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Bahir Dar University Journal of Law

ቅጽ ፩ ቁጥር ፩
ግንቦት ፪ሺ፪
Vol. 1 No. 1 May 2010

In This Issue በዚህ እትም

በባህር ዳር ዩንቨርሲቲ ህግ ት/በት በዓመት ሁለት ጊዜ፣ የሚታተም የሕግ መጽሔት
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በ፪ሺ፪ ዓ.ም. ተቋቁመ
Established in 2010

የባህር ዳር ዩኒቨርሲቲ የህግ መጽሔት
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ቅጽ ፩ ቁጥር . ፩
ግንቦት ፪ሺ፪
Vol. 1 No. 1 **May 2010**

In This Issue በዚህ እትም

Facts and Figurers about the Law School
Articles
Case Comments
Case Reports

ስለ ህግ ት/በት መግለጫ
ጥናታዊ ጽሁፎች
የ ፍርድ ትችቶች
ምርጥ ፍርዶች

በባህር ዳር ዩንቨርሲቲ ህግ ት/በት በዓመት ሁለት ጊዜ፣ የሚታተም የሕግ መጽሔት
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የባህር ዳር ዩኒቨርሲቲ ህግ መጽሔት

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ቅጽ ፩ ቁጥር ፩
ግንቦት ፪ሺ፪
Vol. 1 No. 1 **May 2010**

Message from the Editorial Committee

Finally, after many plannings, ups and downs, the dream of the Law School has come true. The young and vibrant Law School has got its first law journal, *The Bahir Dar University Journal of Law,* published by its own staff. On this momentous occasion, the Editorial Committee congratulates the staff and administration of the Law School. We all hope that this will move the Law School one step further in the direction of achieving its stated objectives of becoming a centre of excellence in legal scholarship and promoting the cause of justice.

The Editorial Committee would like to thank those people who laboured at the formative stage of the *Journal* and made it possible. In particular the Editorial Committee would like to extend its gratitude to the Director's Office of the Law School for the always collaborative gesture and assistance in the course of planning the launching of the *Journal* and preparation of this issue of the *Journal*. The Editorial Committee also appreciates the cooperation and effort of the external reviewers of articles featuring in this issue, who were more than willing to help the *Journal*. Special thank should also go to H/gabriel Gedecho, a member of our faculty, for extending unreserved helping hands in the editorial work.

The Editorial Committee calls upon members of the academia, practitioners, judges and members of the legal profession in general to submit contributions on various legal issues pertaining to Ethiopian laws and institutions. The *Journal* welcomes research articles, comments on cases which standout for any reason, reflections on current legal issues and book reviews. (Submission guidelines are appended at the end page of this issue)

Law School Full Time Staff

No	Name of Instructor	Sex	Qualification
1.	Addisu Damtie	M	LLB, LLM- Lecturer
2.	Alebachew Birhanu	M	LLB, LLM -Lecturer
3.	Amdebrihan Ayalew	M	LLB, LLM Candidate
4.	Belayneh Admasu	M	LLB, LLM- Lecturer
5.	Benyam Tafese	M	LLB, LLM- Lecturer
6.	Elias Hizkeal	M	LLB-Gradu. Asst II
7.	Ermias Ayalew	M	LLB, LLM- Lecturer
8.	Gizachew Silesh	M	LLB, LLM- Lecturer
9.	Hailie Guesh	M	LLB-Gradu. Asst II
10.	H/gabriel Gedecho	M	LLB, LLM- Lecturer
11.	Henok Bogale	M	LLB-Gradu. Asst II
12.	H/Mariam Yohannes	M	LLB, LLM- Lecturer
13.	Prof. Jack Van Doren	M	Professor
14.	Jennifer Ward	F	Assistant Professor
15.	Kokebie Wolde	M	LLB, LLM- Lecturer
16.	Melkamu Aboma	M	LLB-Gradu. Asst II
17.	Molla Ababu	M	LLB, LLM- Lecturer
18.	Muluneh Worku	M	LLB, LLM- Lecturer
19.	Nega Ewunete	M	LLB, LLM- Lecturer
20.	Temesgen Sisay	M	LLB-Asst. Lecturer
21.	Tessema Simachew	M	LLB-Asst. Lecturer
22.	Tilahun Weldie	M	LLB, LLM- Lecturer
23.	Tilahun Yazie	M	LLB-Asst. Lecturer
24.	Worku Yaze	M	LLB, LLM- Lecturer
25.	Addissie Shiferaw	M	LLB, LLM Candidate
26.	Balew Mersha	M	LLB, LLM, PhD Candidate
27.	Belayneh Ketsela	M	LLB, LLM Candidate
28.	Firehiwot Wujira	F	LLB, LLM Candidate
29.	Mekdes Tadele	F	LLB, LLM, PhD Candidate
30.	Mizanie Abate	M	LLB, LLM, PhD Candidate
31.	Nega Mirete	M	LLB, LLM Candidate
32.	Selamawit Bogale	F	LLB, LLM Candidate
33.	Yonas Tesfa	M	LLB, LLM, PhD Candidate
34.	Zelalem Demelash	M	LLB, LLM Candidate
35.	Amanu Mekonen	M	BA, MA - Lecturer
36.	Mihretie Walle	M	BED, MA- Lecturer
37.	Yelfign Ayenew	F	BA, MA - Lecturer
38.	Yohannes Mersha	M	BA, MA - Lecturer

Part Timers

1.	Gashaw Zewdu	M	LLM
2.	Dessie Seyoum	M	LLM
3.	Geremew G/Tsadik	M	LLM
4.	Yeneneh Simegn	M	LLM

የባህር ዳር ዩኒቨርሲቲ የህግ መጽሔት
Bahir Dar University Journal of Law

ቅጽ ፩ ቁጥር ፩
ግንቦት ፪ሺ፪
Vol. 1 No. 1 May 2010

Content

Some Facts and Figures about the Law School

Worku Yaze Wodage*

I'm writing this brief 'tips' about our Law School on the occasion of the inauguration of the publication of the *Bahir Dar University Journal of Law*. I'm very much pleased to see the birth of the *Journal* today as I feel that it has been overdue. I feel very much honored and privileged to see such a beginning which undoubtedly will open an additional avenue for more scholarly and intellectual activities in this country.

On this occasion, I have to congratulate and thank all the members of the Research and Publications Unit of the School, and especially Ato Kokebe Wolde, for making our dreams a reality and for opening this remarkable path. I believe that this beginning will provide an opportunity for the staff and other members of the legal profession to do meaningful intellectual contributions for the betterment of the legal system and for the improvement of the quality of legal education of the country.

I hope it will not be amiss if I take some space jotting down some facts about the Law School of Bahir Dar University on this special and historical occasion.

The School is too young originally founded as a *program* in 1997 within the then Faculty of Business and Economics to offer diploma courses in law in the Continuing Education Program. Later in 2001, it was established as *Department of Law* and started to offer law courses in diploma and degree programs for regular, extension and summer students. Subsequently, in 2004, following its better performance within the university and with a dramatic increase of its staff and student population, it attained a *Faculty* status. Following the re-designing process within the University, the Faculty is again re-named as *School of Law* in July 2009.

Within this short span of time, this young Law School has contributed a lot to the justice sector. It has trained, educated and graduated a mass of regular students drawn from all over the country in its regular Advanced Diploma and Degree programs. It has given trainings to a lot of people living in and around Bahir Dar under its diploma and degree extension programs. It has also given training to many people working in the various justice institutions of the various regional states in the country in its Diploma Summer and Distance (with Face-to-Face component) programs. Most of the legal professionals that are currently working in the justice institutions in the

* Lecturer in Law and Director of Law School, BDU.

Amhara, Afar, Benishangul/Gumuz and Gambela Regional states are, without any exaggeration, graduates of the Law Faculty of Bahir Dar University.

Admission classification	Diploma			Advanced Diploma			Degree			Year
	M	F	T	M	F	T	M	F	T	
Extension	104	5	109							1994
	51	4	55							1995
	103	12	115							1996
	24	4	28							1997
	94	15	109							1998
	118	42	160							1999
10+3	56	16	72				32	3	35	2000
``	35	13	48				103	14	117	2001
Sub total	494	82	576				135	17	152	
Regular				29	2	31				1996
				107	6	113				1997
							34	5	39	1998
							123	37	160	1999
							141	36	177	2000
							150	43	193	2001
Sub total				136	8	144	448	121	569	
Distance/Summer	96	2	98							1996
	74	0	74							1997
	244	77	321							1998
	163	148	311							1999
	155	99	2254							2000
Sub total	732	326	1058							
Grand Total	1226	408	1634	136	8	144	495	125	620	

Table 1. Number of graduates of the School since establishment. Compiled by Atakilt Alemu.

The School has young, very energetic and ambitious academic staff, some of whom have rich experience in the legal practice. There is an exemplary harmonious relationship between the academic staff and law students. Conducting interactive classes as per the university's schedule and other extraordinary arrangements is a well established practice. Most instructors give individual and group assignments and usually send their regular and extension students to the nearby justice institutions with a view to enable them acquire the necessary skill and knowledge. The School often

encourages students to participate in national and international moot court competitions. So far, our students have exhibited good performance in the various national and international Moot court competitions. There is also a well established Law Students' Union which is playing crucial roles in supporting the teaching-learning process and related activities.

The Law School is well known in its community services. With a generous support from Action Aid Ethiopia (Northern Branch at Bahir Dar) it has given free legal aid service to a number of needy persons in and around Bahir Dar. Women, people with disability, people living with HIV/AIDS and generally those who couldn't afford hiring their own lawyer or paying for legal advice have benefited much from the Free Legal Aid Center of the Law School. The School, in collaboration with Action Aid Ethiopia and Amhara Mass Media Agency has given continuous legal awareness to the public at large through Radio program. Furthermore, the School working in collaboration with Amhara Regional State Ethics and Anti-Corruption Commission, with Amhara Development Association (ADA) and with Action Professionals' Association for the People (APAP) and the Law Students' Union (LSU) has given trainings on various issues related to corruption, budget, gender and human rights to the wider community living in the urban and rural areas of the Amhara Region.

The Law School has built a good culture of working in partnership with many governmental and non-governmental institutions. Apart from its close ties to the Justice Bureaus, Supreme Courts, Police Commissions and Prison Commissions of some regional states, especially of the Amhara Regional State, it has well established relationships with FDRE Human Rights Commission, FDRE Institution of the Ombudsman, FDRE Justice and Legal System Research Institute, and Amhara National Regional State Women's Affairs Bureau. In partnership with and with financial support of the FDRE Institution of the Ombudsman, Amhara Regional State Justice Bureau, Amhara National Regional State Women's Affairs Bureau and Action Aid Ethiopia (Northern Branch), it has conducted various research works on various themes.

The Law School is a beneficiary of Nuffic /NPT-Ethiopia/ Project. With a grant from the Netherlands Government, it has upgraded a substantial number of its staff qualification from LLB degree to LLM degree; and, it has acquired a lot of valuable and up-to-date law books from Europe through a selfless engagement and commitment of Professor Leonard F.M. Besselink of Utrecht University, the Netherlands.

I should not fail to mention the contribution of Professor Dagne Yisihak and others in the USA to the Law School (and also to the Faculty of Business and Economics). Besides the books donation, Professor Dagne has visited us a number of times and keeps on encouraging and supporting the School. He has promised to extend his support to the Law School's Masters Program and to create some institutional link with other universities.

Currently, the Law School has 38 academic and more than 10 support staff. It runs undergraduate Regular, Extension, Summer, Distance (with Face –to- Face component) LLB Programs, and Regular and Extension BA Programs in Good Governance and Development studies. There are about 718 regular, 324 extension, 125 summer and 256 Distance (with Face –to- Face component) undergraduate students making a total of 1423 students. It has also started to offer trainings in masters' degree programs in Gender and Development studies and in Environmental and Natural Resources Law. There are 10 and 7, respectively, postgraduate students in these programs. The School is making necessary preparations to launch another LLM program in Criminal Justice.

Comparative Relevance of the Ethiopian Federal System to other African Polities of the Horn: First Thoughts on the Possibility of "Exporting" Multi-ethnic Federalism*

Tsegaye Regassa**

Abstract

Ethiopia has been experimenting with federalism for several years now. Its accent on ethno-linguistic criteria for state formation, its constitutional recognition of the right to secession, the unusual mode of constitutional adjudication through the House of Federation (a body that is analogous to an upper house of a bicameral legislature), the de facto asymmetry that persists in spite of the de jure symmetry, the lack of explicit textual recognition of federal supremacy and the consequent parallelism/dualism noted in federal practice, among other things, have attracted attention both in academic and non-academic circles. This article seeks to reflect upon whether the Ethiopian federal experiment can offer some lessons to other countries of the Horn of Africa who feel the similar burden of diversity, conflict, and insecurity. In other words, it inquires into the "exportability" of the Ethiopian brand of federalism. In so doing, it first seeks to descriptively situate federalism in Ethiopia's past and present. Then it weighs the (ir)relevance of the Ethiopian federal experiment to the countries in the sub-region by looking into the significance of multi-ethnic federalism for internal peace and stability, for entrenchment of ethno-cultural justice and for governance of diversity, and for the prospect of regional integration. In the quest for a potential 'market' to export to, this piece reflects on the factors that facilitate the migration of law (e.g. success at home, prestige abroad, and the psychology of the countries of the sub-region which inevitably is informed by a history of chequered relations, etc). In this way, it seeks to examine the comparative relevance of the Ethiopian federal experiment to other countries with a common set of ailments to deal with.

1. Introduction

The consequences of the end of cold war in the East African sub-region includes the collapse of the State of Somalia[1], the fall of Mengistu's regime in

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* A shorter draft version of this piece was originally presented on events at a couple of places. It has particularly benefited from the discussion subsequent to its presentation in a Public Lecture at the Law Faculty of the University of Trento in Trento, Italy, in May 2009. I am grateful to Professor Roberto Toniatti for organizing the Lecture and encouraging me to publish it subsequently. I am also grateful to my two discussants, namely Professor Romano Orru (of the University of Teramo) and Dr Andrea Lollini (of the University of Bologna) for their insightful comments. Professor Jens Woelk (of Trento) and Ms. Marzia Dalto (of

Ethiopia[2], the birth of Eritrea as an independent nation,[3] and the opportunity in Ethiopia for democratizing the government and restructuring the state.[4] One of the consequences of this series of dramatic events was Ethiopia's resolve on the federal option as the only way forward. Accordingly, Ethiopia became first an

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Trento/Paris) read the piece and gave me their comments for which I am immensely grateful. The continued encouragement of Professors Luisa Antoniolli and Elena Ioriatti has always been a help, and I am very grateful to both of them. I am also grateful to the anonymous referees who, through their comments, contributed to the betterment of the article.

**Tsegaye Regassa (LL.B, LL.M, PhD Candidate) teaches at the Institute of Federalism and Legal Studies of the Ethiopian Civil Service College (ECSC) and the Law Faculty and Institute of Federal Studies of Addis Ababa University (AAU). He is also a Visiting Professor of African Law and Legal Pluralism (Spring Semester) at the Law Faculty of the University of Trento, Trento, Italy. He can be reached at: tsegayer@gmail.com.

[1] Somalia was ruled by Mohammed Siyad Barre for the large part of its independent existence until his country fell into anarchy in 1991 at the end of a sustained civil war mounted by forces from regional and clan groups.

[2] Colonel Mengistu Hailemariam of Ethiopia ruled from 1974 to 1991. He was toppled from power in May 1991 when, under the pressure of an armed liberationist struggles launched against his regime in different parts of the country but mainly in Eritrea and Tigray, had to abdicate power in favour of Lt General Tesfaye G. Kidan who, having signed a ceasefire, marked the end of the Derg era. In the cold war era, Mengistu was supported by the USSR, Cuba, North Korea, and East European Countries. Gorbachev's reform in the USSR and the consequent collapse of communism in the Eastern Bloc countries affected Mengistu's regime rather adversely and could not sustain the long and protracted war fought in Ethiopia since its takeover of power in 1974. See Andargachew Tiruneh, *The Ethiopian Revolution*. Cambridge: Cambridge University Press, 1993; Paul Brietzke, *Law, Revolution, and Development in Ethiopia*. New Brunswick, NJ: Bucknell University Press, 1982; Paul Henze, *Rebels and Separatists: Regional Resistance to a Marxist Regime*. Santa Monica, CA: Rand, 1985; John Markakis, *National and Class Conflict in the Horn of Africa*. Cambridge: Cambridge University Press, 1987; and others for the analysis of the flow of events in the times when the military regime was in power.

[3] Eritrea was declared independent immediately after the fall of Asmara, the Eritrean capital, into the hands of the Eritrean Peoples' Liberation Front (EPLF) in May 1991. The EPLF quickly organized a Provisional Government that oversaw the process of the popular referendum that led to the subsequent *de jure* independence. The government in Ethiopia agreed to the result of the referendum with no qualms.

[4] See, for example, Merera Gudina, *Ethiopia: Competing Ethnic Nationalisms and the Prospect for Democracy, 1960-2000*. Addis Ababa: Shaker, 2002 on this.

intensely decentralized polity with self-governing ethnic groups from 1991 to 1995[5] and subsequently a constitutional multi-national federal polity since 1995. The latter was made possible by virtue of the adoption of its federal constitution.[6] The federal experiment is an ongoing one to date. Recent efforts at state reconstruction in post-conflict contexts in the neighboring countries of Somalia, Southern Sudan, The Sudan Republic, Kenya, and Eritrea have led to consideration of the Ethiopian experiment as a possible model *for peace-building, for governance of diversity, and entrenchment of inter-ethnic accommodation.*[7] This interest in the Ethiopian federal arrangement and its

[5] See the *Transitional Charter of Ethiopia* and Proc No. 7/1992 for the details of how the seeds of federalism were already put in place in the days of the Transitional Charter, the then interim constitution.

[6] The federal constitution was adopted on the 8th of December 1994. It came into "full force and effect" as of the 21st of August 1995. (See the Proclamations [issued] to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/ 1995, *Federal Negarit Gazeta* , Year 1, No.1. for this.) Jon Abbink makes an interesting observation that "[t]he Constitution was published on 12 December 1996, with the imprint '21 August 1995' (the date of inauguration of the FDRE)" although "the reason for the delay is not known." Jon Abbink, "Ethnicity and Constitutionalism in Ethiopia" *Journal of African Law*, Vol. 41(1997), p. 166, FN 24.

