT also does. Hence, the exclusion of VAT from sales tax category is not defensible.

[102] Due, Alternative Forms of Taxation for a Developing Country, Supra note 83, p.318.
[103] Ducat, Constitutional Interpretation, Supra note 78, p.130

Beyond that should we destroy the power of states over sales tax that have been intentionally given so as to provide the Federal Government with a probably an unanticipated power?

Power over VAT and Power over Sales Tax: Destroying the Express Power of States to Legislate on Sales Tax?

In this third approach of exploring whether VAT is really undesignated or not, we will see what VAT has brought in relation to the "sales tax" that was in effect. What power the states have with respect to VAT and what power had they had in relation to with the previous sales taxes which were replaced by VAT?

The VAT proclamation (proc .No. 285/2002) pronounces, in its preamble, the replacement of the existing sales tax by VAT. At the same time, this legislation provides that, again in its preamble, "in accordance with Art.55 (1) and (11) of the Constitution it is hereby proclaimed as follows"- proclaims VAT. It is true that subsidiary legislations must draw ultimate justification in the constitution at least for prima facie validity. The question here pertains to the issue of how far justified is the proclamation's justification under Art. 55 (11)? Is it merely a symbolic frame of reference or constitutionally tenable?

Art 55(11) states that the House of peoples' Representatives shall levy taxes and duties on revenue sources reserved to the Federal Government. Then, is VAT a revenue source reserved to the Federal Government? The validity of VAT being Federal revenue source is derived from the decision of the

Houses. The decision itself must cope with constitutional scrutiny for the VAT legislation to be constitutional.

The Houses generously conceded that VAT is constitutionally undesignated and at the same time and inescapably admitted that it replaces the existing sales tax.[104] Fortunately or unfortunately voices that called for consideration of constitutional implication of this replacement were ignored. The VAT legislation proclaimed on the basis of the decision of the Houses does not explicitly repeal state sales tax laws, if any. Nor does it explicitly require that the state parliaments should abdicate their power to impose and collect sales tax. It simply states the existing sales tax is replaced by VAT and Proclamation No.68/1993 is repealed.[105] It does not specify whether the replaced sales tax is that of federal or both federal and state sales taxes. In this case, given that this is a federal legislation, one would normally interpret it to mean only the previous Federal sales tax is replaced.

However, the proclamation by necessary implication has attempted to throw away states from their constitutionally asserted power of taxation. The minute of the Federal Houses decision, from which the VAT legislation draws its legitimacy, indicates that the parliamentary committee had come up with proposal stating "the constitutional provisions dealing with sales tax shall be read as VAT then after".[106] The decision was adopted having that in mind. It

[104] Minute of the Joint Session of the Houses, Supra note 37, p.4.
[105] Value Added Tax Proclamation, Supra note 47, Article65.
[106] Minute of the Joint Session of the Houses, Supra note 37, p.4. One member had called for clarification on this issue and argued that as it stands the proposal amounts to amending the constitution without adhering to the amendments process but the other members simply

is clear that the Houses were abolishing an existing sales tax and replacing it by a "new" tax as long as they tagged VAT as a novel one. It implies that state sales tax laws are repealed and state parliament is bound to abdicate its power over sales tax as long as the decision of the Federal Houses vested power over VAT totally to the Federal Government.

The implicit exclusion was practically explicated. So far, the states have accepted[107] the federal VAT though it deprives them discretionary control over the tax base as well as on the rate of the tax. Of course, the states had no role at the stage of VAT introduction; they were informed that a decision for national VAT was made after the Houses decision.[108] The federal legislation impliedly informed the states that they are ousted from the sphere of sales tax to the extent that their tax payers fall within the VAT threshold. [109]

Overall, the Houses' decision is meant to budge the existing state sales tax power to the Federal Government. To do so would amount to constitutional

ridiculed the the question and replied that what matters is whether it should be to the federal or to the states. (Author's translation of the minute).

[107] Gizachew, Supra note 36, p.78. After VAT was introduced, the states were consulted and they agreed to the national VAT.

[108] Minute of the Joint Session of the Houses, Supra note 37, p.5. Indeed, the Houses decided power over VAT after the VAT was drafted and was about to be promulgated, just as justifying background to the proclamation.

[109] Value Added Tax Proclamation, Supra note 47, Article 16. Obligatory Registration

1) A person who carries on taxable activity and is not registered is required to file an application for VAT registration with the Authority if -

(a) at the end of any period of 12 calendar months the person made, during that period, taxable transactions the total value of which exceeded 500,000 Birr; or

(b) at the beginning of any period of 12 calendar months there are reasonable grounds to expect that the total value of taxable transactions to be made by the person during that period will exceed 500,000 Birr.

2) The Minister of Finance and Economic Development may by directive increase or decrease the threshold provided for under Sub-Article 1. Even as regards turnover taxpayers the states power over sales tax is limited to power of administration only since the legislative power over there should be assumed by the Federal Government for the sake of uniformity.

amendment. Constitutional amendment, however, goes far beyond the consensus of the two Houses. The decision of the Houses cannot cope with constitutional scrutiny since the two Houses could not appropriate the power of States and assign same to the Federal Government. If that is the case, the VAT proclamation does not have constitutionally valid legal base. In a dual system, we cannot expect to find either government legislating for the other.[110] The federal parliament cannot repeal the states' sales tax laws, if any. It cannot repeal or suspend a law which it has no power to enact. It cannot legislate for states whether or not the states have failed to enact laws in their exclusive powers of taxation.

The decision of the Houses and the legislation there from are unlikely to be in congruity with the Constitution should the case be lodged for constitutional interpretation.[111] It is not undesignated power that the Houses designate. Whether we call it VAT or else, VAT in effect is the same as the previous sales tax. It replaces the manufacture's sales tax over which the states used to have their own share of power thereby ending states power over sales tax.