[7] Somalia made a reference to Ethiopia as it sought to draft the constitution of/for the Transitional Federal Government. In Kenya, a country that normally finds it inglorious to borrow anything from Ethiopia, Ethiopia's federalism has been on the table already. Southern Sudan is considering the Ethiopian model seriously in its attempt to prepare a constitution for the anticipated post-referendum country as well as for the wider Sudan from which they demand a federal arrangement that guarantees them self-rule. Note also the fact that the Comprehensive Peace Agreement (CPA), by allowing self-rule to the South, seems to embrace the federal idea albeit in its incipient forms. In current practice, the Post-CPA Southern Sudan has already organized itself into a federal-type arrangement in which *states* form part of Southern Sudan as constituent units. In the 'greater' Horn, in Uganda, for instance, there is an active interest in federalism as can be seen from the website http://www.federo.com. Tanzania operates on a federal-like arrangement in its relation with Zanzibar. The call for uniting Rwanda and Burundi with Tanzania through a federation has long been made by a prominent Africanist, Ali Mazrui, in 1998. See his, "The US Must Sell Federalism as Part of its Liberal Legacy," *The Nation*, February 22, 1998, now available at: http://www.federo.com/index.phh?id=251.

constitution gives rise to the question of the comparative relevance of the Ethiopian federalism for neighbouring countries with similar trajectories.[8]

This piece seeks to explore the question of how far Ethiopia's federalism can be "exported." It therefore aims at exploring the potentials and the limits of the Ethiopian federal experiment (which hardly lacks in unique features) to serve as a worthy model to consider in the context of other multi-ethnic African countries. In particular, I seek to, first, outline the Ethiopian federal system in a historical context (past and present) and descriptively present its distinctive features. I will also try to outline its relevance to other polities by focusing on its potential for internal peace and stability (alias 'peace in the short term'), for greater accommodation of inter-ethnic diversity (a just

[8] There are a number of attempts to weigh the viability of the federal option for the horn of Africa, especially for the countries that are often referred to as 'the Horn proper' namely Ethiopia, Eritrea, Djibouti, and Somalia. See Martin Dent and Asfa Wossen Asserate, "A New Beginning in Ethiopia and Eritrea: Guidelines to the Healing of the Land through a Federal Structure" and Paul B. Henze, "The Economic Dimension of Federalism in the Horn of Africa" in *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Peter Woodward and Murray Forsyth, eds). Aldershot: Dartmouth Publishing Co, 1994, pp.41-51 and 124-130 respectively; and Daniel Kindie, "Which Way the Horn of Africa: Disintegration or Confederation?" in *Proceedings of the Sixth Michigan State University Conference on North East Africa, April 23-25, 1992* (Compiled by John Hinant). East Lansing, MI: MSU, 1992, pp. 157-169 as examples of such attempts. Other examples of efforts to examine the possible solution to the problems of the countries in the horn (some of which consider federalism as an option) include: Francis M. Deng, *War of Visions: Conflict Identities in the Sudan*. Washington DC: The Brookings Institution, 1995; John Sorensen, *Imagining Ethiopia: Struggles for History and Identity in the Horn of Africa*. New Brunswick, NJ: Rutgers University Press, 1993; John Markakis and Katsuyoshi Fukui (eds), *Ethnicity and Conflict in the Horn of Africa*. London: James Currey, 1994; and Peter Woodward, *The Horn of Africa: State Politics and International Relations*. London: Tauris African Studies, 1996. An excellent summary and critical review of these books is available in: Kassu Gebremariam, "Perspectives on the Horn of Africa's Conflict: a Cure to Prevention of the Collapse of Regional Countries in the 21st Century?" *Third World Quarterly* (1997), Vol 18, No. 1, pp. 175-181. More recently, an attempt at examining the Ethiopian federal system by putting it in a comparative perspective is attempted in David Turton (ed), *Ethnic Federalism*: *The Ethiopian Experience in Comparative Perspective*. Oxford/Athens, OH/ Addis Ababa: James Currey/Ohio University Press/ Addis Ababa University Press, 2006. But as one could quickly gather from a cursory glance at these works, none of these writings-save Assefa Fisseha's, "Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism" in David Turton(ed) above-- are written from a legal perspective. Needless to say, none are written from the perspective of comparative constitutional law.

and fair inter-group relations in the medium-term), and regional (re)integration (a greater sub-regional peace, cooperation, and interdependence, alias 'peace in the longer term'). After weighing on the factors for and against the adoption of the Ethiopian federal arrangement as a model, I will examine tentatively the possible candidates who can be interested in the Ethiopian federal model. Finally, I will draw some conclusions as to the comparative relevance of the model for other similar polities. Throughout this piece, I will argue that while adoption of any legal model (with or without adaptation) often depends on the success of the model in the country of origin, the Ethiopian federalism which may have shown more signs of limits and strains than success, can still be a model, if not for its success, merely for its potentials.

The overall objective is to raise questions and spark a discussion, even a conversation, over the possibility of multi-ethnic federalism serving the purpose of bringing about internal peace, entrenching ethno-cultural justice and greater regional integration in the Horn of Africa. The key questions I seek to raise and reflect upon include the following: what does the Ethiopian federal experiment offer to the troubled sub-region of the Horn of Africa? In particular, what is its significance in terms of bringing about internal peace, just and fair governance of ethno-cultural diversity, and facilitating a broader sub-regional integration? In the course of articulating these questions, I also seek to explore the prospect of its "exportability" to, and subsequent success in, the neighbouring countries of Eritrea, Kenya, Southern Sudan, The (wider) Sudan, and others.

In so doing, following this introduction—in sections two and three--I shall first descriptively present the Ethiopian "brand" of federalism. Then, in section four, I will identify the three purposes for which multi-ethnic federal arrangements might (not) be relevant for the countries in the sub-region. In section five, I assess the possibility for the federal experiment to be adopted or rebuffed in some of the countries that might be its borrowers. Thus, I assess the factors for and against borrowing in each country in the sub-region. In section six, I explore the factors that facilitate or hinder the success of legal borrowing by relying on strands of thought from comparative law. Finally, in the conclusion, I summarise the answers to the questions albeit tentatively.

The underlying assumption of this paper is that examining the comparative relevance of Ethiopia's federalism helps us take a relatively more objective stance as we assess the success or failure of Ethiopia's federalism. Now that—in this piece--we are considering the possibility of "exporting" it, because it is imperative to present 'the best' to the neighbouring countries, it impels us to look into the shortcomings and vulnerabilities of the federal

experiment more piercingly. The venture in exploring the comparative relevance thus helps us take a more detached and a less politicized posture than the attempt to assess it in a manner pertinent to domestic public decisions.

2. Ethiopia and Federalism: Past and Present

Ethiopia is one of oldest countries in the sub-region[9]. It is also one of the most actively engaged ones in the politics and security of/in the sub-region. As a polity, it is a country with "multiple personalities."[10] These "personalities" are part of the images Ethiopia projects, or is perceived as projecting, in relation to its neighbours. Discussing these images (resulting from the personalities) is important as they form part of the "chemistry" that goes into accepting or rejecting the legal technology Ethiopia seeks to "export"(in this case, federalism.) Depending on the historiographic paradigms that project Ethiopia's image, one can have at least six 'personalities' in Ethiopia. Thus, according to Teshale Tibebu, a social historian of Ethiopia, Ethiopia can mean one or more of the following things:

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[9] Ali Mazrui refers to it as "the most ancient of sub-Saharan African states" and contrasts it to South Africa whom he dubs "the most modern of the sub-Saharan states." See Mazrui, "Ethnicity in Bondage: is its Liberation Premature?" (Key note address at a UNRISD/UNDP International Seminar on Ethnic Diversity and Public Policies, New York, 17-19, 1994.), also available at http://www.mtholyoke.edu/acad/intrel/mazrui.htm. Sorensen, *supra* note 8, tends to disagree with the idea that it is as ancient as it claims to be. He argues that the claim to being ancient is a hegemonic vision concocted by nationalists (such as the late Emperor Haileselassie I) when in actual fact this claim is fictitious.

[10] Teshale Tibebu, *The Making of Modern Ethiopia, 1855-1974*. Lawrenceville, NJ: Red Sea Press, 1995, chapter one, pp.3-21, summarizes these images of Ethiopia. Note that these images at times contradict with each other. These contradictions have been brought out—separately, in a different context, from a different angle-- in a piece by Annette Weber, "Will the Phoenix Rise Again?: Commitment or Containment in the Horn of Africa" (paper presented on the 4th Expert on Regional Security Policy at the Greater Horn of Africa, 28-30 November 2008, Cairo, EGYPT). Weber refers to Ethiopia as 'a Phoenix in Arms' but quickly contrasts her metaphor with Nurudin Farrah's reference to Ethiopia as an "Empire in Rags." Nuruddin Farrah is a renowned Somali novelist originally from Ethiopia (Kalfo, Ogaden) who is reported to have said this in reference to Ethiopia's economic strain and its languishing under famine and poverty. Such reference is made, for example, by Said Samater, "The Islamic Courts and Ethiopia's Intervention in Somalia: Redemption or Adventurism?"(Paper presented to Chatham House, London, October 1, 2007), available at: http://www.chathamhouse.org.uk/files959_250407_samtar.pdf. Weber says that it is at ones the strongest and the weakest country in the region at a time. She says, to wit, "in terms of stability in the horn, Ethiopia has always been the straw that broke the camel's back", p.5.

a. ***Christian Ethiopia***. This image is projected by the Axumite paradigm of Ethiopian historiography. In this paradigm, Ethiopia is "a Christian island surrounded by a heathen sea." The core of this image of Ethiopia "encompasses the area from Dabra Bizen in Eritrea to Dabra Libanos in Shoa, which forms one compact cultural entity."[11] This is what Teshale chooses to call the Geéz civilization image of Ethiopia.[12] This Ethiopia is described as the "Christian orient of 'Black' Africa."[13]
b. ***Semitic Ethiopia***. This image is projected by the Orientalist/Semiticist paradigm. Ethiopia, or more narrowly Abyssinia, is a black-Caucasian, Semitic-Christian nation. It is "the living land of the Bible", a black Canaan. In this paradigm, "Ethiopia is seen as the south western end of the Semitic world in Africa" and Ethiopians are Semitic, not Negroid; civilized, not barbaric; beautiful, not ugly."[14]
c. ***The Authentic African Ethiopia***. This image is projected by the pan-Africanist paradigm which views Ethiopia as "the spark of African political freedom," the 'rock of black resistance against white invasion", "symbol and incarnation of independence", the "pride of Africans and negroes" everywhere, the "metaphor for Africa wronged by the West", the "concentrated expression of Africa", the "hope and pride of Africa."[15]

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[11] Teshale Tibebu, "Ethiopia: The "Anomaly" and "Paradox" of Africa," *Journal of Black Studies*, Vol. 26, No. 4 (March 1996), p. 427.

[12] *Ibid.*

[13] *Ibid*. Teshale here quotes from Dugan and Lafore to make his point. They say, to wit,: "Ethiopia is an Old Testament land [where] the Song of Songs and the Ten Commandments are a living lyric and a living law and where the sons of Solomon are kings and prophets still. …" J. Dugan and L. Lafore, *Days of Emperor and Clown: The Italo-Ethiopian War, 1935-1936.* Garden City, NY: Doubleday, 1973 as quoted in Teshale.

[14] *Ibid*. Teshale here makes the point that "It is quite revealing that more is written on Ethiopia in the *Journal of Semitic Studies* than in the *Journal of African History*."

[15] Teshale, *supra* note 10. Elsewhere, *supra* note 11, p. 426, he also observes that Ethiopia "has been revered as the symbol of Black defiance of White domination." Quoting Thwaite, he underscores that Ethiopia was the "shrine enclosing the last sacred spark of African political freedom, the impregnable rock of black resistance against white invasion, a living symbol, an incarnation of African independence." Thwaite in: Asante, *Pan-African Protest; West Africa and the Italo-Ethiopian Crisis, 1934-1941*. London: Longman, 1977, pp.16-17.

d. The Black Colonial Power Ethiopia. This is the image projected by the ethno-nationalist paradigm of Ethiopian history which postulates that Ethiopia was "the only Black African power that participated in the European Scramble for Africa"[16] by taking control of many peoples of the wider south Ethiopia such as the Somalis, the Oromos, and the other Cushitic, Omotic, and Nilotic peoples of the far flung southern parts of Ethiopia and, in the post WWII times, (re)annexing Eritrea. This paradigm, otherwise known as the *colonial thesis*, contends that Eritrea, Oromia, Ogadenia (another name for the ethnic Somalis of Ethiopia who live in Ogaden), and other subject peoples of Ethiopia (e.g. the Sidama) are colonized as a consequence of which they deserve to exercise their right to self-determination to stay with or separate from Ethiopia. Self-determination is invoked as a tool of decolonization, and Ethiopia is projected as a colonial power.

e. Ethiopia with its own Triple Heritage. This image is projected in the heritages' paradigm of Ali Mazrui who says that Ethiopia, too, has its own triple heritage within Africa, namely, indigenous, Semitic, and Greco-Roman.[17]

f. Feudal Ethiopia. This is an image projected by a Marxist and/or Modernist paradigm which argues that Ethiopia is a feudal or feudal-like state akin to those in medieval Europe which needs to experience a series

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[16] Teshale, *supra* note 11, p. 421, quotes from a number of historians including Toynbee, Schwab, Tidy and Leeming, and others to make this point. For instance, he cites Gann and Duignan who argue that Ethiopia partook in the scramble for Africa by "competing effectively with the French, Italians, and British along Ethiopia's borders." Gann and Duignan (eds), *Colonialism in Africa, 1870-1960* (Vol I). Cambridge: Cambridge University Press, 1981, p.16.

[17] Ali Mazrui in his "The Africans: A Triple Heritage" (a documentary film produced and released in 1986) argues that sub-Saharan Africa has a triple heritage, namely: indigenous, Islamic, and Christian. In an earlier article, he observes that Ethiopia has its own triple heritage: indigenous, Semitic, and Greco-Roman. See Ali Mazrui, "The Semitic Impact on Black Africa: Arab and Jewish Cultural Influences," *Issue*, 13, pp. 3-8. But note that Ethiopia has an Islamic heritage as well. See, for example, Hussein Ahmed, "The Historiography of Islam in Ethiopia," *Journal of Islamic Studies*, Vol. 3, No.1 (1992); and Kassaye Begashaw, "The Archaeology of Islam in North East Shoa," in *Proceedings of the 16th International Conference of Ethiopian Studies* (Svein Ege, Harald Aspen, Birhanu Tefera, and Shiferaw Bekele, eds). Trondheim: TUP, 2009 for an inkling to the Islamic heritage (its good and bad legacies) in Ethiopia.

of social revolutions in order to fully partake in progress. This paradigm, one quickly notes, tends to coincide and resonate with the 'national oppression' thesis which seeks to explain the phenomenon of diversity and the uneven relations among the diverse ethnic groups of Ethiopia not as a colonial relation but rather as one of a feudal hierarchy.

These diverse and at times contradictory images Ethiopia projects aside, there is no gainsaying that: a) Ethiopia is a country where diversity is a lived experience (if only a denied norm)[18]; and b) that the historic relations among these diverse groups are uneven. It is important to note that the move to a decentralized federal system was motivated by the impulse to overcome the deficits of equality, justice, and democracy that was the hallmark of "feudal", autocratic, and oppressive ("colonial" or otherwise) Ethiopia.[19]

[18] Edmond Keller observes that the assumption that the Ethiopian emperors of the 19th and mid-20th centuries created a national identity endorsed by multi-ethnic group—thereby successfully creating a nation state—is challenged by empirical evidence flowing from the turn of events after 1974. See his, "The Ethnogenesis of the Oromo Nation and its Implications for Politics in Ethiopia," *The Journal of Modern African Studies* (1995), Vol 33, No.4, p. 622. Thus, one can say the 'Ethiopian nation state', as such, was, at best, more a project than a reality, and an unfinished one at that.

[19] Scholars who stress the "feudal" personality of Ethiopia insist that there was a national oppression in Ethiopia but it was not in any way one that we can characterize as 'colonial'. These recognize the fairness of the quest for ethnic equality and internal self-determination (i.e. autonomy) but stop short of justifying secession. On the other hand there are those who, viewing, Ethiopia as but a black, poor, dependent colonial power, justify the use of self-determination (including secession) as a tool of decolonization in Ethiopia. Secessionist movements such as OLF [Oromo Liberation Front], SLM [Sidama Liberation Movement], ONLF [Ogaden National Liberation Front], are the political parties that subscribe to the latter view. See Merera Gudina, *supra* note 4, on the distinction between the national (re)unification thesis, the national oppression thesis, and the colonial thesis in Ethiopia's historiography. See also Assefa Jalata, *Oromia and Ethiopia: State Formation and Ethnonational Conflict, 1868-1992*. Boulder, CO: Lynn Reinner, 1993 for an extended elaboration of the colonial thesis. The Eritrean liberation movements (EPLF and ELF) acquiesce in the colonial thesis but stress the fact that Ethiopia, by annexing Eritrea in the 1960s, continued the colonialism imposed on them by the Italians in the 19th century. See Christopher Clapham, "Eritrean Independence and the Collapse of Ethiopian Colonialism: Causes, Consequences, and Implications," *Geopolitics and International Boundaries*, Vol.1, No.2 (1996), pp.115-129.

2.1. Ethiopia and Federalism: Past

The historic Ethiopian state was a unitarist state making the least effort to institutionalize federalism or other forms of decentralization.[20] The commitment to *the ideal of a strong unitary state* had anathematized federalism as a step to the dismemberment of the country. The country was seen as *too united* or *too delicate* to accommodate such an arrangement.

The Ethiopian state constituting the territories that comprise today's Ethiopia was largely a creation of a century ago. The 1931 Constitution, the first written constitution which was promulgated only decades after the completion of the process of Empire-building, did not make any reference to federalism. True to its goal of unification and modernization of the country under an Emperor, it could envisage only a unitary state. The Italian occupation of 1935-41 disrupted the constitutional development.

In 1952, Eritrea was federated to Ethiopia by a Federal Act of the United Nations.[21] Two traits most describe the Ethio-Eritrean Federation: 1) that it was more of an international compromise than an internal 'covenant'; and 2) that it is, as most commentators called it, a marriage between unequals. Bairu Tafla[22] put his finger on this point when he said that the Federation had "two inherent problems" that led to its subsequent failure namely,:

> *"it was imposed from outside and was tolerated by both Eritrea and Ethiopia on the basis that 'half a loaf is better than nothing'. It was also a marriage between two incompatible beings-the giant and the*

[20] This is notwithstanding the feudal acceptance of the fact of weak, or at times, non-existent, centralization that obtained in the imperial times, especially during the 'Era of Princes' (alias the *Zemene Mesafint*) and in the 19th century (e.g. during the reign of Emperor Yohannes IV of Ethiopia). The tolerance of uncentralized exercise of local power among local nobles is often a begrudged concession, on the part of the emperors, to the practical infeasibility of controlling the outlying provinces. Some unexamined statements about the *de facto* federalism that existed in pre-1931 Ethiopia aside, the historic Ethiopian state was centralist although it has never been fully centralized. Lack of centralization is not synonymous with decentralization let alone with federalism.

[21] United Nations General Assembly Resolution No 390 (V)/1952.

[22] Bairu Tafla, "The Ethio-Eritrean Federation in Retrospect" in Woodman and Forsyth, (eds), *supra* note 8, p.7.

dwarf, the strong and the weak, the rich and the poor, the autocratic and the democratic."[23]

So delicately constructed was the Ethio-Eritrean federation that it could lapse only for about a decade. The Ethiopian political tradition of the time, being autocratic and centralist, was not accommodative of the pluralism inherent in federalism. Indeed, in Ethiopia "[t]he rulers obviously confused administrative plurality with disintegration and anarchy."[24] Unity was equated with uniformity. Centralism was reinvigorated in the guise of unity and perfected by Emperor Haileselassie I.[25] The trend towards centralism was perhaps the cause of mismanagement of the federalism which was subsequently liquidated in favor of unity in 1962.

The Eritrean constitution and the Federal Act, which was passed on 10 July 1952 and came to force as Proc. no 124 of 11 September 1952 (*Negarit Gazeta*), federated Eritrea as an "autonomous unit" of Ethiopia (Art. 3) "under the sovereignty of the Ethiopian crown." The Government of Eritrea had its own legislative assembly representing the people (Art. 39). It had a government with legislative, administrative and judicial powers (Art. 4). The legislature had legislative competence over virtually everything in Eritrea, from criminal law to laws on education and resources, etc (Art. 5). Eritrea had a strong autonomy, with a rather ceremonial Imperial presence represented by his representative (Arts. 10 and 11). This representative of the Emperor formally introduces the Chief Executive after the latter is elected by the Parliament (Art. 12), opens and closes the Parliament's sessions with an address from the throne; and promulgates Eritrean laws passed by the Parliament (Art. 15 and 18). The Eritrean government had also judicial and executive powers to exercise. The executive is composed of the Chief Executive and his "Executive Secretaries" (a term preferred to "Ministers" for obvious reasons) (Art. 68). An Advisory Council, entrusted with economic planning and the drafting of statutes, was established (Art. 84).

Judicial independence was guaranteed (Art. 86). The Supreme Court and other courts as may be formed were vested with the judicial power (Art.

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[23] *Ibid.*

[24] *Ibid*, p.6.

[25] *Ibid.*

85). The court applies all the laws of Eritrea. Whether it also applies federal laws was not clear. The judges are nominated by the Chief Executive based on the recommendation of the President of the Parliament which in turn is supported by a commission's report (Art. 87). The Supreme Court, in addition to being the highest court of appeal, checks constitutionality of laws issued by the Parliament, decides on conflict between the Eritrean government and other organs and can impeach the Chief Executive (Art. 90).

Membership to the Parliament comes through elections, but as there were no strong political parties, the campaigns were not as strong as one would expect them to be today. The absence of many civic societies is also notable. The relative awareness of the mass was an asset, although to most of them federalism was a queer form of governmental arrangement. Thus there was a clear lack of federal culture as most highlanders sought total unity with Ethiopia while others (most of the lowlanders) sought total independence from Ethiopia or the powers that be.[26]

Moreover, the relatively liberal constitution envisaged a democratic system of government which notionally challenged the autocratic Imperial rule in the other parts of the country. The practice in Eritrea was seen as a threat to the legitimacy of the Ethiopian regime. The 1955 Revised constitution was in a sense an attempt to catch up with the development in Eritrea. The 1955 constitution made no reference to the federalism, though. It established the supremacy of the constitution and by implication of federal laws. But it did not spell out the federal powers and state powers as such. This silence created a room for an unnecessary involvement of the imperial representatives in the affairs of the Eritrean government which ultimately led to the dissolution of the Federation.

Eritrea became a state forming the federation not because it fit any mode of state formation, but rather because it outlived the Italian colonialism under which it was ruled since the 1880's to 1941 when the Allied forces (chiefly the British) ousted the Italians and took over the Eritrean territory. After a lengthy debate in the UN on how to dispose of former Italian colonies

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[26] See Zewdie Retta, *The Eritrean Affair* (*Ye Eritrea Guday*, in Amharic). Addis Ababa: Mega, 2000 for a meticulous presentation of the details of the process that led to the federal compromise first and to the dissolution of the federation later. The book is full of extracts from minutes, exchanges, and letters from and to imminent political actors of the day.

in Africa, a compromise was reached in 1952 to federate it with Ethiopia. It is plain therefore that because it was an arrangement by the international actors, the Ethio-Eritrean federation defies both categorizations of federalism (i.e. of territorial or ethnic or personal?). It was neither territorial nor personal. The boundaries of Eritrea were of colonial making and were as such arbitrary. Because there are the same people groups on both sides of the Ethio-Eritrean border, one cannot say this is an ethnic federalism. Because the Eritrean territory was cut-off from the hinterland Ethiopia since the 1880's, it was not the reordering of the Ethiopian land-mass for the sake of federalizing the country that resulted in an Eritrean and an Ethiopian state. It tends to be an aggregative type of federalism in a sense. It is a queer association of a former colony (Eritrea) with a sovereign state (Ethiopia) who claimed that the colony was part of itself before it was forcefully alienated from it.[27] But the association had similarity to what Daniel Elazar calls federacy.[28]

What was the consequence of this? The major consequence was that the Ethiopian leaders failed to take the federalism seriously. This was manifest in their excessive involvement in the affairs of Eritrea, at times even contrary to the Eritrean constitution.[29] The eagerness to bring Eritrea to complete unity with Ethiopia led to the revocation of the constitution early in the 1960's by an order of the Emperor. Those who sought independence from the beginning protested against the abolition of the federalism with armed violence. Legal solution to the crisis was not at hand--and was not even sought. The abysmal failure of the federalism left us with hardly any lesson to draw from the experience. Yet in retrospect, one cannot fail to see the fact that the imposed nature of the federalism, the absence of federal culture, and the absence of civil societies, and excessive emphasis on unity as uniformity, have played a role in leading to its failure.

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[27] *Ibid.*

[28] See, for example, Daniel Elazar, *Federalism and the Way to Peace*. Kingston: Institute of Intergovernmental Relations, 1994 for an elaborate distinction between Federations, Federacies, Confederations, Associated Statehood, and other variants/species of the federal mode of ordering government. See also his *Exploring Federal Systems*. Tuscaloosa, AL: Alabama University Press, 1987, for a more extended discussion of the variants of federalism.

[29] Bairu Tafla, *supra* note 22, p. 7.

Since the failure of the Ethiopia-Eritrean federalism, no effort was made to restore it in the subsequent years. A nationalist war started in Eritrea. In the 1960s and 1970's a student movement leaning progressively to the left arrived on the scene. At the same time, centralism continued to be the creed of the system. The Eritrean liberationist movement inspired other ethno-nationalist movements in other parts of the country. An inarticulate Oromo nationalist movement started to be in the subtext of Ethiopian politics. The student movement started to discuss the "National Question" in Ethiopia. The Somalis of the Ogaden were also part of the discussion of the time. Later, the Tigrean Liberationists, inspired by the Eritrean movement joined the league of those who challenged the Ethiopian centralism that was moving on in total ignorance of the self-defining pluralism. Conflated with the issue of class (e.g. the farmers' quest for land), ethnic and religious questions came out to demand a benign response.[30] The 1955 Revised Constitution was not of course capable of handling this move. Intensified by other political factors, a popular revolution ensued. The revolution changed the regime. But centralism continued to be the norm. "Ethiopia First" became the motto. Ethno-nationalism was perceived to be a threat to national sovereignty and territorial integrity of Ethiopia. It was even considered counter-revolutionary and reactionary.

The provisional government (the PMAC or the Derg as it is popularly known) did not opt for federalism. On the contrary, it exerted the maximum effort to intensify rigorous centralism. Although it made a concession to the question of "nationalities" as it recognized the equality of "nationalities" and their languages and while it could admit the fact of diversity, the government did not even change the number and powers of the provinces (except in name, as they were changed *from teklay gezat* to *kiflate hager*). That is to say, there were 14 *teklay gezats* which became the 14 *kiflate hager*, with no substantive devolution of power. The time from 1974 to 1987 was a time during which Ethiopia did not have any formally written (comprehensive, "codified") constitution. When in 1987, the PDRE was established the centralism was

[30] See Kiflu Tadesse, *That Generation* (Ya Tiwlid, Amharic). Addis Ababa: Shama, 1999 for the details on the key issues that exercised the imagination of the left leaning student revolutionaries of the 1960s and 1970s. Their response to the challenge of ethnic diversity was complex. To some ethnicity was secondary and subordinate to the class question. To others it was primary and superior. To yet others, it was only an instrument of mobilization against an imperial order.

maintained except that there were now about 24 provinces and 5 autonomous administrative regions. The recognition of some regions as autonomous was an effort to diffuse the mounting pressure by opposition fighters in what was otherwise a centralist state with "democratic centralism" as its motto.

In reaction to the grip of tough centralism, ethno-nationalist groups mounted opposition against the PDRE regime until it collapsed in 1991 leaving the political space for ethno-nationalist groups who, for a while, appeared to take decentralization seriously. The Transitional Charter was the first legal document to institutionalize decentralization. Being a product of compromise among ethno-nationalist movements, it emphasized "nations, nationalities, and peoples" (roughly ethnic groups) as the units serving as the basis for decentralization. Proclamation no. 7/1992 made this ethnic-based decentralization more articulate and real. The 14 self-governing regions were mainly ethnic in their making although almost none were entirely homogenous. Based on this proclamation, National, Regional (the then equivalents of what are now called 'States') and Local Governments were formed and an incipient form of self-government was made apparent. Nonetheless, it was only after the promulgation of the FDRE Constitution that federalism as such was formally institutionalized in Ethiopia.

2.2. Ethiopia and Federalism: Present

2.2.1. Origins

The origins of the current federal option are in the ethno-nationalist liberationist rhetoric of the post -1991 era of Ethiopian history. Led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), a number of ethno-nationalist liberationist fronts came together in a National Peace Conference that led to a Transitional Charter (TC) that served as the interim constitution from 1991 to 1995. It is in the negotiations that led to the TC that for the first time in Ethiopia's history ethnic groups' rights as such are guaranteed a formal legal recognition. Ethnicity was at last "free from bondage"[31] in the oldest of sub-Saharan African countries. Along with this also came the introduction of what was the nucleus of the contemporary federalism. The TC recognized the right of "nations, nationalities, and peoples" to self-

[31] Ali Mazrui, *supra* note 9.

determination up to and including secession.[32] A subsequent proclamation, Proclamation No.7/1992 established 14 self-governing regions.[33] It also reinforced the recognition extended to the right to self-determination by the Charter.

In complete departure from the unitary past, the Charter and the Proclamation devolved power from the center to the self-governing regions and signalled the beginning of a 'holding together' federalism.[34] In 1995, this move towards a federal system through 'scaling down'[35] was perfected when the explicitly federal (Federal Democratic Republic of Ethiopia's [FDRE]) constitution came into force. The federal option was a reaction to what was thought to be an oppressive unitary past, a reaction to a state nationalism that sought to unite the country through, among others, involuntary assimilation and homogenization. One can also say that the federal option was taken due to the *exhaustion of centralization and unitary system* of government. It came when the long suffering *nation-building project (which has been on the political scene from 1855 to 1991) has spectacularly failed*. The centralist and unitarist model has little resources with which to flexibly respond to the strains imposed on the state by ethno-national diversity.

2.2.2. The Federal Compact: Negotiating the Federal Idea

Federalism was formally ushered in by the 1995 constitution. The constitution constituted the federation and continues to be its compact.[36] Pre-eminent in the negotiation of the constitution were ethno-nationalist forces,

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[32] Art 2 of TC

[33] See Proclamation to Establish National-Regional Self-Governments, *Negarit Gazeta* Proc No. 7/1992.

[34] Alfred Stepan makes a distinction between 'coming together' and 'holding together' federalisms by looking at their origin. See his "Federalism and Democracy: Beyond the US Model" *Journal of Democracy* (vol. 10, No.4) (1999), pp. 19-34.

[35] I am indebted to Donald L. Horowitz, "The Many Uses of Federalism" *Drake Law Review*, Vol. 55 (2007), pp.101-113 for this term.

[36] The significance of these forces as the holders of constituent power (*pouvoir constituent*) was made apparent in the opening clause of the preamble of the constitution which reads: "We, the Nations, Nationalities, and Peoples of Ethiopia…" (See Paragraph 1 of the Preamble of the FDRE Constitution).

principally a coalition of ethno-nationalist fronts and movements called collectively the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF). The constitution was drafted by a Drafting Commission duly established by law.[37] The commission engaged in teaching the public about constitutions, democracy, human rights, civic participation, etc with a view to raising the constitutional consciousness of the public. After preparing a preliminary draft which it submitted to the Legislature of the Transitional Government (the Council of Representatives), they also organized several events at several levels all over the country on which the draft text of the constitution was discussed. Although the turnout was low and the level of engagement was modest, there were discussions in which the issue of self-determination, especially secession, and federalism were hotly debated. In the Transitional Legislature (alias known as the Council of Representatives, [COR]), it was very hotly debated even though the single most dominant party in there was the EPRDF.[38] After this rather sporadic and in many ways inconsequential public deliberation, the draft was submitted to the Constitutional Assembly in 1994 for further deliberation upon it and for adoption. The constitutional assembly was an assembly that was popularly elected in 1994, an election the fairness and free-ness of which was contested by the parties opposed to EPRDF. Even in the EPRDF dominated Constitutional Assembly, the points that were very much at issue were the issue of the federal choice, the mode of state formation, the issue of languages, national symbols (flag and emblem), etc.[39]

Consequently, the federal option, its bases for carving out the constituent units, the constitutional recognition of the unconditional right to secession were among the most contested points as a result of which federalism remains to be a controversial subject in Ethiopia to date.[40] But what does the

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[37] Proc no. 24/1992, proclamation issued by the Transitional Council of Representatives to establish the Constitution Drafting Constitution, *Negarit Gazeta*, Proc no. 24/1992.

[38] The discussion in the COR on every provision of the draft is compiled into a large volume of minutes in Amharic, now available in the archives of the House of Peoples' Representatives (HPR).

[39] The discussion in the constitutional assembly is copiously documented in a set of minutes compiled into six volumes (in Amharic), now available in the archives of the HPR.

[40] See Tsegaye Regassa , "Issues of Federalism in Ethiopia: Towards an Inventory of Legal Issues" in *Issues of Federalism in Ethiopia* (Tsegaye Regassa, ed). Addis Ababa: Addis

federal constitution, Ethiopia's federal compact, offer? I now turn to a brief description of the federal constitution.

The Federal Constitution is a compact document made up of a total of 106 articles divided into 11 chapters. (As a legal document, it is a well organized document with an enviable degree of simplicity and clarity.) It is the legal document that *constituted* the federation. From its preamble, we note that it is a compact agreed upon among the "nations, nationalities, and peoples" of Ethiopia. It is thus a solemn contract, treaty, even a vow, among these groups who reconstituted Ethiopia into a federation of disparate ethno-linguistic groups that aspire to build "one economic community" based on a "common destiny" born out of a shared past.[41]

From the preambles, one can glean such principles with far reaching consequences as the principle of the salience of self-determination, the sanctity of human rights, the sacredness of the principle of inter-personal and inter-group equality, and the primacy of the need to build a democratic order based on the principle of the rule of law for the sake of a sustainable peace. Apart from these, the constitution postulates five basic principles as 'fundamental' pillars of the constitutional order. These principles are that of sovereignty of 'nations, nationalities, and peoples', constitutional supremacy and constitutionalism, sanctity of human rights, secularism, and of transparency and accountability of government.[42]

In its chapter three,[43] the constitution provides for a catalogue of fundamental rights and freedoms. About 31 "kinds" of rights are recognized and granted a constitutional guarantee. The provisions of this chapter are *entrenched*, i.e., they are protected from easy (and often unilateral)

Ababa University Press, 2009, pp. 1-68, for a tentative inventory of controversies regarding the Ethiopian federal system.

[41] Paragraphs 3-5 of the preamble of the FDRE constitution.

[42] See arts 8-12 for these principles.

[43] Chapter three, the chapter that can be taken as Ethiopia's Bill of Rights chapter, extends from art 13 to 44 in which all the traditional civil and political rights, economic, social and cultural rights, as well as the rights to peace, development, and environment are enshrined.

encroachment through making the amendment procedure rather rigid.[44] Nevertheless, the absence of an *application* clause (that indicates whether they have *direct*[45] or *indirect*[46] application), *interpretation*[47] clause (that clearly indicates the institutions, principles, methods, and steps to be used in the construction of human rights clauses), *limitation*[48] clause (that regulates the

[44] According to art 105(1) of the FDRE constitution, chapter three can be amended only through the consent of all the nine state legislatures and the 2/3rd majority vote of the Federal Houses (i.e., the House of peoples' Representatives and of the House of the Federation).It is very intriguing that the provisions that divide powers as 'federal', 'state', and 'concurrent' (arts 50-52) are not subjected to the more rigorous method of amendment as per art. 105(1). They can be amended as per art 105(2) which requires the agreement of 2/3rd of the states and of the two federal houses.

[45] *Direct application* relates to the situation whereby the provisions of chapter three are invoked in the process of litigation to assert a particular claim hoping to obtain a specific remedy emanating from the self-executing nature of the human rights chapter. It is so invoked when the chapter is viewed as a special law directly applied in the course of litigation to assure the plaintiff a special regime of remedy.

[46] *Indirect application* is said to exist when the human rights chapter, by permeating the system from behind, prompts all public decisions (be it in court or otherwise) to be respectful of the rights and freedoms recognized therein. In these circumstances, the human rights chapter serves more as a framework of understanding, a tool of interpretation of other laws, than as a special regime of law applicable directly in its own right. In indirect application, the human rights chapter of the constitution "loses" itself into the other (ordinary) laws and disciplines them thereof. For an elaborate discussion on direct/indirect application, see generally Johan De Waal, Iain Currie, and Gerhard Erasmus, *The Bill of Rights Hand Book* (4th ed). Lansdowne: Juta & Co. Ltd, 2001.

[47] An interpretation clause would clarify to us as to what modes, principles, and techniques ought to be adopted in the course of constructing the provisions of chapter three. In particular, it would clarify issues of procedure (jurisdiction, standing, and justiciability), content (the scope and limitations of a particular right), and remedies (as to the consequences of the decisions of the tribunal that is engaged in the work of 'making sense' of the chapter). It would also hint at the steps and principles (e.g. textual/literal, historical, purposive, etc) to be used in the actual task of interpretation. The reason all these are not self-evident in the 'normal' judicial process in Ethiopia is because, at least since 1991, the courts have had no experience in the hermeneutics of human rights; it is also the result of the fact that the courts' position vis-a-vis the constitution is ambiguous. See Section 38 of the constitution of South Africa, for example, for how constitutions deal with interpretation of human rights provisions.

[48] The constitution does not set aside a separate provision dealing with limitations to be imposed on the exercise of human rights. But built into specific provisions are some

manner in which limitations are imposed when necessary), and the ambiguity with regard to the role of courts to enforce constitutional human rights—owing to the bifurcated division of the interpretive power between courts and the House of the Federation—have played a role in the diminished implementation of human rights in Ethiopia.[49]

The constitution establishes a parliamentary system of government with a formally (weak) bicameral legislature at the federal level.[50] The lower house is the supreme legislator and the supreme political organ.[51] The upper house has little legislative role; instead it has interpretive and adjudicatory powers.[52]

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limitative phrases. But absent a general limitation clause, we hardly know how to rule on the (im)propriety of a limitative legislation, decision, or any other measure.