Should it be desired to shift power of "sales tax" from states and replace it with national VAT for any justifiable reason, the procedure should have proceeded according the amendment clause in Art. 104and 105 of the

[110] Sawer, Geoffery, Cases on the Constitution of the Common Wealth of Australia, 1964, p.84.

[111] The FDRE Constitution bestows the power to interpret the Constitution to the House of Federation assisted by the Council of Constitutional inquiry. See FDRE Constitution, Supra note 11, Article62 (1)&(2).

Constitution, and no other alternative seem to be legally tenable.[112] Whether the States would have conceded to it or not is another issue. The enthusiasts for VAT, nonetheless, did not want to follow that route.

Concluding Remarks

The decision of the Houses and the legislation based on them are, at least in the opinion of the writer, unconstitutional. The power to decide as to the

[112] Delegation was suggested as a solution to get out of the constitutional hurdle during the introduction of VAT in Ethiopia. It was suggested that the states should delegate their power over sales tax to the federal Government. (see Supra note 23). But would such option have been viable in the eyes of the Constitution requires some inquiry. The FDRE Constitution provides for unlimited delegation from Federal government to the states whenever appropriate unless the nature of the power by itself is non delegable. (see Article 28&50(9)). The fundamental question then is whether there can be upward delegation and if so to what extent. The Constitution is not clear on this issue. It could be urged, however, that delegation from state to Federal Government is constitutionally impossible in as far as legislative power is concerned. In the first place, the very idea of upward delegation may militate self governance and self reliance of states. It may be a defeat to the rational of federalism. Secondly, It could be reasonably argued that a constitution that expressly provides for downward delegation could have done same as regards upward delegation had it been to mean that upward delegation is permitted. More important than other arguments, the minute of the Constitutional Assembly communicates the intention unequivocally. It provides, after hot debate on the issue, delegation will be only downward so as to assure and encourage state self-governance. See Minute of the discussion on draft of the Ethiopian constitution volume 5, November 1994, p 5.
On the contrary, doubt might arise when one looks at Article 94(2)of the Constitution . It reads "…unless otherwise agreed upon, the financial expenditures required for the carrying out of any delegated function by a state shall be borne by the delegating party." Here it appears that even the states may to delegate. But even if that is the case, what can be delegated is restricted as the languages of the provisions speak. Delegation under Article 50(9) (downward delegation) pronounces "powers and functions" while Article 94(2) reads "functions". The Constitution makes distinction as to the scope of delegation. The latter delegation is bare administrative function. Although the scope of functions may be hard to precisely demarcate, it is made obvious that states cannot delegate at least their legislative power as the minute clarifies. The ultimate conclusion is that, absent constitutional amendment, upward delegation is not possible and any attempt to delegate state legislative power would not bear fruit. The suggestion that states could delegate their power to the Federal Government for the introduction of national VAT would not have been viable and any future attempt will not be viable.

issue of constitutionality rests with the House of Federation. It will be a judge on an issue which itself has taken part in the decision in another capacity. The verdict would be challenging to the House. But to hold the decision and legislations constitutional would obviously be against the commitment of the framers that provide the states with legislative as well as administrative power over sales tax. In so far as the decision of the Houses entrusting the power over VAT to the Federal Government and legislations there from can hardly pass the test of constitutionality, future challenges are feasible from taxpayers and states.

From the taxpayers' perspective, no persons or property is subject to taxation absent valid laws to that effect. A tax payer may defend a proceeding against him pointing to the non-applicability/invalidity of the tax law. Mere submission by citizen when power is exercised illegally is not a bar to contest future proceeding .Thus in relation to VAT, taxpayers may raise as a defense in court proceeding by challenging[113] the validity of the federal tax legislations on VAT on state subjects of sales tax (individual traders).

From the perspective of regional states, notwithstanding the current practice, they may begin to challenge the continuation of national level VAT that denies discretion in setting tax base and tax rates in designing state sales tax. The states council can at any time come up with its own valid sales tax

[113] Of course, the challenge has already started. In 2006, some allegedly VAT payers in Tigray were prosecuted for VAT evasion. The defendants challenged the legality and applicability of the Federal VAT laws on them as they are subject of state sales tax. See Gizachew, Supra note 36, p.77, (but no information on the final outcome of the decision as it was pending).

should it want to make use of its constitutional power. This may be a reality when the states become strong and self-assertive through time and experience. The present harmony may also be attributed to the fact that the Federal and state governments are from same party. These good old days might wither away in the future.

No matter what the current practice or any agreement, if any, a state legislature could not bind itself not to legislate upon a particular subject matter constitutionally vested to it. All this tells us that only constitutional amendment is safe exit, if at all centralized VAT is indispensable.

NOTE

The Interplay between the Duty not to cause Significant Harm and Equitable and Reasonable Utilization Principle

Zewdu Mengesha Beshahider[♣]

Introduction

States sharing freshwater resources have developed basic rules governing the use of these resources through their practice over many years. Some of the rules form part of customary international law, which is a body of unwritten law binding on all states. Countries sharing freshwater may also enter into treaties applying and adjusting rules of customary law to suit their specific situations with regard to the watercourses they share.[1]

In contemporary state and institutional practice of none state actors, two doctrines have attained supremacy. The first entitles riparian states to exploit international watercourses in an equitable and reasonable manner. The second principle cautions states to take appropriate measures in the utilization of trans-boundary Rivers such that significant harm to the share of other watercourse states is averted. Today these two principles are indisputably regarded as cornerstones of the regime of international watercourses law.[2]

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[1] Dinar, S. Dinar, McCaffrey& McKinney, Bridges Over Water: Understanding Trans-boundary Water Conflict, Negotiation and Cooperation, World Scientific Publishing Co. Pte. Ltd, 2007, vol.3, pp.64-65.[hereinafter Dinar et al., Understanding Trans-boundary Water Conflict, Negotiation and Cooperation].