[49] Art 13 is only partially about application and interpretation. Art 13(1) states that the state—at all levels—is the duty bearer of obligation emanating from chapter three. Art 13(2) states that interpretation of chapter three must conform to the principles of the UDHR, the UN Covenants, and other international human rights instruments ratified by Ethiopia, but says no more. Note that Art 13(1) is thus about the *reach* of the Human Rights Chapter. Art 13(2), on its part, seems to suggest that hermeneutically speaking, the Ethiopian system is an open system allowing the invocation of international human rights jurisprudence such as the General Comments of the Human Rights Committee, etc.

[50] Art 53 of the FDRE.

[51] Arts 54-55 of the FDRE Constitution.

[52] Art 62 of the FDRE constitution enumerates a number of 'powers and functions" of the HoF. From among the 11 powers and responsibilities, only one suggests the legislative role the HoF has. This is seen in sub-article 8 which reads: "It shall determine civil matters which require the enactment of laws by the House of Peoples' Representatives." A strict reading of this provision suggests that this is more a *meta-legislative power* than a legislative power proper. The HoF can thus be said to have a legislative power only in the meta-legislative sense. One can think of its power to order federal intervention in the states (art 62(9)) as another similar, i.e. meta-legislative, or quasi-legislative, power. But this can be the case only if the order to intervene demands that the HPR issues an 'intervention proclamation'. But if the order is directed merely to the Federal Executive, then there is no way that this power under art 62(9) can take a legislative (be it *meta*, or *quasi*-) form. Added to this is the HoF's involvement in assigning taxing power undesignated to be within the domain of the states or the federal government or of concurrent powers (art 99). This joint engagement in assigning taxing powers (with HPR)—if at all legislative—is another moment when the HoF comes close to enjoying a legislative power. The other decision-making power of the HoF that has some resemblance to a legislative power is its involvement in constitutional amendment as per the provisions of arts 105 (1)c and 105 (2)a.

It is a house in which nations, nationalities and peoples (and, indirectly, states) are represented in proportion to their numbers.[53] The constitution also establishes an executive made of the Prime Minister, the Council of Ministers and the Ministries.[54] It also provides for a ceremonial executive headed by a President who serves as the non-partisan, non-political Head of State.[55] Furthermore, it provides for a three-tiered, parallel, court system of federal and state judiciary.[56] A Constitutional Inquiry Council with an advisory power (to send recommendations on constitutional interpretation) that assists the House of the Federation is also provided for.[57] Moreover, the constitution lists down the policy objectives and directive principles that guide government policies, decisions, and activities in its chapter 10. Thus the directives that guide the foreign affairs, defence, political, social, cultural, and environmental policies of the country are specified therein.[58]

2.2.3. The States and the Federal Government

The Ethiopian federation is composed of nine constituent units carved on the basis of "settlement patterns, language, identity, and consent of the people concerned."[59] These nine states, officially called variously as "National Regional States", "Regional States," "Regions", or simply "States",[60] are: Afar, Amhara, Benishnagul-Gumuz, Gambella, Harari, Oromiya, Southern Nations, Nationalities, and Peoples (SNNPRS), Somalia, and Tigray.[61] Most of

[53] All nations, nationalities, and peoples are represented by one member having one more additional member for every additional one million. See art 61 of the FDRE Constitution.

[54] Art 72 of the FDRE constitution

[55] Art 69-71 of the FDRE Constitution

[56] Arts 78-79 of the FDRE constitution.

[57] Arts 82-84 of the FDRE constitution.

[58] See arts 85-92 for these policies.

[59] Art 46(2) of the FDRE Constitution

[60] Throughout this paper, the term used will be "states" at times interchangeably with sub-national entities. This is done only for reasons of convenience.

[61] Art 47 (1) of the FDRE Constitution.

these states are ethnically heterogeneous although in most of them there are dominant ethnic groups after whom the states are often named.[62]

The power of the states is provided for in Article 52 of the FDRE constitution as the "reserved" or 'residual' power that is "not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States."[63] While the constitution reserves the "residual" powers to the states, it also makes it clear that states, among other things, have the power to set up their own administration "that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution", to "enact and execute" their own state constitutions, and other laws, to administer land within the framework legislations of the federal government, to levy and collect state taxes on their own revenue sources, to establish and administer their own police force, etc.[64] Obviously one can have a fuller picture of the 'residual' powers only after considering the list of federal

[62] Hence, we have the states of Amhara, Oromia, Somali, Afar, and Tigray, in all of whom we have diverse peoples other than the Amhara in Amhara state (such as the Agaw, the Argoba, the Oromo, etc), other than the Tigrayans in Tigray (such as the Erob and the Kunama), other than the Oromos in Oromia (such as the Zay, and pockets of other peoples living mostly in urban centers all over the state), other than the Afar in Afar State (the urban dwellers who have migrated into the region over the years), the Somalis in the Somalia State (urban dwellers in the cities and towns). The SNNPRS is demographically intensely diverse, and is obviously an exception in this regard, i.e., in the sense that there is not one predominant group that can be associated with the identity of the State. Harari state is composed predominantly of the Oromos, the Harari, and many other people groups who live in the city of Harar. Given the fact that the Harari are numerically small in the state, Harari, too, is an exception in having a political predominance that lets the state be identified with it while it is the smallest in terms of numbers. Harari is also unique in its adoption of a mode of democracy that is more consociational than any of the states or even the federal government can afford. Gambella is composed of the Anywaa, the Nuer, the Mezenger, the Mao, and the Opo peoples but 'Gambella' does not signify a people group. Likewise, Benishangul-Gumuz is composed of the Berta, the Gumuz, the Shinasha, the Mao and Como peoples and the name hardly refers to anyone group in the state—except the Gumuz. Interestingly, in these latter states of the Western periphery of Ethiopia, there is a distinction made even in the constitutions between 'indigenous nations, nationalities' [of , for example, Berta, Gumuz, Shinasha, Mao and Como in Benishangul-Gumuz State] and 'other peoples residing in the region'. (See for instance Preamble, Parag. 3 and Article 2 of the constitution.)

[63] Art 52(1) of the FDRE constitution.

[64] See art 52(2) a-g of the FDRE Constitution.

powers in the preceding provision[65] which includes those powers traditionally known as federal powers (such as foreign affairs, defence, interstate commerce, interstate relations, currency, foreign trade, national security, transportation, postal services, and telecommunication, some natural resources including land, etc). Because the list of federal powers seems to be long, people often reasonably doubt if the residual powers reserved to the states in Ethiopia are really significant. Nevertheless, it is important to note at this juncture that state constitutions play an immense role in articulating these 'plenary' powers so that they can be better exercised by the states in consonance with the principle of self-rule that constitutes an aspect of federalism.

It is interesting to observe that some of the state powers "enumerated" (by way of example) in art 52(2) (a-b) tend to impose an obligation on states. Thus, to an extent, they seem to be determining the key elements of the state constitutions. That is to say, a state constitution that does not recognize the pre-eminence of the principles of self-government, democracy, and rule of law, and is not poised toward protecting and defending the federal constitution cannot be accepted as valid. It stands to reason, then, that all state constitutions, minimally, need to abide by these principles.

In the Ethiopian federation, symmetry is the norm.[66] Thus, states have "equal rights and powers."[67] State legislatures command the supreme political power and are accountable to the people(s) of the states.[68] States are obliged to establish local governments at various administrative levels so that there are possibilities for local people "to participate directly in the administration" of these levels of governments.[69] The state legislatures' powers "to draft, enact,

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[65] Art 51 of the FDRE constitution

[66] I am quick to concede the point that in multi-national polities, asymmetry is almost inevitable. See, for instance, Rainer Bauböck, *Multinational Federations: Territorial or Cultural Autonomy?*. Malmö: Malmo University (Willy Brandt Series of Working Papers in International Migration and Ethnic Relations 2/01), 2001. Bauböck says that "Asymmetry is endemic to multinational federations...." (p.11).

[67] Art 47(4) of the FDRE constitution.

[68] Art 50(3) of the FDRE constitution.

[69] Art 50(4) of the FDRE constitution.

and amend" the state constitutions is also recognized in the federal constitution.[70] Its supreme legislative power is similarly recognized in the same provision. The states' executive and judicial powers—and by extension all the powers that mark sovereignty at the local level—are also recognized in the constitution.[71] Although the constitution does not explicitly stipulate the existence of the *principle of federal supremacy*[72] in the Ethiopian federation, it holds, in consonance with the *principle of federal comity*, that "[T]he states shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States."[73] This provision is indicative, at least in theory, of the dual nature of the Ethiopian federation.

The perusal of this provision in conjunction with the provisions that indirectly (through nations, nationalities, and peoples) grant the right to self-determination[74] to the states, give the impression that the Ethiopian federal system guarantees state sovereignty. As a result, it is incumbent upon the state constitutions to articulate, elaborate, and give institutional expression to this state sovereignty that seems to be regnant in the constitution.

3. Ethiopian Federalism: Distinctives

The federation that was born out of the concern for ethno-nationalist groups' right to self-determination (which in turn was a result of an age-old quest for ethno-cultural justice[75]) manifested a number of *unique features*. The

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[70] Art 50(5) of the FDRE Constitution

[71] Art 50(6-7) of the FDRE Constitution.

[72] The principle of 'federal supremacy' or 'federal paramountcy' maintains that the federal government, its laws, and institutions are supreme, i.e., superior to, and override, the state laws and institutions.

[73] Art 50 (8) of the FDRE constitution.

[74] Art 39 of the FDRE constitution.

[75] It is to be noted that the two most important questions that dominated the Ethiopian political terrain since early 1960s, and indeed the predominant preoccupation of the student movements of the age, were the question of land (typified by the slogan, "Land to the Tiller") and the "Question of Nationalities". There is a huge body of literature on this. Balsvik's *Haile Selassie's Students: The Intellectual and Social Background to Revolution, 1952-1977*. East Lansing: African Studies Center, Michigan State University, 1985; Kiflu Tadesse *supra* note 29; Edmond Keller's "Ethiopia: Revolution, Class and the National Question" 80

recognition of the right of secession,[76] the use of ethno-linguistic criteria as a basis of state formation,[77] the unconventional constitutional interpretation through the upper house of the federal legislature,[78] the fact that states are not directly represented in the upper house,[79] the fact that the upper house has little,

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African Affairs No 321, 1981; Merera Gudina *supra* note 4; Assefa Jalata, *supra* note 19; Andargatchew Tiruneh, *supra* note 2; are only a few notables among a morass of books and articles on the historic questions of class and ethnicity in Ethiopia. The "question of nationalities" was subordinated to the question of class in the course of the making of the 1974 revolution and its unfolding in the subsequent years, but since 1991 it seems that, on the wake of the collapse of the *Derg*, the former has triumphed as the preeminent question that, if repressed, hardly dies out.

[76] Art 39(1) recognizes the "unconditional right to self-determination, including the right to secession" of every nation, nationality and people. The procedure for secession is described in art 39(4) as follows: *"The right to…secession… shall come into effect: a) when a demand for secession has been approved by a two-thirds majority vote of the members of the Legislative Council of the Nation, Nationality or People concerned; b) when the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession; c) when the demand for secession is supported by a majority vote in the referendum; d) when the federal government will have transferred its powers to the Council of the Nation, nationality, or People who has voted to secede; and e) when the division of assets is effected in a manner prescribed by law*." This clause—as divisive as it looks on the surface—is said to have had a uniting effect in the mid-1990s because it helped some of the peripheral regions/states to commit themselves to give Ethiopia a chance. It is also said that it prevented violent clashes and consequent dismemberment of Ethiopia. It is thus presented by its proponents as a uniting thread in the face of impending disunity and a guarantee of peace in equality.

[77] See art 46(2) which holds that states are formed "on the basis of settlement patterns, language, identity and consent of the people concerned".

[78] The House of Federation poses formally as the upper house of the federal legislature. See art 53 which says that "There shall be two Federal Houses: the House of Peoples' Representatives and the House of the Federation." This obviates the fact that Ethiopia's legislature is bicameral in form although it is unicameral in actual operation. That aside, Art 62 cum 82-84 indicate that the House of the Federation (with the support of the Council of Constitutional Inquiry) is the ultimate interpreter of the constitution. Subsequent federal legislations, namely Proclamations No. 250/2001 and 251/2001 confirm and elaborate on the interpretive powers of the House of the Federation and of the Council of Constitutional Inquiry. This makes Ethiopia's system unique compared to other contemporaneous constitutions of its time (such as that of South Africa, Namibia, etc).

if any, legislative role,[80] etc, can be mentioned as evidence of its unique features.)

4. Relevance to Other Diverse Polities

Why do we seek to explore the transferability of the Ethiopian federal system to some countries of Africa? Why do we even talk about the relevance of such an arrangement to these countries of an intensely turbulent sub-region? Exploring the potentials and limits of such a federation is important because the quest for a "solution" to the problems of internal and external conflicts in the sub-region continues unabated. On the whole, the assumption behind the discussion in this section, as it is behind this piece in its entirety, is that federalism might help better handle the problems of conflict at both domestic and international/sub-regional level thereby leading to peace and stability at least by reducing the incidence of its violent manifestations. In the abstract, there are three major reasons for considering federalism as a form of flexible governance that can possibly absorb the kind of challenges posed by diverse and competing ethnic nationalisms. We now turn to the consideration of these three reasons one after the other.

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[79] The House of the Federation, the upper house of the Ethiopian parliament, is "composed of representatives of Nations, Nationalities, and Peoples" (art 61(1)). The House is thus a representative of the ethno-cultural groups rather than the states. But the states may have their interests aired through the ethnic groups that come out of them. Besides, the fact that the representatives are—in practice so far- selected by the state legislatures (often from within the state legislatures), rather than by direct popular vote, has created the impression that they represent the states. The state legislatures are of course allowed to elect the representatives themselves or to "hold elections to have the representatives elected by the people directly" (Art 61(3)).

[80] In deed the House of Federation has little legislative role. This is evidenced by the fact the list of powers and mandates under article 62 refers only to two matters, among a total of 11, as the ones relating to legislation. These matters are: a) determination of "the division *of revenues* derived from joint Federal and State tax sources and the *subsidies* that the Federal Government may provide to the States" (art 62(7)); and b) determination of "civil matters which require the enactment of laws by the House of Peoples' Representatives." (art 62(8)). One can quickly note that even these are not legislative matters *in stricto sensu*; they are rather directions on what to legislate upon, sort of a license for the HPR to legislate on the matters indicated.

4.1. Federalism for Internal Stability and Peace: Short Term.

First, the interest in peace and in the defusion of conflict and tension demands consideration of federalism as an option. The urgent need to disarm the armed and to take out the military option as a solution to political problems, and thereby replacing it with politico-diplomatic solutions, requires that there is a guarantee to a minimal degree of autonomy and power-sharing in a broader encompassing polity. The self-rule and shared-rule components of the federal idea offer a synthesis of this demand to enjoy autonomy in one's locality and share power in the larger polity. Multi-ethnic federalism such as the one being practised in Ethiopia, then serves as an instrument of brokering truce, especially in post-conflict societies such as those that exist in the horn of Africa region.

An ethnicity-sensitive federalism in Ethiopia, when it arrived on the scene in 1991/1995, had helped end a conflict born out of a quest for ethno-cultural justice[81] and resentment of what was perceived as a privileged ethnicity's dominance from the center. The recognition of the right to self-determination (political, cultural, and economic), and even secession, the (legal promise of) fair representation in the structure of the "central" government buoyed many a political actor with hope, and led to demobilization of their liberationist armies.[82] This plucking out of the military solution to a political

[81] That is to say, it helped warring factions to come together and negotiate a space in the restructured Ethiopia. With regard to some, e.g. the Somalis in Ogaden, this conflict took a new shape and re-emerged in 1994 when the ONLF decided that the EPRDF-led Transitional Government has not delivered on its promises. Similarly, in Oromia, OLF—which disarmed itself to take part in the Transitional Government—went back to take arms again when it decided that the democratization process is derailed. See generally Leenco Leta, *The Ethiopian State at the Crossroads: Decolonization and Democratization or Disintegration***?** Lawrenceville, NJ: Red Sea Press, 1999 on the latter.

[82] This was the case in Ethiopia when, immediately after forming the Transitional Government, the liberation movements agreed to demobilize their armed forces in the interest of peace and stability. While so agreeing, they also agreed to maintain the EPRDF forces as the country's armed forces for the transitional time. The anomaly here is the Eritrean situation. The Eritreans, by virtue of the military triumph of EPLF over the *Derg* in Eritrea, had already formed a separate Provisional Government since the fall of Asmara in May 1991. While the general discourse of 'self-determination up to and including secession' (art 2(3)) in Ethiopia might have reinforced the events unfolding in Eritrea, Eritrea did not secede—and peace did not come-- by virtue of the implementation of the provisions of the TC or the subsequent federal constitution (which also endorsed the right to self-determination and secession as a towering constitutional human right in its famous article 39).

stalemate was achieved by a dispensation of multi-ethnic federalism. To be fair, in Ethiopia, there are many groups that hold the view that, because the promise was not fully delivered in practice, the peace and stability was and still is fragile. Nevertheless, there is no gainsaying that, owing to the federal dispensation, at least in 1991/1995, disintegration and dismemberment of Ethiopia as a country was kept at bay; conflicts are devolved to the sub-national level; ethno-nationalists' questions for secession, autonomy, recognition, equality and non-discrimination were blunted. For preservation of unity and for assuaging extreme nationalist demands, multi-ethnic federalism was of some help in Ethiopia.[83]

4.2. The Federal Idea as a Legal Technology for Governance of Diversity: Medium Term

In the medium term, multi-ethnic federal systems such as Ethiopia's might help to entrench the politics of recognition. By constitutionalzing and institutionalizing ethno-political relations, it engenders broader accommodation and deeper recognition of diversity. Reinforced by the peace and stability that the first purpose outlined hereinabove provides, multi-ethnic federalism helps

[83] Elsewhere, I argued that the most explosively violent conflict that seized the country chiefly orientated as one taking place between a dominant and repressive center (embodied by the Derg government in Addis) and a host of liberationist forces from the peripheries (typified by EPRDF, OLF, ONLF, and several others including EPLF) was resolved through the military triumph of the latter but then an equally explosive circle of violent conflict between a potentially dominant center and weaker peripheries was averted by the recognition of self-determination, autonomy, and ethno-cultural justice through the Charter (1991-1995) and through the Constitution (after 1995). In post-constitutional times, such conflicts have not only been made to take the conflicts of constitutional type (e.g. litigation) democratic-political type (e.g., electoral, representational), they have also been devolved to the sub-national level. This might have multiplied the incidence of low-key conflicts by accentuating the competition born out of heightened ethnic self-awareness and awareness of new interests, but surely has reduced the nation-wide conflicts that threaten the existence of the Ethiopian polity as such. See, Tsegaye Regassa, "Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia" (forthcoming in 2010). This should, however, not give the impression that the quest for secession among some groups (such as the Somalis in Ogaden, or the Oromos in Oromia) has been jettisoned. Nor should it give the other false impression that the unity of the country is so well established that we can now take it for granted. Besides, it should also be noted that, especially since the 2005 election and the altercation that followed it, there was a general state of peace-lessness although there was little overt violence.

build a multi-national state building. Building a multi-national state in turn helps to decouple the concept of nation-state thereby leading to the distinction between the notions of nation-states and citizenship.[84] In this scenario, multi-national federalism as a legal technology will help ensconce the federal principles of self-rule and shared rule and extend them to the need to fulfil ethno-nationalist quest for autonomy and difference on the one hand and fair and equitable sharing of the "national" power, resources, and opportunities on the other.

In Ethiopia, ethno-cultural justice is constitutionalized, institutionalized, and as such, regularized.[85] Ethnic self-assertion is legally routinized. The fears of discrimination, involuntary assimilation, oppression, and even genocidal persecution are assuaged as there are legal protections for equality, difference (of linguistic, identity, religious, or cultural type), autonomy (including self-law), self-governance, and even independence. The self-determination clause (in art 39) guarantees political autonomy/independence; stresses the right to language, history, and culture; and recognizes the right to "a full measure of self-governance". The principle of federal comity (art 50(8)) and of subsidiarity (implicit in federalism in general) guarantees the exercise of self-rule locally. On the whole, self-rule seems to be doing well in Ethiopia.[86]

Shared rule, which theoretically, is possible especially through the "House of ethnicities," called in Ethiopia the House of Federation, is undermined by the mode of representation (one for each plus one more representative for every additional one million, art 61(2)). The fact that the

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[84] See generally Alain Gagnon and James Tully (eds), *Multinational Democracies*. Cambridge: Cambridge University Press, 2001 for a discussion on the need for such decoupling.

[85] By so doing, Ethiopia has made a bold departure from the trend in Africa which, for the times since decolonization, has endorsed the slogan 'kill the tribe to build the nation.' See Will Kymlicka, "The Global Diffusion of Multiculturalism," in *Governing Diversity: Democratic Solutions in Multicultural Societies* (Razmik Panosian, Bruce Berman, and Anne Linscott, eds). Montreal/Kingston: Rights and Democracy/EDG, 2007, p 11 (Here, Kymlicak says: "'Kill the tribe to build the nation' was a popular expression in many post-colonial African countries.")

[86] Note however that owing to the little political party pluralism in the contestation for state and the federal, and the dominant and centralized nature of the ruling EPRDF, self-rule could not have a full expression as yet. See Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience, 1991-2000*. Bergen: Ch Michelsen Institute, 2002 on this matter.

voting system is majority system (art 64) minorities having no veto on the traditional 'vital' matters also undermines their power as groups who engage in shared rule. The fact that the constitution is mute on executive power-sharing, or representation in other institutions (such as the federal judiciary, security, the federal army, or civil service, etc) also seems, on the face of it, to undermine the shared rule component. Nevertheless, in practice, there is a constant, and often, silent act of balancing the ethnic configuration of the federal cabinet, judiciary, civil service, and even the military.[87] On the whole, although one cannot insistently argue that ethno-cultural justice is securely ensconced in Ethiopia, one can fairly say—especially considering the existence of the legal, structural, and procedural infrastructure in place and the little good practice that even goes beyond the silence of the constitution—there is enough room afforded to grant legal-institutional expression of the quest for ethno-cultural justice. Hence, multi-national federalism's significance as a tool for dispensing ethno-cultural justice.[88]

4.3. Federalism for Regional (re-)Integration: In the longer term

Federalism can also be sought in the Horn of Africa owing to its potential utility as a tool of guaranteeing sub-regional peace via regional (re-) integration. It is trite to say that all the countries in the sub-region share people (who live across borders), cultures (languages, histories, and identities), and resources (which especially the pastoralist peoples seek, unhindered by national boundaries). Tigrigna speakers live in Eritrea and Ethiopia. The Afar people straddle the territories of Eritrea, Ethiopia, and Djibouti. Somali speaking people live in the Somalias, Kenya, and Ethiopia. Oromos, the Nyangatom, and other Nilo-Omotic peoples inhabit Ethiopia and Kenya. The Nuer, the Anua,

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[87] Art 87 of the constitution, the article stating the "Principles for National Defense" holds that "The composition of the national armed forces shall reflect the *equitable representation* of Nations, Nationalities, and Peoples of Ethiopia" (art 87(1)).

[88] Of course another suggestion would be to have a decentralized unitary government especially in view of the similarity of peoples, cultures, identities, resources, environments, experiences, and fears, etc. But at least in Ethiopia and the Sudan, unitarism is viewed as too oppressive of and too constraining to diversity. As a result, lessons of history counsel us against it: it has been tried and found wanting. Indeed, it is exhausted at least in some of these countries.

and the Gumuz live both in Ethiopia and the Sudan. The Kunama and the Irob (alias the Saho) also live in Eritrea and Ethiopia. Often, when two neighbouring countries have conflicts, the peoples living across borders shoulder the brunt of pain of war. At times, they cause the wars. The neighbours use their 'kins' in the other countries to destabilize each other arming them as opposition groups. The demographic linkage is so strong that any domestic problem with a peripheral people in one country has a reverberating effect on the people in the neighbouring countries.

These countries also share an environmentally fragile ecology in their borders. There is an economic inter-dependence (for ports, natural resources, and agricultural consumption products). Because of the weaknesses of states in almost all of these countries, there is a shared sense of military and geo-political insecurity. In deed such a fear is a constant presence in the region. That is why most media describe the entire region as nothing less than 'volatile'.

A multi-ethnic federal arrangement that pays sufficient attention to ethno-nationalism and its quest for ethno-cultural justice, I argue, will help stretch a thread that can bring these countries together to alloy their common fears of economic inviability, military insecurity, internal instability and deficit of ethno-cultural justice. The fact that everyone will reserve their right to independence in the secession clause that is now part of the Ethiopian federal experiment will preclude fear of conceding one's sovereignty on a permanent basis. One might suggest that this is more like a confederal arrangement, but confederalism—always suffering from the deficit of democracy that comes along with the indirect relation between the confederal government and the citizens—does not suit the goals intended for this federal project within each country, although it seems to come as rather handy.[89]

5. Who Cares to Buy Federalism from Ethiopia, and Why: A Search for Potential "Market"?

5.1. *Eritrea.*

Eritrea will be the most unlikely candidate to adopt the Ethiopian brand of federalism. This does not mean that for that reason it is not useful to Eritrea. But why would Eritrea not want to consider federalism Ethiopian style?

[89] Note however that, rather curiously, Clapham refers to the Ethiopian federation itself as confederal, often using the term "ethnic confederalism". See Clapham, *supra* note 19, p. 125.

Whence comes the resistance? Why would Eritrea resist adoption of the contemporary Ethiopian federalism? One of the reasons is rooted in the history of the recent past: Ethiopia and Eritrea were once part of a federation that did not work.[90] And in more recent times—at the time of the discussions that led to the adoption of federalism--Eritrea had advised Ethiopia against dabbling with ethnicity[91]. Politically, they would argue, nation-building requires a degree of unconcern for diversity management. They project a shared history, in Eritrea, of resistance to Ethiopian (centralist and unitary) oppression. They claim to have no ethno-cultural justice deficit at home yet. If they do, it is one that they share in the larger Ethio-Eritrean political space[92]. Hence, no incentive to go federal in Eritrea, let alone to go ethno-federal like Ethiopia. Moreover, Eritrea is relatively small geographically. If the thesis that holds that federalism is for large countries obtains, then Eritrea might feel that it doesn't need it. Further, disaffection with the practice (i.e., the wrong turn the practice might take) makes the federal option unattractive if not downright repulsive. Eritrea perceives the Ethiopian federalism as an example of failure in political arrangement rather than that of success. For Eritrea, federalism in Ethiopia did not pacify the country, did not address the issue of ethno-cultural justice and did not help integrate Ethiopia better (echoing the view among some circles in

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[90] See Thomas Goumenos, "The Pyrrhic Victory of Unitary Statehood: A Comparative Analysis of the Failed Federal Experiments in Ethiopia and Indonesia" in *Defunct Federalisms: Critical Perspectives on Federal Failure* (Emilian Kavalski and Magdelena Zolkos, eds). Aldershot: Ashgate, 2008, pp.41-47, on the failed Ethio-Eritrean federal experiment. See also Tekeste Negash, *Eritrea and Ethiopia: The Federal Experiment* (2nd Printng). New Brunswick, NJ: Transaction Publishers, 2005, for a more comprehensive and historically informed treatment of the Ethio-Eritrean experience.

[91] See Tekeste Negash and Kjetil Tronvoll, *Brothers at War: Making Sense of the Eritrean-Ethiopian War*. Oxford: James Currey, 2000, pp. 1-3, 12-20, 87-90 on the divergent strategies the two regimes adopted in the two countries with regard to ethnicity. The whole book tries to reconstruct the differences between TPLF and EPLF in visions, strategies, and tactics in advancing their goals one of the points of divergence being on the extent to which they can take ethnicity in nation-building (in the case of Eritrea) and state restructuring (in the case of Ethiopia).

[92] But this is so in spite of the resistance movements mobilized along ethnic lines in contemporary Eritrea. The armed Red Sea Afar movement, the armed movement from the side of the Kunama are examples one can cite to show the existence of ethnic tensions in Eritrea. That Eritrea is an ethnically diverse country is too obvious to need a discussion here.

Ethiopia that federalism is more the dividing than the uniting factor in Ethiopia).

Moreover, Eritrea's rivalry with Ethiopia and its current competition for hegemony in the sub-region is another factor that plays against the adoption of the Ethiopian brand of federalism. The lesson that emerges from this is that: one does not borrow from a rival, even when, on its merit, the legal technology to be borrowed is good per se[93]. Given the fact that this rivalry is reinforced by a historic relationship of the oppressor and the oppressed, the victor and the vanquished, it is difficult to imagine Eritrea to be lulled by the federalism technology. Difference in national character, self-image, subjective sense of superiority, etc will be part of the mix. Finally, we should not underestimate the effect of neighbourly proximity as such proximity gives the air of familiarity. And like in everything else in life even in law, the familiar is the dull, and hence the unattractive, the less charming. The Ethiopian brand of federalism is not exotic enough to stir Eritrean curiosity. Added to that is the lack of prestige of the Ethiopian federal system, at least in Eritrea. Prestige is important because one of the factors that facilitate the migration of law (or a particular legal technology such as federalism) is prestige of the country of origin (of its wider culture as well as its laws).

5.2. *The Somalias*[94]

Somalia is many and one at a time. Somalia is one in the sense that it is a country constituted of one (Somali) ethnic group. It is homogenous in terms of ethnicity as well as religion (Islam). But it is also many in the sense that

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[93] See, for example, Ugo Mattei, "A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance," *Indiana Journal of Global Legal Studies*, Vol 10, pp. 383-448, on the importance of prestige for the reception to, and subsequent success of, a legal technology in another (host) country. See also Ugo Mattei, "Patterns of African Constitution in the Making" *Cardozo Law Bulletin* (1999), available at: http://www.jus.unitn.it/Cardozo/Review/constitutional/Mattei-1999/Patterns.html.

[94] By the 'Somalias,' I mean Somaliland, Puntland, and Southern Somalia. Somaliland (with its capital in Hargiessa) seems to have succeeded in consolidating peace, working a constitutional system of governance, and a democratic practice since Mid-1995 but it lacked a wide recognition by members of the International Community. Puntland seems to be following suit. The remainder of Somalia (often referred to as Southern Somalia) is formally represented by the Transitional Federal Government of Somalia but is still beleaguered by the forces of the Union of Islamic Courts (UIC), the Al-Shabab, and other war lords, pirates, and terrorists. See Weber, *supra* note 10, p.8 for the use of the term 'The Somalias.'

there is a division into regions, clans and/or sub-clans which invites the use of the term 'Somalias' to refer to them. The term "Somalias" is used to refer to Somaliland, Puntland, and 'Southern Somalia'. And the prospect for it to go federal gives a complex picture emerging in the Somalias. Somaliland and Puntland, in their eagerness to gain recognition from any member of the international community, especially from Ethiopia, and considering the relatively cordial relationship they currently maintain with Ethiopia, may not be averse to the idea of borrowing an 'Ethiopian' legal commodity. Indeed, Somaliland seems to be keenly aware of its clan diversity as it framed its constitution and established its now solid government, especially after 2001.[95]

Southern Somalia is already a fledgling federation: the Transitional Federal Charter of Somalia is modelled after the Ethiopian Constitution.[96] Hence, interest in at least one "segment" of Somalia could emerge. The need for guaranteeing equality among competing clans and regions by entrenching a much sought clan- and region-based justice makes the Ethiopian type of federalism a possible option. Moreover, the fact that a broader democratic space created by a transnational federal dispensation can be secured by a multi-national federal system such as Ethiopia's makes the latter a veritable candidate for adoption. It is to be noted that such a broad democratic space secured by federalism helps to progressively de-securitize ethnicity in the sub-region.

But old history of animosity between Ethiopia and Somalia delegitimizes reception of anything from Ethiopia.[97] The current state of Ethiopian foreign (Somalia) policy will also be part of the mix of factors against Somalia going federal.[98] Nevertheless, the need for truce and

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[95] See Berouk Mesfin, "The Political Development of Somaliland and its Conflict with Puntland," *ISS Paper 200 (September 2009)* for a summary of the state of affairs in the two Somalias. Following the tack of the constitution of 2001, Berouk (on p. 2) observes that the upper house of the legislature, the House of Elders, is composed of unelected clan elders known as the *guurti*. The *guurti* are nominated by clans during peace building conferences.

[96] Note the name of the Government: THE TRANSITIONAL FEDERAL GOVERNMENT OF SOMALIA.

[97] Said Samatar, *supra* note 10, says that "for ages, Ethiopia stood, in the eyes of Somalis, as the putative foe of the Somalis." He even quips, by rephrasing the old Mexican lamentation regarding its relation to the US ("Poor Mexico, so far from God and so close to the United States"), "Poor Somalia, so far from Allah, and so near to Ethiopia." (p.3)

[98] The Ethiopian policy in Somalia is tied to the chief goals of: a) building a viable state in Somalia; b)establishing the rule of law; c)entrenching and protecting peace; and d)helping

transformation of the politics of war into a politics of democratic/electoral confrontation requires the need for a decentralized arrangement of power on the basis, perhaps of clans, sub-clans, sects, and other cleavages that exist and emerge in the contemporary Somalias. Transplanting federalism in the Somalias thus depends, among other things, on which Somalia (greater or fragmented) we seek to imitate Ethiopia's ethno-cultural federalism. In addition, who comes out as a winner from the struggle for hegemony in Southern Somalia; the level and impact of involvement of the international community and its consequences; Ethiopia's policy on the Somalias in general (whether it is going to emerge as principled or pragmatic); the clan configuration of those who control governmental power; the success of the self-rule in the Somali State/region of Ethiopia;[99] and others play a role in determining whether Somalia will go federal or not. Like the case it is in the case of Eritrea, the lack of prestige of the Ethiopian legal system might work against transplantation of the Ethiopian model of federalism.

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democracy take roots. See FDRE, *Policies and Startegies on Foreign Afairs and National Security* (2nd ed). Addis Ababa: Ministry of Information, 2004 (in Amharic), p.84. It is remarkable indeed that this document also states that Ethiopia's policy on Somalia must always take account of the presence of Ethiopian Somalis this side of the border whose identity as Ethiopians must be affirmed in an inclusive and democratic citizenship. The document specifically mentions the need to dispense ethno-cultural justice to the people in the Somali region not just as a matter of principled commitment to democracy and development to its own people but also as a matter of securing its Eastern border by taking advantage of the opportunity the similarity of languages, cultures, and faiths offers as a bridge to build between the two countries. Note that cultures are referred to as bridges rather than boundaries (pp.78-83). See also Tsegaye Regassa, "State Building in the Somali Region: Challenges and Implications for Regional stability/Stabilization" (paper presented at the Fifth International Expert Meeting on peace and Security in the Horn, Nov. 4-5, 2009, Cairo Egypt) on the significance of building state in the region to secure the border and to stabilize the Somalias.

[99] Success of the federal experiment in synthesizing the local Somali and the encompassing Ethiopian identity in the Somali region of Ethiopia; the fair balance stricken between the demands of federal self-rule and shared rule; the achievement of stability, state building, ethno-cultural justice, respect for human rights and social justice, and democratic governance; etc will play a role to win the hearts and minds of people in the wider Somalias. The constitutional legal infrastructure now in place in Ethiopia has a potential to do all this.

5.3. *Kenya*.

Kenya's ethnic diversity was always the sub-text of Kenya's politics but has become more so in recent years. Ethnicity has begun to rear its ugly face, and scourges of conflict have started to show ironically in times of better electoral-democratic experimentation.[100] The pattern seems to hold: when centralism/unitarism exhausts, finally a space is created for considering federalism. Ethnic federalism is being considered in earnest. That makes Kenya a plausible candidate for adopting the Ethiopian model of federalism in the foreseeable future. But the question remains: is Ethiopia the right client to adopt it from? Don't the other issues to consider in the analysis of the prospect of adoption in the Somalias and in Eritrea come up again in the analysis of the prospect in Kenya?

5.4. *Southern Sudan*.

Southern Sudan, if separated from the Wider Sudan in the wake of the referendum in 2011 (or even otherwise), it is probably the most veritable candidate to borrow federalism from Ethiopia. Reasons: first, it is diverse although not as diverse as Ethiopia (for no one in the region is). Second, it always defined Ethiopia as the "Christian" or secular ally against Arab Northern Sudan. Third, it shares ethno-linguistically similar people on the border (Nuer, Anua, Gumuz, Uduk, Dinka, etc) some natives, some displaced because of ecological fragility or war. Fourth, because it will have a weak beginning and is thus geopolitically and economically vulnerable as a result, it seeks strong ties with Ethiopia, among others of course[101]. Besides, it is healthy to assume that it seeks neighbourly peace to concentrate on the arduous task of nation-building and state-building. Needless to say, it needs internal peace for state building. So, multi-ethnic federalism can be adopted as a tool of defusing internal conflict. The liberationist (self-determination) rhetoric it has forced into the 2005 CPA (which *de facto* serves as the interim constitution of the Sudan now) resonates well with the Ethiopian constitution's heavy accent on self-determination, secession, and even equality and self-rule. Juba had many draft constitutions and in recent times, it is considering the ethno-federal option.

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[100] This was the case in the 2007 election and the crisis that followed it.

[101] Note that, if independent, South Sudan will be a yet other landlocked country in the horn region.

5.5. *The Wider Sudan*.

Wider Sudan is traversed by calls for federalism, self-rule, shared-rule, autonomy, equality, and social justice. These are exactly the values that are given a high premium in the Ethiopian federal constitution. But now that we have South Sudan's upcoming referendum in 2011, a secessionist movement holding sway in Darfur, and other movements intensifying their rage against the North (e.g. South Khordofan, East Sudan's Beja movement, etc,) is it perhaps a bit too late for the Sudan to ponder the values of federalism? Besides, one wonders if the Sudan is willing to relinquish its Islamism which propels a form of religious tyranny (majoritarianism) of the North. What about the Al Bashir-ICC altercation? Where does it lead? Does it lead to the abrogation of the CPA, and if so, are we going to see a new flash of war that will necessitate a new start of peace negotiations? In any event, does the Sudan have any better option than federalism? To make the question more pointed, does it have any better option than the multi-ethnic type? If the answers to these last questions is in the negative, then it is a clue as to the Sudan's potential to become a borrower of the Ethiopian brand of federalism.