[2] Tadesse Kassa, International watercourses law in the Nile River Basin: Three States at a Crossroads, (Routledge Taylor and Francis Group, London/New York), 2013, pp.148-149

This note tries to look in to the duty not to cause significant harm and its interplay with the equitable and reasonable utilizations rule. The presentation will also explore lingering issues of preeminence between the two principles which may be crucial in understanding the full scope of riparian rights and obligations in the international water basin.

1. The Duty not to Cause Significant harm under International Water Law

The duty not to cause significant harm is one among the basic principles governing international water law. This duty is enshrined in various international water law instruments in different facets. There is general agreement that the principle has already achieved the status of customary international law.[3] In contemporary state practice, this principle stands among the few principles that has gained supremacy and come to be regarded as one of the cornerstones of the regime of international watercourse law. Beyond this, the rule has been enumerated in the pronouncements of numerous international governmental and nongovernmental organizations. It has also been referred to in judicial decisions as well as opinions of highly praised jurists.[4]

[hereinafter Tadesse, International watercourses law in the Nile River Basin: Three states at a crossroads].

[3] Scholars like McCaffrey and Caflisch have concurred that this principle is firmly grounded in customary international law and is a general principle of international law. See generally Mohammed S. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, Colo. J. Int'l Environmental. Law & Pol'y, Vol. 18:2, 2007, p.356.

[4] Well-known experts in the field of international water law, Caflisch, Dellapenna, McCaffrey, Wouters and others have in one way or another discussed that this principle is a basic obligation imposed upon watercourse states. In addition to these experts, the Trail Smelter arbitration award and Corfu Chanel case may also be cited in this regard.

The obligation "not to cause significant harm" derives from the theory of limited territorial sovereignty.[5] The theory of limited territorial sovereignty stipulates that all watercourse States have an equitable right to the utilization of a shared watercourse but must also respect the sovereignty of other States and their equitable rights of use.[6] This principle is widely accepted as it is one of the principles that serve as the foundation of the law of international watercourses and the UN Watercourse Convention.[7]

Historically, the no-harm rule has been identified with the maxim *sic uteretuoutalienum non laedas* which means "use your own not to harm that of another".[8] This has itself been called "a reflection of the sovereign equality of states".[9] It has been said that this rule "appears to have acquired customary force, as is attested by international practice".[10] There is indeed little doubt that the *sic uteretuo* or no-harm rule have acquired the status of customary international law and also broadly recognized as a general principle of international law.[11] Experts in international water law state that *sic uteretue*

[5] At WWW <http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-7-obligation-not-to-cause-significant-harm/7-1-commentary/>, (last Visited 18/2/2016).
User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, at WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, (last visited 18/2/2016).

[7] User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, at WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, (last visited 18/2/2016).

[8] Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988), Extract from the Yearbook of the International Law Commission, 1988, vol. II(2), p. 35.

[9] Ibid, p.35

[10] Stephen McCaffrey, The law of international water course non navigation use, Oxford University Press, 2nd edition 2007 pp.415-416 [hereinafter McCaffrey, The law of international water course non navigation use].

[11] Ibid, p.416

occupies a firm place among the doctrinal bases for the obligation of states to avoid appreciable harm to other states, perhaps even more particularly with respect to harm transmitted via international watercourses.[12]

> As described above, the duty not to cause significant harm calls for watercourse states to take all appropriate measures to prevent causing significant harm to other watercourse states. The inclusion of this duty in the UN watercourse convention and its placement in the section of the convention entitled "general principle" implies that it is a fundamental obligation in the field.

In its commentary, the International Law Commission (ILC) also reasoned that this reflected the equality of rights and sovereignty of all watercourse states, because, "in the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse states have equal and correlative rights to the uses and benefits of the watercourse."[13] Thus, states' freedom of action and utilization of international rivers is limited by the reciprocal rights of other states in utilizing shared watercourses. This principle represents a further reflection of the limited territorial sovereignty theory.[14]

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[12] Ibid.p.416

[13] ILC, Report of the International Law Commission on the work of its forty-sixth session, As quoted by Mohammed S. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, Colo. J. Int'l Environmental Law and policy, vol. 18, 2007, p.356.

[14] The theory of limited territorial sovereignty is based on the assertion that every co-riparian is free to use the waters of shared rivers within its territory on condition that the rights and interests of all the other co-riparian states are taken into consideration. In this case, sovereignty over shared waters is relative and qualified. The co-riparians have reciprocal

In the present days it is believed that states may not intentionally cause harm to another through, for example, flooding or deliberate releases of toxic pollution, questions are sometimes raised about whether one state's use that reduces the available supply in another state is prohibited by this norm.[15] However the principle obliges the watercourse states, when utilizing an international watercourse in their territory, to take all proper measures to avoid causing significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, as provided in the 1997 UN Watercourse Convention, the state causing the harm is required to "take all appropriate measures, having due regard to different factors, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation".[16]

2. The Principle of Equitable and Reasonable Utilization

The principle of equitable and reasonable utilization can be seen as one of the most fundamental principles of international watercourses law which emerged in the Helsinki Rules and was further developed under the UN Watercourse Convention (1997). Article 5 of the convention provides for "equitable and reasonable utilization and participation."

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rights and duties in the use of the waters of common rivers. Physical unity creates a unique legal unity leading to the formulation of a 'community of interests,' and the waters of the shared rivers so become res comunis. See Dante A. Caponera, Principle of Water law and Administration National and International, 2nd edition, (Taylor & Francis, London, UK,), 2007, p. 213 [hereinafter Dante, Principle of Water law and Administration National and International].

[15] Grzybowski, McCaffrey & Paisley, Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses, Global Business & Development Law Journal, vol. 22, 2010, p.142.