5.6. *Others*.

Djibouti, a small country,[102] with its Afar and Isa population, has a potential of having to face the burden of a bipolar conflict. But both the Afar and the Isa straddle the territories of Ethiopia and Djibouti. The need to blunt the tension between the two groups, the need to de-securitize its two ethnicities (both of which have their larger homes outside of its borders) might make federalism a veritable option. Besides, its small size, the threats from Eritrea,[103] the dependence of Ethiopia on its port and the pressures Ethiopia imposes from time to time, and other reasons might force Djibouti to consider a federal relation with Ethiopia or a greater regional shield. The fact that the Afar in Ethiopia—the largest Afar concentration—and the Isa as well, have their own self-rule (the Isa in the Shinille Zone of the Somali region) and if their autonomy is entrenched through Ethiopia's federal experiment, there is little to

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[102] Weber, *supra* note 10, refers to Djibouti as "last man standing, Francophony on a salt lake." p. 10.

[103] There is a military confrontation that arose out of a border dispute. The border dispute is the result of disagreement between Italian and French Colonial powers before WWII. New tensions also emerge owing to Djibouti's "monopoly of port activities between the Horn and the Arab peninsula" See Weber, *supra* note 10, p. 11.

fear the threat of dissolution in the wider Ethiopian polity, Djibouti can even be tempted to consider the federal option as a mode of (re-)bonding it with Ethiopia.[104] But will Djibouti be a 'market' for Ethiopia's federalism? The answer to this question depends on the factors that will help determine the answer to the questions raised with regard to the countries discussed thus far.

A call has been, and is being, made in ***Uganda*** for adopting a federal system. A veritable literature is available on a pro-federalist website (http://www.federo.com) on the justification for and the direction proposed for the federal system is to take. They even feature an alternative draft constitution for a federal Uganda that has details about the form of government, the mode of state formation, the powers of the constituent units, and the mode of operation of local government, etc. Ali Mazrui advises that the bipolarly conflictual (and at times even genocidal) relation between the Hutus and the Tutsis in ***Rwanda*** and ***Burundi*** can be redeemed through federally dissolving these small countries and incorporating them in a multi-national federal polity in the ***Tanzania –Zanzibar*** continuum.[105] He advises against ceding them to Congo in spite of their shared colonial history under Belgium. Multi-national federation, according to Mazrui, dispels the bipolar tension, and as in Uganda, Tutsis and Hutus might find a political space of alliance and cooperation in a multi-national federation of the ***Tanzania-Zanzibar continuum***. But one does well to ask: is the federal solution a little too late for Rwanda and Burundi?[106] Perhaps. Is the Ethiopian option viable? If not its practice, then its promise might make it an option.[107]

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[104] Note that Djibouti used to be part of Ethiopia before it was given over as a concession to France in the late 19th century for their construction of the Djibouti-Addis Ababa rail connection.

[105] Mazrui, *supra* note 7.

[106] A more interesting and perhaps inscrutable question for lawyers is what about the impact of all these developments in international law? What about its adverse effect on the African Union Law which cannot permit us to go against the sacrosanct principle of adhering to colonial boundaries thereby never allowing a rethinking of the old boundaries?

[107] But note that federalism is a familiar concept in this part of the horn. Tanzania-Zanzibar is still a federation of a sort. Uganda and Kenya, along with Tanzania, was once part of the East African Federation. The argument from familiarity (especially from the experience of failure in the past) might win over the interest to adopt federalism, even of the multi-ethnic type (which in a way is new) to the sub-region in general and to these last group of countries in particular.

6. Factors for and Against "Exporting" Ethiopian Federalism: The Political Economy of Import-Export—a Quick and Tentative Sketch

In this section, we will attempt to identify some of the factors for and against adopting the Ethiopian brand of federalism. First let us consider the ***factors for***, which include:

a. Fact of shared *peoples, cultures, languages, histories, and identities* across the borders of most of the countries of the sub-region. This factor serves as an impetus for considering federalism for internal peace, ethno-cultural justice, and greater integration and cooperation in the sub-region.
b. The fact of *common diversity and of common problems* that ensue there from.
c. The existence of *common fears* that haunt the countries of the sub-region, especially the fears of economic inviability and geo-political insecurity.
d. The reality of *common needs* shared among these countries, namely: stability, peace, state-building, economic progress, environmental protection (or restoration), and human development.
e. *Interdependence* (for ports—between Ethiopia and Djibouti or Eritrea, or Uganda and Kenya, South Sudan and the rest, etc—and hydro-power--between Ethiopia and the Sudan, etc-- for instance)
f. Others.

In contrast to these factors stand the ***factors against*** adopting the Ethiopian version of federalism. One can easily identify the following as some of the factors against it:

a. *Relative equality among the countries' legal systems*. The fact that the usual pattern of law's migration is from a strong center to a weak periphery contrasted to the non-obvious relative strength of the Ethiopian system poses a challenge to its transplanatability.
b. *Lack of prestige*. The Ethiopian system is not a prestigious one by any standard. Given Ethiopia's bad showing in the media for decades (associated with famine, war, abject poverty, dictatorship, etc, all of which tend to stick for various reasons), and the fact that the Ethiopian system hasn't yet overcome the trinity of deficits (deficits in democracy, human rights protection, and good governance, the latter by the current regime's admission)[108], there is little that is spectacularly charming about the practice of the federal experiment in Ethiopia.

[108] Recent programmatic documents by the Ethiopian government and the ruling party such as *Democracy and Democratic Unity in Ethiopia* (Amharic). Addis Ababa: NP, June 2005,

c. *Rivalry and competition for hegemony*, especially between Eritrea and Ethiopia. This hinders the possibility of learning from one another.
d. *History* of *bad relations* among two or more countries (e.g. Eritrea and Ethiopia; or Ethiopia and Somalia).
e. *History of failure and familiarity.* Federalism has once been tried in Ethio-eritrea, British East Africa, the Sudan, and Tanzania. (As a result, the mood looks like "So… what is new about this one?")
f. *Lack of a compelling success story*. Ethiopia's experiment is not particularly a spectacular case of success. As has been seen in the foregoing sections, mixed stories emerge from the analysis of the Ethiopian experiment. As a result, why would anyone borrow a system that has not achieved a proven and demonstrated success in the 'mother' country? Success, among others, as is well known in the comparative law literature, is what makes a particular legal technology appealing.
g. *Psychology* of countries. The subjective belief that we have no problem of ethno-cultural deficit, nor do we need this technology as we are a different, if superior, people, also leads to rejection of a legal technology.
h. The fact that the *federal idea as an idea is a transplant* seeking local legitimacy even in Ethiopia also contributes to the lack of enthusiasm to accept it readily in the potentially host countries.
i. *Proximity* of Ethiopia to all these countries makes the experiment sound like it is familiar. And as in life in general, the familiar is the dull. "It is not exotic enough to be exciting," the mood goes. Thus, it is not worth transplanting.
j. Other factors such as the *absence of clear intellectual (as opposed to political) articulation* of the uses and costs of federalism in the countries of the sub-region, the general *lack of inter-popular dialog* over the matter (over any public matter anyway), and the fact that federalism of any type, being *complex*, requires a corps of *experts* to run it and incurs *expenses* at various levels also serve to undermine the possibility of a federal contagion—for to talk about a 'federal revolution' is to be too utopian about it-- in the sub-region.

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make a repeated reference to lack of good governance and the practical problems in the implementation of the democratic dispensation as partly the result of the fact that democracy is merely at its nascent stage in Ethiopia facing formidable historic and contemporary challenges.

7. Conclusion

In this piece, an attempt is made to inquire into whether the Ethiopian brand of federalism is exportable. A question is raised as to whether the Ethiopian model of multi-ethnic federalism can be adopted for the purpose of bringing about internal peace and stability, entrenching ethno-cultural justice, and a greater prospect of regional integration in the Horn. In conclusion, let me attempt to summarize the answer to the key questions raised at the outset. Does it bring about peace and stability? The fact that it responds to the quest for identity-based equality, autonomy, and self-rule makes it a candidate as a governance structure for the countries troubled by such quests. These quests, as one can readily note, have been the sub-text of many an African politics which, owing to the salience of the principle of sanctity of the arbitrary colonial boundary, sought to advance nation-building by 'killing the tribe'.

The fact that the Ethiopian federal experiment extends recognition to ethnicity (thereby freeing it from the "bondage of boundaries"[109]) and accords secession to identity-based groups seems to prevent conflicts by offering the ultimate. It takes the bull by the horn (so to speak) and takes the sting out, as it promises peaceful separation if and when an identity-based group seeks to exit the federation. This disarms the armed ones and takes the military solution out of the political equation. In Ethiopia, as it has been observed above, in spite of the raging controversy over it, it has served—at least as far as some groups are concerned-- as the case of the apparently repulsive becoming the actually attractive, the case of the dividing serving the goal of uniting the country. More importantly, it has helped to convert secessionist conflicts into the normal political and democratic process. To this extent, then, the Ethiopian model can offer some attraction.

The fact that ethnic-based self-rule is recognized in a federation, inter-personal and inter-group equality is guaranteed by an entrenched human rights chapter of the constitution, and a fair and equitable share in the federal power game is constitutionally assured, and that the constituent units might use their secession right for purposes of political bargaining at the center is pivotal in entrenching ethno-cultural justice. In its potential for a fair and even-handed management of diversity, therefore, the Ethiopian federal system might also

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[109] See Mazrui, "The Bondage of Boundaries," *IBRU Boundary and Security Bulletin* (April 1994), pp.60-65 (available at: http://www.dur.ac.uk/resources/ibru/publications/full/bb2-1_mazrui.pdf) on this general bondage of boundaries much of Africa languished under.

offer an example to consider. The fact that the ethnic-based constituent unit formation might initiate a rethinking of old boundaries and a remapping of the region (thereby effectively de-securitizing the hitherto bounded ethnicity); the fact that this in turn reinforces the interconnection among the countries of the region who share trans-boundary people, resources, fears, and inter-dependences; the fact that because of the principle of non-centralization built into a federal system, no constituent unit needs the fear of dissolution, i.e. the fear of being dissolved, in a larger Ethiopia-dominated polity; and the fact that, by exercising the right of secession, any one unit can opt out of the regional federation especially in time of an undesirable centralization; these and other factors might make it suitable for regional integration. This last point strengthens the idea that federalism can be used as a legal technology to be used (even in international law) to facilitate regional integration. This however is not without noting the limits of law to constitute a community, a Horn of Africa community in our case. Indeed, to create a community that comes together to covenantally federate with each other is a herculean task towards which to work. Given the existence of interdependence that exists among the countries in the region, this is not entirely inconceivable. But converting the conceivable to the real (i.e., into a lived experience) takes time. In the long term, therefore, one can consider the federal experiment of Ethiopia as laying the ground work, the foundation, for starting to imagine a federally integrated Horn of Africa community.

Nevertheless, considering the fact that laws migrate depending on factors other than those recognized as important in comparative law such as relative strength of the legal system, similarity or dissimilarity of the legal tradition, its prestige, and its success at home, etc,[110] the Ethiopian system might not find it easy to migrate to (or diffuse itself into) the countries of the region. This is because although the Ethiopian legal system in general (and its constitutional system in particular) is relatively stronger than most of its equivalents in the region, it is not so outstandingly strong that it invites imitation. Although some of the countries of the region share a similar legal tradition with Ethiopia (e.g. Eritrea, Djibouti, Somalia all having affiliated with the continental European civilian tradition), there are also those countries whose modern legal system is not similar to the Ethiopian one (e.g. Kenya,

[110] See generally Sujit Choudhry (ed), *The Migration of Constitutional Ideas*. Cambridge: Cambridge University Press, 2006.

Uganda, The Sudan) thereby making it difficult to create a synchronization. But given the fact that the imported European legal traditions affect only the upper layer of the legal systems in all the countries of the region (and hence the common distance of these traditions to all of the countries of the region),[111] and the added fact that the constitutional system that institutionalized the federal system has little link to the civilian tradition to which Ethiopia owes credit for the corpus of its substantive laws, the differences in tradition affects the prospect of exporting it, if at all, less than the other factors do.

In spite of the relative strength of the Ethiopian system, there is no gainsaying that its prestige is still low. That is partly because of lack of efforts at popularizing the system even at home, let alone in the region. Partly, it is because the Ethiopian system has to compete with other more prestigious (or hegemonic) systems (such as that of the US).[112] Moreover, the psychology of the neighbouring nations affects the prestige. Some countries, owing to historic relation of rivalry, often work to put Ethiopia into disrepute by citing it as an example of failure than success. The lack of prestige affects the prospect of reception elsewhere adversely. Added to that is the lack of clarity in the link between federalism and economic growth on the one hand and the lack of consensus, even at home, on the success of the experiment in the area of the economic growth scored in Ethiopia on the other.[113]

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[111] See, for example, Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed). Cambridge: Cambridge University Press, 2006, especially its ch. 6, pp.380-492 on the distance between the often transplanted modern laws and the normative life of the society.

[112] Mattei, *supra* note 93 on the hegemony of American law worldwide.

[113] In recent years, it was repeatedly reported by the government that there has been an economic growth rate of about 11%. In 2009, the growth rate was reported to be at 9.9%, and in 2010, it is expected that the rate will rise to 10.1%. See, Jason McLure, "Ethiopia Expects Economy to Expand by 10.1% This Year (Update1)" (February 4, 2010), available at: www.bloomberg.com/apps/news?pid=20601013&sid=ahgBUT_6y4FA. The Ethiopian government attributes this economic growth, among others, to federalism. But how exactly federalism contributed to such an economic growth is not manifestly clear. Whether it is by creating a peaceful environment in which to do business; or by empowering/capacitating citizens (through human rights, justice, human development) that it helped achieve such growth; or by unleashing local nationalisms that help grow the *parts* which will then spill over to the *whole*; etc is not clear. There are some who disagree, especially those in the political opposition. Often they doubt the statistics. They also hold that better could have been done if, for e.g., land is privatized and the economy in general is liberalized. Some also

At this historical juncture, the answer to the question posed is a mixture of (half) 'yes' and (half) 'no' as there are both factors for and against "exporting" Ethiopia's federalism. Consequently, one wonders if raising the issue of "exporting" federalism in the context of the horn of Africa itself is a bit too premature. Premature or not, as the foregoing pages have shown, the question of "exportability" of the Ethiopian brand of federalism is, at least, worth the asking.

argue that the logic of cultural boundaries (emphasized in ethnic federalism), being contrary to the logic of profit-led market (which rejects any boundaries including cultural ones), has contributed to the stagnation of the economy.

Some Problems Related with Reservations to International Treaties: Focus on Human Rights Treaties

Molla Ababu*

Briefly, the writer basically explores whether the rules of reservations available in the Vienna Convention on the Law of Treaties and other customary international law are compatible with the nature, objects and purposes as well as protection of human rights treaties. Specifically, the writer argues that such rules are either inadequate or are not suitable to govern reservations that may be made to human rights treaties. The problems related with lack of appropriate institutions or authorities to interpret rules of reservations and follow up the consequences of reservations made to human rights treaties will be assessed in terms of their impact on the protection of human rights.

Introduction

Since the end of World War II, human rights treaties have been flourishing mainly in the form of multilateral conventions. From the human rights activists' perspective, universal application of human rights has been highly intended, which may in turn be achieved by allowing as many states as possible to ratify such treaties. It has also been desired that states should become a party to the full contents of human rights treaties as a result of which their unity and integrity would be maintained. In practice, however, these two broad objectives have not been achieved at the same time. Due to various factors, inter alia, sovereignty, national interest, incapacity to implement human rights treaties, states may understand some provisions of human rights treaties as burdensome and onerous. Thus, compelling them to be a party to all provisions of a given human rights treaty may have an exclusionary effect in a sense that states may automatically opt to disregard being a party to the whole treaty, and hence its universality will be compromised.

Thus, the concept of reservation has been introduced in international law with the view of balancing the two crucial goals: universality and unity of international treaties in general and human rights treaties in particular. Reservations are not only seen as manifestation of states consent and sovereignty but also as mechanisms which may increase the participation of states to human rights treaties by allowing them to reserve to one or more

* LL.B (Addis Ababa University), LL.M (University of Utrecht, the Netherlands), Lecturer in Law, Bahir Dar University, Vice Dean of Law School (2007-2009).

provisions, while being a party to the substantial contents of such treaties. It is not, however, easy to strike a balance between such goals when we come to human rights treaties.

In this paper the writer basically aims to deal with the following issues: Whether there are adequate international rules that govern reservations; whether there are special rules applicable to reservations to human rights treaties; if not, whether it is fair to employ the general rules of reservations to them. The adequacy/inadequacy of such rules will also be evaluated from the perspective of their roles to maintain the balance between universality and integrity of human rights treaties. As to which international organ has the legitimate power to construct and determine rules of reservations to human rights treaties and related problems will also be the point of focus in the discussion.

In order to tackle such basic research problems, the paper is logically organized into four parts. In the first part definition, features, elements and scope of international treaties will be dealt. International rules of reservations and their nature and applicability will make the discussion in the second part. The writer will substantially embark on examining major problems associated with rules of reservations that may be made to human rights treaties in part three. Part four will wrap up the discussion by way of conclusion and recommendations

1. Some Remarks on International Treaties

1.1. What do International Treaties Constitute?

It is widely accepted that international treaties (herein after treaties) are the major sources of international law. Article 38 of the Statute of the International Court of Justice (ICJ) provides that international conventions, whether general or particular, are accepted as a source of international rules together with international custom, general principles of law, and judicial decisions. Treaties are not only a principal source of international legal rules but also are themselves the subject of considerable body of international law called the law of treaties. Nowadays, the most favoured and frequented means of creating international rules is the conclusion of treaties.[1] The significance of treaties is also found immense as they are constantly used by the international community to codify existing international customary rules. They are not only a means to create international norms among nations but

[1] Antonio Cassese, *International Law*, Oxford University Press,2nd ed,2005, P. 170

also becoming an increasing source of national laws thereby rights and obligations of individuals can be established. This is especially true in human rights and humanitarian law treaties. The ever increasing interdependence of states, the ongoing process of regionalization and internationalization and the system of globalization as a challenge of the new world order, the effect of technology and the concern of human rights protection are the major push for the importance of treaties. This fact can be easily seen from the case that between 1946 and 2003 the United Nations has received registration for over 50,000 treaties.[2]

Thus, treaties are the major regime to create international legal norms not only in old fashion international fields such as foreign relations and diplomacy, navigation and use of high seas, use of force and international security, commerce but also in human rights and environmental protection, control of modern weapons, investment, halting terrorism etc. The wide consumption of treaties as major alternative norms is partly attributed by the fact that treaties are systematically codified and arranged, more specific and explicit, written and duly registered, modern, consensual and deliberate acts of states. These are also important factors that lead treaties to be more respected and enforced at international and national levels.

Currently the most authoritative definition of treaties is the one provided under the 1969 Vienna Convention on the Law of Treaties (herein after the Vienna Convention). Article 2(1) (a) of the convention provides:

> *Treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation.*

From the explicit and implicit messages of the given definition, we can establish some basic elements or features of treaties.

a) *Treaties are international:* unlike domestic laws whose application is limited within the territory of respective states, treaties have international character governing broader relations between international subjects. In fact the term international is relative. There are particular treaties involving two or

[2] D.B.Hollis et al (Editors), *National Treaty Law and Practice*, Martinus Nijhoff Publisher,2005, P.1

several states or general treaties which establish rules, or norms to be applied at regional or universal levels. The latter types of treaties are known as law making treaties to which human rights treaties belong. The term international seems to be a repetition of ``between states`` and hence superfluous.

b) *Treaties are consensual*: Consent is the central element of treaties. Treaties are deliberate and conscious actions of sovereign states. Rights and obligations embodied in a treaty are freely and expressly determined or consented by the subjects of international law. In this regard treaties are different from other sources of international law such as customary norms which impose obligations on states even without their express consents. They are also different from national public laws whose application may not depend on the consent of their subjects. Rather, treaties are like national and international private contracts, trusts and other juridical acts the obligations of which emanate from consent of contracting parties. Even though treaties are, as a matter of principle, consensual and cannot impose obligation on or create rights for the non-party states, there are exceptional situations in which states may be bound by treaties or benefit from them without their consent. When treaties have codified customary norms, all states including the non-party ones are duty bound to respect them. Moreover, treaties which contain obligation *erga omnes* have the power to impose their obligations on all states regardless of their consent. Of course the backbone of such treaty obligations and rights affecting third states is basically international custom.

c) *Treaties shall involve two or more states*: According to the given definition only sovereign states are entitled to make treaties. This is a very narrow definition. On the one hand, unilateral acts of states are excluded from being a treaty as there shall be at least two states to involve in treaty making-process. On the other hand, agreements between international legal persons such as international organizations or between organizations and states are not deemed to be treaties. Despite this continuing controversy, these types of agreements are now being considered as treaties. Accordingly, the 1986 Vienna Convention sought to resolve such controversy by defining treaties to include international agreements between states and international organizations as well as between international organizations themselves.

d**) *Form:*** the definition provided by the Vienna Convention is also narrower from another perspective as it excludes oral agreements. Hence, treaties must

be in written form though no particular formality is set as to the number of instruments in which treaties are expressed and their designation. The requirement of a written form is the modern quality of treaties and is found essential for clarity and simplicity though it may exclude a good number of oral agreements out of the scope of treaties. But the room for applying and giving valid force for oral agreements is not totally closed. If oral agreements are the restatement of established international customs, they can be validly respected whatever their form may be.[3]

Another interesting issue here is that the Vienna Convention doesn't stipulate registration of treaties as part of the definitional elements of treaties. This may lead us to conclude that registration is not a decisive requirement so that unregistered treaties may not be excluded from being a treaty. Of course article 80(1) of the Convention provides that treaties, after their entry into force, be transmitted to the secretariat of the United Nations for Registration. But this doesn't tell us about any consequence of unregistered treaties. Registration is also required by article 102 of the United Nations Charter. The Charter also comes with a certain consequence of unregistered treaties in that they may not be enforced before any one of the UN Organs. In practice, however, ICJ has considered unregistered agreements as treaties so long as other requirements have been fulfilled though registration and publication can have still strong probative value to show the binding character of treaties.[4]

The Vienna Convention is also indifferent as to the particular designation a treaty can assume. The implication is that treaty shall be taken as a general term which represents a variety of different names such as charter (e.g. UN Charter, African Human Rights and peoples` Charter), covenants (e.g. International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights), international agreements, pacts, general acts, statutes, declarations, conventions etc.[5] Though giving infinite and informal names to treaties is more confusing, it is essential to focus on substance and on the determination of basic features and requirements of treaties so that content will be more decisive than form, name and structure.

e) *Governed by international law*: The making of treaties, their effect, scope, extent of application, reservation, invalidation, amendment and termination and their operational framework in general are governed by international

[3] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, P.7
[4] Ibid at P.39
[5] Ibid at P. 19-23

rules. Such governing norms have been for long provided by international customs. Yet, today the 1969 Vienna Convention on the Law of Treaties provides comprehensive norms for treaty regulation. The logical implication of this feature of treaties is that international agreements between states, or states and organizations which are often to be governed by municipal law such as large number of commercial concessions or transnational contracts are not treaties. It has been also suggested that the phrase `governed by international law` includes the element of an intention of states involved in a treaty to create legally binding norms in the form of rights and obligations under international law.[6] As we will see in the following section, the existence of intention of states is also a basic feature of treaties that excludes non-binding international agreements from the ambit of the term treaty.

f) *Purpose of Treaties:* In the definition given under the Vienna Convention the purpose of treaties is not explicitly mentioned. From its implied reading we can understand that treaties aim to regulate the relationship between states- to create binding norms between themselves or to establish enforceable rights and obligations just for them. Though this may be out of the scope of the Vienna Convention, there are treaties whose purpose is to govern the relationship between states and international organizations or between organizations. Though treaties basically aim to regulate the relationship between sovereign states, and sometimes with or between organizations as international subjects, most recently they are intended to extend rights and obligations directly to individuals. There are sizeable self- executing human rights treaties that can be directly enforced by national courts and claimed by individuals.[7]

1.2. International Treaties as Legally Binding Instruments

Taking into account the above discussed features and elements of treaties, readers may understand what treaties really are and why every international agreements or norms are not a treaty. But they may still get puzzled as to why treaties are binding, applicable and given proper place in international and national regimes. There are people who naively conceive treaties as fictitious and optional agreements than as binding norms. Here we will briefly fight such obstacle with a view to facilitate the ground for our main discussion.

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[6] Ibid at P.17

[7] Antonio Cassese, Supra Note at No.1, P.146-147

The principle of Pacta Sunt Servanda: This is a long established principle dictated by scholars as a major reason why treaties are binding and respected by their makers. It is a deep- rooted customary norm since it has been used by classic states. It was firmly believed that treaties as a solemn covenant or contracts of sovereign states were legally and morally binding as the law of nature as strongest pledge sworn oath because God and the law of nature obliged promisors to keep their promises and makers of treaties to honor their commitments.[8] The main reasons for respecting treaties were associated with natural law, morality and fear of God. Yet, this principle is not only a traditional one but also a modern concept taken as one of the basic reasons for obligatory nature of treaties though for different justifications.

Accordingly, the Vienna Convention under its article 26, *pacta sunt servanda*, states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This is just the re-affirmation of the oldest principle as governing norm. The very assumption behind this principle is that in the absence of certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.[9] Unlike the traditional thought, the basis of such assumption is not related with natural law or the law of God. More usually, it turns to the authority of sovereign states to account for the mandatory character of treaties. The idea is that treaties are legally binding because they are concluded by sovereign states consenting to be bound. As states are freely involved in negotiating, concluding and accepting treaties, they are also legally bound to perform treaties in good faith.

Intention: Another basic requirement for the binding nature of treaties is the existence of intention not only to make treaties but also to be bound thereby. The existence of a treaty as a binding instrument lies on the fact that the parties to the treaty must intend to create legal relations as between themselves by means of their agreement. The intention of parties involved is a vital precondition not only for the formation and existence of the treaty but also important for its enforcement at international and national levels. The problem is that there is no consensus as to whether this requirement is stated in the definition of treaties given under the Vienna Convention.

[8] Mark W. Janis, *An Introduction to International Law*, Aspen Publishers, 4th ed, 2003, P.166
[9] M.N.Shaw, *International Law*, Grotius Publications Limited,5th ed,,2006, P.812

1.3 The Extent (Scope) of International Treaties

At this stage, we will try to delimit the subject matter- treaties where the act of reservation is carried out. We have seen that non- consensual acts, oral agreements, unilateral acts, declarations or statements are excluded from the ambit of treaties though they may be a source of obligations and rights from other perspectives. It has been also pointed out that agreements involving international private law undertakings, commercial relations and contracts regulated by national law have nothing to do with treaties even if they are legally binding acts. Moreover, the fact that treaties are legally binding instruments excludes non-binding or gentlemen's agreements and various soft laws such as communiqués issued at the end of summit meetings, declarations of common policy by members of regional organizations, general diplomatic correspondence, bilateral acts of daily administration of foreign affairs that depend on the request or willingness of respective states and UN general assembly resolutions all of which are political commitment than binding treaties.[10] However, it has to be admitted from the outset that there is still confusion on the scope of treaties and what they exactly do constitute. States usually make a great many arrangements *inter se* and sometimes there will be a question about where to draw the line between international agreements that are legally binding and so called gentlemen's agreements and some varieties of soft law that are not binding though they may have some moral or political force.

From international law perspective ICJ has granted treaties a broader scope. In its 1994 *Qatar V Bahrain* decision, it held that the signed minutes of a meeting among the foreign ministers of the Bahrain, Qatar, and Saudi Arabia, recording an agreement to submit a maritime and territorial delimitation dispute to the court if diplomatic negotiations were to fail, constituted a legally binding agreement regardless of the protest of the foreign minister of Bahrain that the minutes were simply a statement recording a political understanding.[11]

The court stated that as a matter of principle all international agreements are treaties; So long as there is a commitment, legal rights and obligations are created; any requirement seeking the intention of either party and the assessment of the legal effect of agreements shall not be left to the

[10] Martin Dixon , *Text Book on International Law*, Black Stone Press Limited,4th ed, 2000, P.52

[11] www.un.org/law/icjsum/indexw.htm

parties involved in a dispute. The court added that any instrument will be a treaty so long as it is intended to be legally binding in the sense of creating rights and duties enforceable under international law and this is to be judged objectively (not subjectively by referring the disputant parties' intention) according to the nature and content of the agreement and the circumstances in which it was concluded. So, this view gives treaties an extensive scope in such a way that it includes the most informal international agreements such as those emanating from the deliberation of an international conference, direct bilateral negotiations, informal government discussions, exchanges of notes and letters.[12] The fact that all agreements must be regards as treaties and there shall not be a distinction between treaties and the so- called gentlemen's agreements is also supported by some scholars such as Klabbers.[13] According to him the room is either none or narrow for the existence of the concept called gentlemen's agreements.

But there are other scholars who make a distinction between treaties and other agreements which are not legally binding.[14] According to A. Aust intention of states is the basic requirement of treaties and if there is no such intention to create rights and obligations under international law the instrument will not be a treaty.[15] Thus, agreements which have no any legal force and binding nature can be taken as memorandum of understanding, soft law, or gentlemen's agreements than treaties. In line with this view, many national constitutions do establish a distinction between treaties and the rest of international agreements. To begin with many countries have adopted a system of national law giving democratic control or legitimacy to the process of treaty-making. In principle international agreements qualify as treaty when they pass through the participation or approvals of national legislatures. Treaties are the end product of formal international processes and national legislative procedures. Moreover, treaties are legally binding instruments that produce rights and obligations on member states and capable to be enforced before national or international tribunals. At the same time many countries have introduced a different category of international agreements that need not require the participation or approval of legislatures. These types of agreements are usually called gentlemen's agreements or soft laws. They may be

[12] Martin Dixon, Supra Note at No.10, P.52

[13] Jan Klabbers, The concept of treaty in international law, 1996 as Quoted by Anthony Aust, Supra Note at No.3, P.41-43

[14] Ibid

[15] Ibid at P.17

international policy agreements, administrative agreements, presidential or executive agreements, informal agreements etc depending on their scope and preference of national constitutions. National constitutions do not qualify such agreements as a treaty.[16]

It is contended that unlike treaties they need not pass through formal national procedures like approval; they lack intention of their makers to create legally binding norms and don't create enforceable rights and obligations before courts.[17] Even if there is an intention of the parties to those agreements; it is not to be legally bound but only politically. Hence, they are soft or gentlemen's agreements which are more of political commitments than legally binding acts. The idea is that the government has to be free to enjoy discretionary powers in its dealing with foreign and diplomatic relations, minor or technical affairs, things of urgent nature and the like. But on the other side of the argument there are others who contend that such agreements should have at least some legal character, otherwise their enforcement remains fictitious. In any ways their legal status is not yet settled. This paper, however, deals only with treaties that have a legally binding force.

2. International Rules of Reservations in Brief

2.1. What Does the Concept of Reservations Represent?

The concept of reservations is one of the most controversial issues in the law of treaties. There are always unsettled questions in relation to the definition, scope, nature and status of reservations. A reservation is defined in article 2 (1) (d) of the Vienna Convention as:

> *a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that state.*

On the basis of this definition and other considerations in international law the following crucial features and scopes of reservations can be pointed out:

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[16] Phillip R. Trimble, *International Law : United States Foreign Relations Law*, New York Foundation Press, 2002, P.132-134

[17] D.B.Hollis, Supra Note at No.2, P.16

***Unilateral Statement*:** A reservation is a unilateral statement or an act made by the concerned state without being agreed by the negotiating states. But this does not exclude the possibility that two or more states can agree to make the same reservation. As we can see below, however, all unilateral statements can not be considered as a reservation. Thus, all other elements or features of the definition of reservation must be cumulatively considered so that it can be distinguished from other types of unilateral statements or declarations.

Time when Reservations may be made: As stated in the above definition, reservation is not a separate treaty process. It is part and parcel of the manifestation of an expression of consent of a sovereign state towards a treaty; hence, it may be made by a state at a time when it expresses its consent to be bound by means of signature, ratification, acceptance, approval, or acceding to a treaty. The real message of a state transmitted to the negotiating states during signing, ratifying, accepting, approving, or acceding to a treaty is, in short, the expression of consent to be bound by all or most of the provisions of the treaty, or the expression of reservation to exclude the application of some of the treaty provisions. Before the coming of the Vienna Convention, reservation was possible only when it has been accepted unanimously by all negotiating states, tacitly or expressly, and usually before signature.[18] But now this practice is no more existent.

There are strong logical, historical and legal bases that a state that expressed its consent to be bound by a treaty may withdraw its consent before the entry into force of the treaty as it is not a legally binding instrument in that period. There is nothing wrong to extend the same argument to the case of reservations. If it is possible for a state to withdraw its consent from the entire treaty, for stronger reason, it can make new valid reservations (if it had not made any when giving consent or it wishes to add new reservations) so long as the treaty has not yet entered into force and so long as the reservation is made in accordance with the applicable rules. For example, in 1958 Spain withdrew an instrument of accession two months after it had been deposited, but before the treaty had entered into force and at the same time it deposited a new instrument containing a reservation, that in both cases no objection was made.[19] In general, no reservation is allowed after the treaty has entered into force unless a non-signatory state consents to a treaty by accession where

[18] Shaw, Supra Note at No.9, P.825
[19] Anthony Aust, Supra Note at No.3, P.96

reservation is part of it. In fact, withdrawal of reservations can not be controversial as such and shall be welcomed any time.

Reservation purports to exclude or modify the legal effect of some treaty provisions: from the outset it is possible to forward a general formula that the very purpose of reservation is to exclude or modify the legal effect of certain treaty provisions in their application to its maker and all other statements which do not have such effect though they are unilateral and made by the state when consenting to a treaty are far from being reservations. Thus, reservation must be distinguished from other statements or declarations made with regard to a treaty that are not intended to have the legal effect of reservation, such as understandings, arrangements, political statements or interpretative declarations. In political declarations, what is involved is a political manifestation for primarily internal effect that is not binding upon the other parties.[20] When singing, ratifying, accepting, approving or acceding to a treaty, a state may make a kind of political declaration which is not to have any legal effect. A declaration may be as to the general policy of the state towards the subject matter of the treaty, or a disclaimer that ratification does not signify recognition of a particular party as a state.[21]

It is also clear that as the very purpose of reservation is to exclude or modify the legal effect of certain treaty provisions, interpretative declarations are removed from its ambit. The International Law Commission (ILC) has found that an interpretative declaration means;[22]

> *A unilateral statement, however phrased or named, made by a state or by an international organization whereby that state or that organization purports to specify or clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions*.

In principle, interpretative declarations are not reservations though they are as widely applied as reservations. If the statement makes an interpretation of treaty provisions just for the purpose of clarification, specification, definition and explanation of their meaning and scope, without

[20] M. N. Shaw, Supra Note at No.9, P. 820
[21] Anthony Aust, Supra Note at No.3, P.103
[22] UN Doc.A/Cn.4/491/Add.4,para. 961

excluding, altering and modifying the original content or substance of the provisions, it is not a reservation but an interpretative declaration. It is a formal unilateral statement expressing the interpretation favoured by a particular state and becomes part of the negotiating history or declared at the time of signature or ratification.[23] The purpose of an interpretative declaration is very often to establish an interpretation of the treaty which is consistent with the domestic law of the state concerned and it has been an element of interpretation governed by rules of construction unless it amounts to a disguised reservation.[24] As we can see more below, however, it is not always easy to distinguish reservations from declarations.

***However phrased or named*:** One of the most challenging problems in relation to reservation is that there is always confusion between it and other related concepts. In practice, interpretative statements and other declarations may possibly transgress the boundary of reservation thereby excluding or modifying the legal effect of some treaty provisions. They may open the door for systematic exclusion of the content and substance of provisions of a treaty and in effect they may be a disguised reservation. Thus, appearance, naming, phrasing, structure and titling of a particular attachment made to the treaty shall not be decisive criteria. However, phrased or named, whatever language we employ, the decisive thing is to look into content and substance of the statement even if the term reservation is not there. If the statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the state, it constitutes a reservation. Conversely, if a so-called reservation merely offers a state's understanding of a provision but does not exclude or modify that provision in its application to that state, it is, in reality, not a reservation. It is not uncommon for what is in fact a reservation to be described as an understanding, explanation or observation which at the same time systematically exclude or modify the legal consequence of a given treaty. The reasons for making such disguised reservations may be that the treaty prohibits reservations or it may be more acceptable politically for a state not to appear to be attaching conditions by way of reservations to its participation in a treaty.[25] But, as the definition of reservation makes clear, it does not matter how the declaration is phrased or what name is given to it so that those disguised reservations may be,

[23] S.K. Verma, *An Introduction to Public International Law*, Hall Of India PLC, 1998, P.270.
[24] Anthony Aust, Supra Note at No.3, pp.101-102
[25] Ibid at P.104

depending on the circumstances and the intention of the state, considered as true reservations.

By the same token, states may employ the term interpretative statement in stead of reservation though, in reality, it is a systematic exclusion or modification of the content of treaty obligations. Hence, a distinction has been drawn between mere or simple interpretative declarations and qualified or conditional interpretative declarations that need to be accepted by others.[26] Simple or mere interpretative declarations are usually taken as genuine interpretive statements; hence they are excluded from the scope of reservation. However, conditional or qualified interpretative declarations may in certain circumstances contain systematic or disguised reservations by stipulating strong conditions which in effect exclude or modify treaty provisions. Again we shall not be deceived by the term interpretative statement and in such cases they shall be considered as reservation depending on given circumstances.