[16] The UN Convention on the Law of the Non-navigational Uses of International Watercourses, adopted by the General Assembly of the United Nations by resolution 51/229, in its Fifty-first Session, on 21 May 1997, come in to force, August 17 2014 Articles 5, 6, 7(1) &7(2) (herein after UN Watercourse Convention).

The equitable utilization principle may be conceptualized as dividing the entire watercourse among states taking into account different factors. While Reasonable utilization looks at how water is used to determine if the purpose for which water is being used and the amount dedicated are reasonable under the circumstances.[17] This principle is "born" out of the principle of equitable apportionment. Apportionment is a division of the water among or between states. The legal principle of sovereign equality of states permits each state to use a share of the watercourse based on principles of equity.[18] By contrast, insistence by one state on exclusive sovereign rights over shared natural resources within its territory runs counter to the claims of other states to rights over the resources within their own territories.[19]

The equitable utilization rule applies specifically to international watercourses; it was developed primarily in the context of proceedings before domestic courts (notably in the United States), and its foundations today lie in customary international law.[20] This principle reflects the emerging view of shared natural resources which favors regulating the use of the international environment so as to manage the resource, as opposed to managing the

[17] Margaret J. Vick, The Law of International Waters: Reasonable Utilization, Chi.-Kent Journal of International and comparative Law, vol. XII, No. 1, 2009, p.145.
[18] Ibid, p.146.
[19] B.A. Godana, African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems, A publication of the Graduate Institute of International Studies, Geneva, 1985,p.55 [hereinafter Godana, African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems].
[20] Patricia K. Wouters, Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States, University of British Columbia Press, The Canadian Yearbook of International Law, Volume XXX, 1992,Pp.45-46

individual political entity.[21] The principle emphasizes that a state, albeit sovereign, cannot legally do as it pleases with trans-boundary water resources within its territory. Its essence is that states must act equitably and reasonably in dealing with these waters.[22] Interdependence among utilizations in river basins and international legal interdependence in respect to the protection of interests of all states belonging to that basin can be cited as the core reasons why the international community developed this principle for the utilization of international shared water course resources.[23]

In his treatise on the law of non-navigational uses of international watercourses, Stephen McCaffrey describes equitable utilization as follows: "born from the U.S. Supreme Court's decisions in interstate apportionment cases beginning in the early twentieth century, and supported by decisions in other federal states, the doctrine of equitable utilization was applied to international watercourses as the basic, governing principle by the International Law Association's 1966 Helsinki Rules.[24] Its status as the fundamental norm in the field has recently been confirmed by the decision of the International Court of Justice in the case concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)... The 1997 UN Convention on the

[21] David J. Lazerwitz, The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses, Global Legal Studies Journal, Vol. 1: 1993, P.259

[22] Notes and Comments /Notes et commentaries', The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention, The Canadian Yearbook of International Law 1997,P.216

[23] The nexus between factual interdependence among utilizations within a given river basin and international legal interdependence in respect of the protection of interests of all states belonging to that basin has been affirmed as the basic premise in the drafting of an international convention on the subject matter. Look First Report on the Law of the Non-navigational Uses of International Watercourses, U.N. Doc. A/CN.4/295 (1976) paragraph 38-39

[24] Margaret J. Vick, Supra note 17, p.145.

Law of the Non-navigational Uses of International Watercourses (Hereinafter called The 1997 UN Convention also appears to treat equitable utilization as the overarching principle governing the use of international watercourses, as did the draft articles adopted by the ILC on its second reading in 1994."[25]

Equitable utilization entails the allocation, sharing and division of the resource and its benefits among riparian states. Equitable use is often referred to as a right to use water resources in a just and reasonable manner; it is not, however, the same as reasonable use.[26]

The 1997 UN Watercourse Convention calls for both equitable and reasonable sharing and for equitable and reasonable utilization. Article 5 of the convention states that: "watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits there from, taking into account the interests of the watercourse states concerned, and consistent with adequate protection of the watercourse."[27]

Accordingly, article 5 introduces a new concept of equitable participation. The basic idea behind this concept is that in order to achieve a regime of equitable and reasonable utilization, riparian states must cooperate with each

[25] McCaffrey, Supra note 10, pp. 384-385.

[26] When we talk about reasonable use we are referring to how far the utilization of the river is rational. Even if a use of an international watercourse has been identified as reasonable, it might still be challenged when balanced with other uses and examined through the lens of equity.

[27] UN Watercourse Convention, Supra note 16, Article 5(1).

other by taking affirmative steps, individually or jointly, with regard to the watercourse.[28] This means that the principle under the convention adds a concept of participation which empowers, and of course requires, all riparian states to maintain and work towards a process that enhances cooperative and effective utilization of shared water resources.

There is no doubt that a watercourse state is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every state whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of states results in every watercourse state having rights to the use of the watercourse that is qualitatively equal to, and correlative with, those of other watercourse states.[29] This fundamental principle of "equality of right" does not, however, mean that each watercourse state is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse state is entitled to use and benefit from the watercourse in an equitable manner. The scope of a state's right of equitable utilization depends on the facts and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 6.[30] Article 6 of the convention also provides a non-exhaustive list of factors

[28] Ibid, Article 5(2). See also Stephen McCaffrey, The contribution of the UN convention on the law of the non-navigational uses of international watercourses, International Journal of Global International Issues, vol.1, nos.3/4, 2001, p.253.
[29] Report of the International Law Commission (ILC) on the work of its forty-sixth session. UN Doc. A/49/10 (1994), p.98, available at WWW <http://www.un.org/law/ilc/index.htm>.
[30] Ibid, p.98.

which shall be considered in the assessment of an equitable and reasonable utilization.[31]

3. The Interplay Between the Duty Not To Cause Significant Harm and Equitable and Reasonable Utilization

In this part of the analysis, the relationship between the two principles will be explored. However the focus is on the interplay as enshrined under the 1997 UN Watercourse Convention. The equitable utilization rule and the principle which prescribes a duty not to cause significant harm constitute the basic principles of international water law. Hence, it is not surprising to see the two principles enshrined in agreements regarding the utilization and management of international watercourses. The normative content and the relationship between the principle of equitable utilization and the no harm rule in the field of watercourse law has been defined not only in the UN Watercourse

[31] UN Watercourse Convention, Supra note 16, Article 6. Factors relevant to equitable and reasonable utilization: 1.Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:
(a) Geographic, hydro graphic, hydrological, climatic, ecological and other factors of a natural character;
(b) The social and economic needs of the watercourse States concerned;
(c) The population dependent on the watercourse in each watercourse State;
(d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
(e) Existing and potential uses of the watercourse;
(f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
(g) The availability of alternatives, of comparable value, to a particular planned or existing use. 2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation. 3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

Convention, but also in the works of l'Institut de Droit International (IDI) and the ILA.[32]

The relationship between the principle of equitable utilization, on the one hand, and that of no significant harm rule, on the other, continues to be, a subject of controversy.[33] The unresolved relationship between these two core principles of international water law has allowed states to maintain irreconcilable positions. In brief, the basic approach of international water law has been rooted in these core rules and in the underlying idea of mutual limitation of sovereign rights.[34] Under the principle of equitable utilization, riparian states are entitled to use international watercourses in a "reasonable" and "equitable" manner.[35] What is reasonable and equitable must be determined in each individual case and depends upon various factors, none of which has inherent priority. The mutual limitation approach also dictates that a state's right to use its territory is limited by the duty not to cause significant harm to another state.[36]

It is necessary that the principle of equitable utilization and the duty not to cause significant harm each require precision in their application. Therefore, the issue of implementation must be examined on a case by case basis. The procedural rules of notification, exchange of information, and consultation

[32]Patricia K. Wouters, An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation, International Watercourse Law, vol. 36, Spring, 1996, p.420.

[33] Notes and Comments/Notes et Commentaries, Supra note 22, p.221.

[34]A.S. Alsharhan and W.W. Wood, Water Resources Perspectives: Evaluation, Management and Policy, editor. Elsevier Amsterdam, The Netherlands, 2003, p.106.

[35] UN Watercourse Convention, Supra note 16, Article 5.

[36] Ibid, Article 7. It should be mentioned that this principle is not only part of international water law but also constitutes a cornerstone of international environmental law (see the 1972 declaration and 1992 Rio Declaration).

may assist in this task.[37] Additionally, the general duty to cooperate and the customary obligation that states peacefully settle their disputes encourage watercourse states to resolve any contests over water by agreement.[38]

It is worth clarifying in this connection that lower riparian states tend to favor the no harm rule, as it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparian states tend to favor the principle of equitable and reasonable utilization, because it provides more scope for states to utilize their share of the watercourse for activities that may impact downstream states.

In the 1983 Report of the International Law Commission on the work of its thirty-fifth session, it is stated: "It was considered essential to emphasize the duty of system States to refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States.[39] It was said that, taken together with article 7, the two articles constituted a legal standard: reasonable and equitable use must not cause appreciable harm."[40] This clearly shows how the relationships between the two principles are crafted. Beyond this, in the 1984 Report of the ILC on the work of its thirty-sixth session, it is stated that "the new wording provided a more acceptable

[37] Wouters, Supra note 32, p.420.
[38] Ibid, p.420.
[39] Report of the International Law Commission on the work of its thirty-fifth session (3 May - 22 July 1983), Document A/38/10, Par. 246. P. 72, at WWW <http://www.un.org/law/ilc/index.htm>
[40] During that draft Article 7 is Equitable sharing in the uses of an international watercourse system and its waters; whereas Art 9 talks about Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States. Look Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), Document A/38/10, Par. 246.

basis for an equitable international watercourse regime…[O]nce each State received its equitable share in the uses of such waters, it had sovereign powers to use that share provided no injury was done to others."[41] In his 1986 second report concerning the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other, the Special Rapporteur explained the problem as follows. An equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs, for one or more States using the watercourse, but not entail a legal "injury" or be otherwise wrongful.[42] This is due to the fact that an international watercourse might not always be capable of fully satisfying the competing claims of all the States concerned.[43] The object of an equitable allocation is to maximize the benefits, while minimizing the harm, to the States concerned. Thus, where there is, for example, insufficient water in a watercourse to satisfy the expressed needs or claims of the States concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse that was, in fact, equitable.[44]

[41] Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984), Document A/39/10, Par. 316, at WWW <http://www.un.org/law/ilc/index.htm.
[42] Report of the International Law Commission on the work of its thirty-eighth session (5 May - ll July 1986), Document A/41/10,Par.240, at WWW <http://www.un.org/law/ilc/index.htm>
[43] Ibid, Par. 240.
[44] Ibid, Par. 240.

After a lengthy debate by the Working Group assigned for this task, a compromise regarding the relationship between the two principles was reached. The compromise addressed articles 5 and 6 (equitable and reasonable utilization) and article 7 (obligation not to cause significant harm).[45] The language of article 7 requires the watercourse state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6" which deal with the principles of equitable and reasonable utilization.[46]

Throughout the preparation of the draft articles on the UN Watercourse Convention, the framing of the concept of the duty not to cause significant harm underwent several changes, alternating between the duty not to cause "appreciable" versus "significant" harm.[47] Before article 7 was finalized, it had to pass through lengthy debates, especially with regard to the relationship it has with the principle of equitable utilization. [48]

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[45] Salman M.A. Salman (2007), The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?, International Water Resources Association Water International, vol. 32, No. 1, March, p.6.

[46] Ibid, p.6.

[47] For Example, in the Report of the International Law Commission on the Work of Its work of Fortieth Session, which is held from 9 May - 29 July 1988, Article 8 was drafted as Obligation not to Cause 'Appreciable' Harm. However the International Law Commission on its forty-sixth session which held from 2 May-22 July 1994 the provision is drafted as the duty not to cause 'Significant' harm; which finally adopted in the final version of the UN Watercourse Convention.

[48] In 1993 the Special Rapporteur, Robert Rosenstock clarified to some extent by the commentary, he recommended that necessary changes be made in the text of article 7 for which he proposed a text. That revision would make "equitable and reasonable use" the determining criterion, except in cases of pollution, as defined in the draft articles. The Special Rapporteur's proposed redrafting of article 7 would impose on States only an obligation to "exercise due diligence", not an obligation not to cause appreciable or significant harm. Thus, where the use was equitable and reasonable, some harm would be allowable, with the result

In its present state under the convention, the principle provides that "watercourse states should, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other states".[49] In the second part, the same article provides that where significant harm nevertheless is caused to another watercourse state, "the state whose use causes such harm shall, in absence of agreement to such use, take all appropriate measures having due regard for the provisions of Article 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."[50]

A central debate in the protracted deliberations of the international law commission was whether to give precedence to the doctrine of equitable utilization or the "no significant harm" rule. The commission labored to reach an accommodation and produced a compromise that will probably not please anyone neither the downstream states nor the environmental community that pushed hard for a "no trans-boundary harm rule" nor the upstream states and the international water community that advocated for retention of the doctrine of equitable utilization.[51]

4. Issue of preeminence

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that equitable and reasonable would become the overriding consideration. Generally see A/48/10 The Report of the International Law Commission on the work of its forty-fifth session, 3 May - 23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, at WWW <http://www.un.org/law/ilc/index.htm>

[49] UN Watercourse Convention, Supra note 16, Article 7(1).
[50] Ibid, Article7 (2).
[51] Albert E.Utton, Which Rule should prevail in International Water Disputes: That of Reasonableness or that of No Harm, Natural Resources Journal, vol.36, 1996, p.635.

The core principles of international water law such as equitable utilization and the obligation not to cause significant harm will not to stand alone. This is due to the fact that international rules require the consent of both upper and lower riparian states. For this reason, it is possible to look at the basic principles incorporated into the agreement of watercourse states.

Agreement on which of the two rules (equitable and reasonable utilization, and the obligation not to cause harm) takes priority over the other proved quite difficult to attain and the issue occupied the ILC throughout its 23 years of work on the convention.[52] Each rapporteur dealt with the issue differently, equating the two principles or subordinating one principle to the other.[53] The issue was discussed by the Sixth Committee of the United Nations (the Legal Committee), which was convened as the Working Group of the Whole. Sharp differences within the Working Group between the riparian states concerning these two principles dominated the discussion.[54]

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[52] Salman M.A. Salman, Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses, Water International Vol. 35, No. 4, Rutledge Taylor & Francis Group, 2010, p.354.

[53] For example, the Special Rapporteur Rosenstock, in his first report in 1993, reversed precedent in favor of the principle of equitable utilization. However, in the 1988 40th session it is stated that "[a] watercourse State's right to utilize an international watercourse [system] in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—prima facie, at least—utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm. Thus a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in the absence of agreement between the watercourse States concerned. See Report of the International Law Commission on the work of its fortieth session, 9 May-29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No.10,p.36.This shows that there seems to have been some sort of priority given to the duty of that State not to cause appreciable harm to other watercourse States.

[54] Salman M.A. Salman, Supra note 52, p.354.

International law seems to favor the equitable use principle over the obligation not to cause significant harm. The UN Watercourse Convention incorporates equitable use and significant harm without any indication as to which is preeminent, but scholarly interpretation of the convention's language—from which the concepts are drawn—assigns primacy to equitable utilization.[55] Similarly, the ICJ emphasized the need for equitable utilization of the Danube River in the *Gabcikovo-Nagymaros* case that involves Hungary and Slovakia, but made no explicit reference to significant harm.[56]

The issue of preeminence of the equitable use doctrine could also be considered from a different dimension. The principle of equitable utilization, which evolved from early inter-state practice involving watercourses, determines the legitimacy of a use by balancing all factors relevant to a particular case and determining whether the use is an equitable and reasonable one.[57] The "no significant harm" rule, which originated as a general principle of law in inter-state relations, precludes, in the context of international watercourses, uses that result in significant harm to another state.[58] The conflict between the two principles is readily apparent. While the former rule might permit significant harm as a result of an equitable use of the watercourse, the latter would not**.**[59]

The net effect of the organization of the two principles under the convention, as some have argued, the convention purports to put the obligation not to

[55] Fasil Amdetsion, Where Water is Worth More than Gold: Addressing Water Shortages in the Middle East & Africa by Overcoming the Impediments to Basin-Wide Agreements, SAIS Review, Johns Hopkins University Press, vol. 32, No. 1, 2012, P.180.
[56] Ibid, p.180.
[57] Wouters, Supra note 32, , p.419.
[58] Ibid, pp.419-420.
[59] Ibid, p.420.

cause significant harm on a par with the principle of equitable utilization.[60] The implication of article 7 would be that if significant harm is not prevented, it follows the use of the state concerned will be challenged even if it is within the margin of equitable and reasonable utilization. This can be inferred from the specific obligation imposed upon watercourse states to make compensation in cases where the action of the state causes significant harm, the equitability of uses notwithstanding. But this should not us to conclude that the duty not to cause significant harm rule superior than the equitable and reasonable utilization principle. It is provided in the ILC commentary that '…the fact that an activity involves significant harm would not of itself necessarily constitute a basis for barring it. In certain circumstances "equitable and reasonable utilization" of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.'[61]

Obviously, there cannot be a guarantee that no 'harm' will result from the equitable use of an international watercourse. Once it is established that a particular use is equitable and reasonable, it is implied that every effort must have been made not to cause significant harm to another watercourse state (obligation of conduct). No more should be expected of the state that has

[60] FissehaYimer, An Assessment of the convention on the law of the Non-navigational uses of international uses of international waterways, Ethioscope, a periodic magazine published by the Press, Information and Documentation Directorate of the Ministry of Foreign Affairs,vol.3,No.2, 1997, p.18.

[61] Report of the International Law Commission on the work of its forty- sixth session (2 May-22 July 1994), Extract from the Yearbook of the International Law Commission, 1994, vol. II(2), P.103

equitably and reasonably utilized the international watercourse. That is why the primacy of the principle of equitable utilization has been preserved.[62] What is expected from the watercourse state is to make compensation in cases where the other watercourse state has suffered significant harm. Because the convention has stated that where significant harm nevertheless is caused to another watercourse state, the states whose use cause such harm are required to take all appropriate measures to eliminate or mitigate such harm. This means though the states are required to mitigate the harm, so long as the watercourse states' utilization is within the margin of equitable utilization, it seems that they are not required to stop their utilization. What they are required to do is to mitigate the harm by taking all appropriate measures and in case harm is occurring to discuss the question of compensation, depending on the situation.

Though the lower and that of the upper riparian states took positions that might benefit them; however, it has also been held widely that every international water basin must developed so as to render the greatest possible service to the whole community through which it flows, even though that community may be divided by political frontiers.[63]

It is possible to analyze the different stands and attitudes that watercourse states take with regard to how far the UN Watercourse Convention is cited in regard to which rule takes supremacy in cases of conflict. Lucius Caflisch presented an analysis of the convention's formulation, noting that the new

[62] FissehaYimer, Supra note, 60, p.18.

[63] British Yearbook of International Law, 1930, pp. 195-196, as cited by Mohammad Tufail Jawed, Rights of the Riparian, Pakistan Horizon, vol. 17, No. 2 (Second Quarter, 1964), and p.141.

formula[64] was considered by a number of lower riparian states to be sufficiently neutral not to suggest a subordination of the no harm rule to the principle of equitable and reasonable utilization. A number of upper riparian states thought just the contrary, namely, that the formula was strong enough to support the idea of subordination of the no harm rule to the principle of equitable utilization.[65]

On the contrary, significant upper riparian states such as Ethiopia and Turkey have, in their explanations of voting during the adoption of the convention, made their position clear on this issue; Ethiopia stated that article 7 was one of the grounds for abstaining on the convention, while Turkey argued that the convention should have established the primacy of the principle of equitable and reasonable utilization over the obligation not to cause significant harm.[66] However, notwithstanding such differing views among states, the prevailing approach, in the view of many renowned scholars, remains that the convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization. This conclusion has been based on a close reading of articles 5, 6 and 7 of the convention.[67]

A careful reading of articles 5, 6 and 7 of the convention should lead to the conclusion that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable and reasonable utilization. Thus, it can be concluded that, much like the Helsinki Rules, the principle of

[64] The new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6".
[65] Salman, Supra note 45, p.6.
[66] Fisseha, Supra note 60, p.18.
[67] Salman, Supra note 45, p.6.

equitable and reasonable utilization is the fundamental and guiding principle of the UN Watercourse Convention.

Many experts in the field of international law also believe that the Watercourse Convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization.[68] For example, McCaffrey has argued that a downstream state that was first to develop its water resources could not foreclose later developments by an upstream state by demonstrating that the later development would cause it harm. Under the doctrine of equitable utilization, the fact that the downstream state was "first to develop" (and thus had made prior uses that would be adversely affected by new upstream uses) would be merely one of a number of factors to be taken into consideration in arriving at an equitable allocation of the uses and benefits of the watercourse.[69] The right of late-coming riparians to utilize resources of an international watercourse would still remain qualified by the duty not to cause significant harm, except as may be allowed under equitable utilization of the watercourse concerned.[70]

In his Second Report during the codification of the UN Watercourse Convention, Special Rapporteur McCaffrey also recommended that the no significant harm articulation should be redrafted in such a way as to bring it

[68] Bourne 1997, Caflisch 1998, Paisley 2002, McCaffrey 2007, Salman 2007—all as cited by Salman M.A. Salman, Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses, Water International, vol. 35, No. 4, July 2010, Rutledge Taylor & Francis Group. p.355.

[69] Stephen C. McCaffrey, The Law of international watercourses: Some recent Developments and Unanswered Questions, Den. Journal of International Law and Policy, vol. 17:3(1989), p. 509.

[70] Tadesse Kasa, Supra note 2, p.257

into conformity with the principle of equitable utilization.[71] He said that the focus should be on the duty not to cause legal injury (by making a non-equitable use) rather than on the duty not to cause factual harm. In the context of watercourses, suffering even significant harm may not infringe on the rights of the harmed state if the harm is within the limits allowed by an equitable utilization.[72] However, he also recommended in his Fourth Report that, in matters involving pollution harm, the "no appreciable harm" threshold should be the fundamental rule.[73]

Under Article 7(2) of the UN Watercourse Convention, it is stated that where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of an agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

Based on these provisions of the UN Watercourses Convention, a State must always give "*due regard*" to the principle of equitable and reasonable utilization whenever significant harm occurs.[74] However, there is no reciprocal obligation of "*due regard*" to the principle of no significant harm

[71] McCaffrey, Second Report on the Law of the Non-Navigational Uses of International Watercourses, p.133, as cited by Wouters, Supra note 20, p.47.
[72] Ibid, p.47.
[73] S. C. McCaffrey, Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, UN, international Law Commission, 40th Session, UN Doc.A/CN.4/ 412/ Add.2 (1988).
[74] At WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf>, (last visited 18/02/2016).

when States are determining if a use or uses are equitable and reasonable. This crucial distinction is what has led many legal scholars to conclude that the duty not to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilization.[75]

While it is clear that this paragraph does not entirely solve the problem of which rule takes precedence, it strongly suggests that if a state's use is equitable, it should be allowed to continue, even if it causes significant harm to another state. If such harm is caused, the reformulation suggests that the harming state would be obligated to minimize the harm to the extent possible and to compensate the other state for any unavoidable harm.[76]

However, as Wouters notes, there are some scholars who argue that the obligation not to cause significant harm remains the governing rule under the Watercourse Convention. Most also argue that article 7(2) of the convention reduces the principle of equitable utilization to a mere factor to be considered in consultations where significant harm occurs.[77] Based on the construction of these provisions of the UN Watercourse Convention, therefore, a state must always give "due regard" to the principle of equitable and reasonable utilisation whenever significant harm occurs. However, there is no reciprocal obligation of "due regard" to the principle of no significant harm when states determine that a use or uses are equitable and reasonable. This crucial distinction is what has led many legal scholars to conclude that the duty not

[75] Ibid.
[76] Stephen C. McCaffrey, An Assessment of the Work of the International Law Commission, Natural Resources Journal, Vol. 36, spring 1996, p.312.
[77] Wouters, Supra note 32, pp.423-424.

to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilisation.[78]

Though the drafters of the Watercourse Convention took different positions with regard to this principle, it is possible to conclude that interpretation of the UN Watercourse Convention has interpreted the text in a way that does not seem to absolutely prohibit causing significant harm.[79] Instead, the threshold of state obligation is the exercising of "all appropriate measures" to prevent causing such harm.[80]

There may be questions raised concerning the effect of language that are used in the Convention such as "take all appropriate measures". It is clear that this type language is generally regarded as reflecting a due diligence obligations imposed on the watercourse states. Moreover, quite a number of experts have noted that if the no harm rule took presedence over that of equitable utilization, the effect would be to freeze the right to development of many riparian states.[81] If we give more protection to the state which is already

[78] User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, at WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, (visited 18/02/2016).

[79] The ILC commentary confirms this: "The obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur." See Report of the International Law Commission on the work of its forty-sixth session, U.N. Doc. A/49/10 (1994), p.237.

[80] UN Watercourse Convention Supra note 23, Article 21(2) of the 1997 Convention enjoins states to "prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse..."

[81] Stephen McCaffrey, The Law of International Watercourses: Some Recent Developments and Unanswered Questions, Denver Journal of International Law and Policy, Vol.17 (2), 1988-1989, p.509.

making use of the resources of the international watercourse, irrespective of whether or not other watercourse states have obtained an equitable share in those resources and could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from their use, the result would be that the most developed states—generally the first to derive benefit from the watercourse—would be favoured to the detriment of developing states, which would normally be late comers in developing and utilizing international watercourses. Solutions must be envisaged with a view to achieving a balanced regime that would ensure that the freedom of a state to use its watercourse is not already unduly restricted while also adequately safeguarding the freedom from harm of other states.[82]

On the other hand, it should be mentiond here that it is the "no appreciable harm" standard, rather than the principle of equitable use, that is applied in cases of pollution. This is a practical solution, given that pollution must be reduced on all levels, not just balanced in one state against the beneficial uses in another.[83] Use of the waters of an international watercourse that causes significant pollution or any harm to the ecosystem is *ipso facto* unlawful; it is unlawful not because it is in fact unreasonable and inequitable but because it is deemed to be so.[84]

The ILC's position with respect to pollution harm is more stringent than the general rule encapsulated in article 7. Article 21 of the convention contains a

[82] Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984), Document A/39/10, par.339, at WWW <http://www.un.org/law/ilc/index.htm>
[83] David J. Lazerwitz, The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses, Global Legal Studies Journal, Vol. 1, 1993, p.260.
[84] Ibid, p. 220.

solid prohibition of pollution that "may cause significant harm" to the other watercourses.[85] The ILC's Special Rapporteur concluded on many occasions that "water uses that cause appreciable pollution harm to other watercourse states and the environment could well be regarded as being *per se* inequitable and unreasonable."[86]

5. Conclusion

The relationship between the principles of equitable utilization, on the one hand, and the duty not to cause significant harm, on the other, has been and continues to be a subject of controversy. The unsettled correlation between these two core principles of international water law has allowed states to maintain conflicting positions. The conflict between the principle of equitable utilization and the "no significant harm" rule is readily apparent. While the former might permit significant harm as a result of an equitable use of the watercourse, the latter would not.[87]

There can be not be guarantee that some 'harm' will not result from the equitable use of an international watercourse. Once it is established that a particular use is equitable and reasonable, it implicitly entails that every effort have been made not to cause significant harm to another watercourse

[85] Supra note 16. Article 21(2) states that Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

[86] Steven McCaffrey, Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, cited in Y.B. Int'l L. Comm'n at 241, U.N. Doc A/CN.4/412/Add.2 (1988).

[87] Wouters, Supra note 32, p.420.

state (obligation of conduct); no more should be expected of the state which has equitably and reasonably utilized the international watercourse. That is why most scholars on the subject have confirmed the primacy of the principle of equitable utilization. What is expected is that the watercourse state takes all appropriate measures which deemed necessary.

However if the "no harm" rule took preference over that of equitable utilization, the effect would be to freeze the right to development of many riparian states through the employ of international watercourses.[88] If we give more protection to the state which is already making use of the resources of the international watercourse, irrespective of whether or not other watercourse states have obtained an equitable share in those resources, this could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from watercourse use. The result would be that the states which have been the first to derive benefit from watercourses would be favored to the detriment interest of the states which fail to develop earlier in time, which would normally be late comers in developing and utilizing international watercourses, which mostly a developing nation.

[88] McCaffrey, Supra note 81, p.509.