In the Belilos case in 1988, the European Court of Human Rights considered the effect of one particular interpretive declaration made by Switzerland upon ratification.[27] The court held that one had to look behind the title given to the declaration in question and to seek to determine its substantive content.[28] It was necessary to ascertain the original intention of those drafting the declaration and, thus recourse to the *travaux preparatoires* was required.[29] In light of these, the court felt that Switzerland had intended to avoid the consequences and found the declaration was actually a reservation which was invalid. It is generally accepted that reservation in its capacity to exclude, modify or alter treaty obligations can best be distinguished from interpenetrative declarations and other statements if one relies on intention of the concerned state towards the subject matter, content and substance of the statements, their ordinary meanings interpreted in good faith, the circumstances in which the treaty is made and the nature of the provisions, than the name given to statements.

Finally, there are some border areas from which reservation has to be identified. Reservations are different from derogations as the former are intended to exclude or modify the legal application of some provisions of a treaty to the concerned state for indefinite period. On the contrary, derogations are statements authorized by a treaty by which a party is able to exclude

[26] M.N. Shaw, Supra Note at No.9, P.823
[27] www.uio.no/studier/emner/jus/.../h06/.../Belilos_v_Switzerland.doc
[28] Ibid
[29] Ibid

certain provisions in their application to it during a particular period, such as a public emergency.[30] Reservation is also different from a case where a state wishes to become bound by a specific part of a treaty only. In that case, the state can do so if it is permitted under the treaty or it has been otherwise agreed by the contracting states. Third states may consent to some treaty obligations or rights and be bound while they are free from the rest of treaty provisions. This situation is completely different from the concept of reservations. Further, it is important to note that the nature of bilateral treaties is totally incompatible to the concept of reservation. Reservations can not be conceived in such treaties. This is because in case of bilateral treaties all of the terms must be accepted by the other party absolutely and unconditionally. If one party refuses to accept some of the provisions by way of reservation, an agreement between the two parties can not exist as negotiation would re-open for the modification or exclusion. Thus, we will deal with reservation as the most natural and basic feature of multilateral treaties.

2.2. *Justifications for Reservations*

Why do reservations exist as a concept? There are various justifications behind reservations. First, the privilege to make a reservation is regarded as an incident of sovereignty and perfect equality of states.[31] Treaties are deliberate and consensual acts of states-without their consent a treaty can not create rights and obligations. By the same spirit, the capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty and national independence of states, whereby a state may refuse its consent to particular provisions so that they do not become binding upon it. But the justification that considers a reservation as an absolute and unconditional manifestation of national sovereignty may be incompatible with the nature of human rights treaties which may not be fully characterized by the relations between states. This controversy will be dealt more in section three.

Second, the theoretical justification of reservations that bases itself on the consent and sovereignty of states can be supported by some practical reasons. If the state is unable to fulfill its obligations under the treaty in its totality because of certain constraints and instead of excluding it altogether from participating in the treaty, the state should be allowed to do so, even if in a limited way, provided that the reservation does not materially affect the

[30] Anthony Aust, Supra Note at No.3, P.105.
[31] S.K. Verma, Supra Note at No.23, P.270.

basic provisions of the treaty.[32] In some situations, the obligations of certain treaty provisions may be too onerous or burdensome for a state which can be cornered and frustrated unless it is permitted to adjust those obligations by way of reservations with domestic laws which might be difficult, if not impossible, or undesirable to change them for various social, religious, cultural and political factors.[33]

Third, Reservations are, nowadays, being taken as a best instrument for the furtherance of multilateral treaties. Since the culmination of WWII, there have been many multilateral treaties that involved a good number of states such as the UN Charter and the Convention on the Rights of the Child each of which has been joined by more than 180 states. Without reservations, reaching an agreement to such types of treaties, which have far-reaching effect, general and universal applications, could be unthinkable. The ever increasing number of states involved in negotiating, adopting, concluding and consenting to treaties is only one reason that necessitates reservation. It is also hard to imagine any agreement with those states which have a different background-from capitalism, mixed economy to socialism, from conservative to radical views, from western Christianity to Islamic radicalism unless there is a way out for reservations. This situation is further complicated by the fact that most of the multilateral treaties are adopted by consensus which needs a compromise on major aspects of a treaty.[34] Given all these problems, states would have been forced to reject treaties in their totality had they not been given a privilege to exclude or modify the applications of some burdensome provisions by way of reservations.

Thanks to reservations, where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may agree to be bound to a treaty which otherwise it might reject entirely while at the same time excluding such provisions by the device of reservation.[35] This will have beneficial results in the negotiation, adoption, conclusion and expression of consents to multilateral treaties, by inducing as many sates as possible to adhere to the proposed treaty and becomes a means of compromise and harmony amongst states of widely differing social, economic and political systems.[36] Thus, reservation has a capacity to promote general application of

[32] Ibid
[33] Antonio Cassese, Supra Note at No.1, P.129.
[34] Anthony Aust, Supra Note at No.3, P. 107.
[35] Shaw, Supra Note at No.9, P.821.
[36] Ibid

treaties and considered as a necessary price paid for the attainment of universality of treaties.

On the contrary, the need for universal and general application of treaties by allowing reservations for states has been seriously facing a tension exerted from the other side of concern for unity and integrity of treaties which can be achieved by not permitting any deviation or reservation. It has been argued that to permit a treaty to become honeycombed with reservations by considerable number of countries could well jeopardize the whole exercise of treaty obligations.[37] It could seriously dislocate the whole purpose of the treaty and lead to some complicated inter-relationships which are cornered by reserving states and objecting states. It is unfortunate that many states have made reservations to human rights treaties than other types of treaties.[38] This has inevitably affected the applications of international human rights in some states.

2.3. International Rules Governing Reservations

There are various rules that provide manners and conditions whereby reservations may be made. Rules that govern reservation are found in the law of treaties and in general international law (customary rules), yet the application of such rules different from time to time. The following three approaches will give us a clear picture about rules of reservations.

A) Traditional Approach

The basis of this traditional view is a positivist approach which promoted consent as the basis of all international obligations and considered treaties as purely contractual concept. According to this approach reservations could only be made when they are accepted by all the other states involved in the process, otherwise both reservations and the signatures or ratifications to which they were attached were considered as null and void.[39] This rule of unanimity was generally followed by major states, the League of Nations (until 1945) and the UN (until 1950). The idea was that as the adoption of a treaty used always to require the agreement of all the negotiating states, so was a reservation only effective if it had been accepted by all.[40] This move was intended to preserve as much the unity and integrity of (full contents) of treaties as possible to ensure the success of treaties and to minimize deviations

[37] Ibid at P.822.
[38] Anthony Aust , Supra Note at No.3, P.107.
[39] Malcolm D. Evans, Supra Note at No.18, P.191.
[40] Anthony Aust, Supra Note at No. 3, P.113.

from them.[41] However, this approach is very rigid or restrictive where reservations are virtually impossible. Each state has a veto in that if a single state objects the particular reservation, the reserving state could either become a party to the original treaty by withdrawing its reservation or reject a treaty as whole. This rule may be good to maintain the unity of a treaty but it narrows the scope of the treaty as only few states could join it in such situation so that its general or universal application is questionable.

B) **The Pan American Union Approach**

This approach is more lenient and flexible one when compared with the above rule of reservations. Under the Pan American Union Approach, adopted in 1932, reservations are permissible but the judicial status of treaties ratified with reservations will be affected in the following manner:[42]

1) The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations.
2) It shall be in force between the governments which ratify it with reservations and the signatory states which accept the reservations in the form in which the treaty may be modified by the said reservations.
3) It shall not be in force between a government which may have ratified with reservations and another which may have already ratified and which does not accept such reservations.

The above approach has rejected the rule of unanimity and vetoes of contracting states in allowing reservations. Rather, it introduced various flexible rules that could give a way out for different conflicting interests of states.

C**) The Modern Approach**

1) ***The ICJ Approach***: With regard to rules of reservations the modern chapter was opened in 1951when ICJ was requested by the General Assembly to give its advisory opinion on the *Reservations to the Genocide Convention Case.*[43] Reservations made by some countries to the 1948 Genocide Convention which contained no clause permitting such a reservation, put the whole issue of making reservations to a multilateral treaty in a new perspective which

[41] M.N. Shaw, Supra Note at No.9,P.825.
[42] S.K.Verma, Supra Note at No.23, P.271.
[43] www.scribd.com/.../The-Reservations-to-the-Genocide-Convention-Case

triggered a change to the old unanimity approach. In its opinion the ICJ came up with the following conclusions:[44]

> *a) If a reservation has been objected to by one or more parties, but not by others, the reserving state will be a party, provided the reservation is compatible with the object and purpose of the treaty.*
> *b) If a party objects to a reservation because it considers it incompatible with the object and purpose, that party may consider the reserving state as not a party.*
> *c) If a party accepts a reservation as being compatible with the object and purpose, it may consider the reserving state as a party.*

In many cases the Pan American and the ICJ have adopted similar approach which is more flexible and lenient than the traditional approach. One basic difference is, however, that the latter circumscribed the area of reservation by laying down the criterion of `` compatibility with the object and purpose of the treaty`` for making the reservation and that of objecting to it. In doing so, the compatibility test was skillfully invented by ICJ as flexible and liberal approach so as to strike a balance between the two contrasting concerns towards treaties, namely, universality and integrity of treaties. The traditional unanimity approach which favoured only the integrity of a treaty was not accepted by ICJ as it failed to achieve the two objectives at a time. On the one hand, the ICJ tried to promote the universality and general application of the treaty in that the object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of states which adopted it that there should be widest possible participation by states. The complete exclusion from the Convention of one or more states would not only restrict the scope of its participation, but would detract from the authority of the moral and humanitarian principles which are its basis.[45]

Thus, reservations are tolerable so long as they are compatible with the object and purpose of the Convention and this is found important to increase the acceptability and scope of treaties and with the trend in adopting

[44] Id.
[45] Malcolm D.Evans, Supra Note at No. 18, P.192.

multilateral treaties which are away from unanimity rule and towards majority voting. On the other hand, the court did emphasis on the principle of integrity of the Convention as reservations which could affect the object and purpose of the Convention shall not be accepted. However, as we have seen it from the opinion of the court, the compatibility test is left for each state whose decision may be highly influenced by subjectivity. Hence, this test is found most problematic and unworkable. Moreover, in practice, the above rules formulated by the court would lead to fragmentation of multilateral treaties.[46]

2) *Rules of the Vienna Convention:* The very liberal and flexible doctrine of universality of treaties developed by the ICJ has been held by the Vienna Convention under articles 19 to 23. Article 19 provides: a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

> *(a) The reservation is prohibited by the treaty;*
> *(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
> *(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*

The way articles 19 to 23 are drafted in general and the word ``unless``, in article 19 in particular show that, in principle, states are allowed to make reservations. It seems that they are prohibited from making reservations only exceptionally when their cases fall under either of the above three conditions. That means most of the rules drawn from the conclusions of the ICJ and the justifications behind them must have been well considered by ILC which drafted the Vienna Convention (in fact, the rules of the ICJ were intended to be applied to the Genocide Convention where as the rules of the Vienna Convention have a comprehensive applications for all treaties between sovereign states). In its provisions under articles 19 to 23, the Convention attempts to strike a balance between ensuring the integrity of a treaty whilst encouraging universal participation by adopting liberal rules of reservations. The ILC was forced to reject the old rigid requirement which claimed the consent of all contracting states for making reservations as it was found

[46] Antonio Cassese, Supra Note at No.1, P.130.

extremely difficult to secure the whole votes of the ever increasing membership in international community having diverse attitude. This requirement could potentially exclude many states from joining treaties since the only option available for them is either to accept the treaty as whole or not to be a party at all.[47] But, as we shall see below, some of the provisions of the Convention have a devastating effect on the protection of human rights treaties because of their inclination to universalism than integrity.

Thus, states can append reservations unless such reservations are expressly prohibited by the treaty (either because the treaty totally prohibits any reservation or only allows reservations to provisions other than the one that is the object of a reservation) or found incompatible with the object and purpose of the treaty. Many treaties particularly the ones on human rights such as the International Labour Organization (ILO) Conventions stipulate express provisions that totally prohibit the making of reservations.[48] Reservations shall not also be made when the treaty prohibits reservations to most of the provisions to which the object of the reservations belongs (while at same time it is provided in the treaty that only some reservations may be made). Here it can be reminded that the rules stipulated under article 19 (a and b) may show that the Convention has not given an ultimate demise or blow to the traditional approach which required the consent of all other states in order a given state to make a reservation. That old rule has somewhat been maintained as other states may give consent to the reservation by expressly providing a total prohibition or partial prohibitions to reservations. Of course, now a day, a consensus or qualified majority vote of negotiating states is sufficient for adopting multilateral treaties concluded in international conferences or international organizations. Thus, we may extend the argument that the prohibition in (a) and (b) of article 19 may be made by consensus or qualified majority vote.

When states fail to provide an express prohibition to reservations in their treaty either in the form stated under (a) or under (b), it doe not mean that states are totally free to attach reservations. They may do so if and only if their reservations are not incompatible with the object and purpose of the treaty as provided under article 19 (c). This rule is exactly the replica of the one forwarded by the ICJ in the Genocide Convention case. The compatibility test of the Convention may be taken as the most systematic, liberal and flexible instrument to advance the universality of treaties and their general

[47] S.K. Verma , Supra Note at No. 23, P.273.
[48] Anthony Aust, Supra Note at No.3, P.109.

application by inviting many states to multilateral treaties at least for most of the provisions while at the same time maintaining crucial substance, basic object and purpose of the treaties. In practice, however, it is very difficult to maintain the balance and achieve the goal intended. In particular, the compatibility test has encountered chronic problems with regard to reservations to human rights treaties. Still the Convention has left the compatibility test to be decided by contracting states based on subjectivity which may complicate the process of reservation and reduce the effectiveness of human rights treaties. This liberal rule of compatibility may impair the integrity of human rights treaties since they may end up being split into series of bilateral agreements.[49] Moreover, the terms `object` and `purpose` of treaties and compatibility itself are too general and subjective and without concrete criteria for determining them. We will see those problems and their particular impact on human rights treaties somewhere below.

2.4. The Legal Consequences of Reservations under the Rules of Vienna Convention

Assuming that a reservation is not prohibited under article 19 (a), (b) or (c), is there a situation where reservation is not permitted? The answer is definitely yes. In instances where reservation is possible, once again, the traditional rule of unanimity requiring acceptance by all parties is maintained to be applicable under article 20(2) of the Convention. It provides: when it appears from the limited number of the negotiating states and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties. With similar spirit, article 20(3) also provides another possibility for prohibition of reservations. According to this article when a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization. Thus, in those two cases, reservations which lack consent of all contracting states or approval of the competent organ, respectively, shall not be made even if not prohibited under article19. The reason for maintaining such old rule relates to the special nature of such treaties which require integrity as a vital factor for their applications.

It may be thought that objections to reservations are possible only on the basis of the prohibition under article 19 (a) and (b) or on the basis of

[49] Antonio Cassese, Supra Note at No.1, P.130

compatibility under (c). But objections to reservations may be possible even when reservations are not prohibited under article (a), (b), or (c) of article 19 unless a reservation is expressly authorized by a treaty pursuant to article 20(1) in which any subsequent acceptance or objection is not required. Acceptance of and objection to reservations (except those reservations expressly authorized by a treaty or require the consent of all parties or competent organs) that base on the prohibitions under article 19 or any procedural or substantive grounds may have some legal consequences stated under article 20(4), 20(5) and article 21. Article 20(4) provides:

> *(a)acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state if or when the treaty is in force for those states;*
> *(b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and the reserving states unless a contrary intention is definitely expressed by the objecting state;*
> *(c) an act expressing a state's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting state has accepted the reservation.*

From the above provisions, it is clear that normally the objection does not have major legal consequences different from the acceptance; acceptance of a reservation by another state makes the reserving state a party in relation to the accepting state and at the same time objection to reservation does not preclude the entry into force of the treaty as between the reserving state and the objecting states unless a clear intention to this effect (such as opposing the entry into force of the treaty between itself and the reserving state) has been expressed by the objecting state.[50] This is at variance with the ICJ`s approach, which precluded the entry into force of the treaty between the reserving and the objecting states. Lack of major differences in the legal consequences of acceptance of and objection to reservations can also be drawn from the cumulative reading of articles 20(4) and 21. By virtue of reservation, the treaty stands modified to the extent of reservation in relation to other states

[50] S.K. Verma , Supra Note at No.23, P. 273.

accepting the reservation or objecting, but not precluding the entry into force of the treaty between themselves and the reserving state.[51] Therefore, when the reservation is aimed at excluding the applicability of a particular provision, there is no difference between acceptance of a reservation and objection to it: in both cases the treaty applies, except for the excluded provision, as between the reserving and the objecting states or all non-objecting states.[52]

Given the cumulative messages of articles 20(4), 20(5) and 21, the promise to strike a balance between universality of treaties and integrity of treaties by way of rules stated under article 19 particularly by compatibility test seems to have been eroded. In other words, the fact that both acceptance of and objection to reservation do not preclude the entry into force of the treaty (article 20 (4) (a) and (b); respectively), the treaty to which reservation is made is effective as soon as at least one other contracting state has accepted the reservation (20 (4)(c)); a reservation is considered to have been accepted by a state if it shall have raised no objection to the reservation by the end of a period of 12 months, and the modified provision has more or less the same legal consequences to both the accepting and objecting states towards their relation to reserving states, have tilted the balance towards widening participation by states to multilateral treaties than keeping the unity or integrity of treaties. Here the rules of the Convention are even more liberal than the approach followed by the ICJ in Genocide Convention case. It may be useful to bring sufficient number of states to become parties to multilateral treaties. It may be even helpful for the application of many non-human rights treaties. But these more liberal rules may pose some problems to human rights treaties as we will discuss the issue subsequently. The rules of the Convention are also unclear about the effect of impermissible reservations. We will look at these and other controversial issues in the following section

3. Problems of Reservations to Human Rights Treaties

In the first section we have examined the salient features, elements, conditions and scope of treaties. Reservation is inherently associated with and inseparable from the concept of treaties. In section two, we explored what reservations are, what basic features and qualities they have and what rules and conditions are applicable to them. Along the way, we have witnessed several unsettled issues, and controversial problems that arise from rules of

[51] Ibid

[52] Antonio Cassese, Supra Note at No.1, P.130.

reservations: What does the compatibility test constitute? How and by what standards can this test be determined? Who has the legitimate authority to determine the test? What effect do inadmissible reservations bring about? The impact of these and other related problems on human rights treaties will be assessed in this particular section.

3.1. Some Special Features of Human Rights Treaties: a Call for Caution in Reservations?

In my previous discussion I have pointed out most of the essential features of treaties as a common denominator for all international conventions including human rights treaties. Readers may get puzzled why reservations create special problem to human rights treaties. Thus, in this section we have to brief some special features of human rights treaties, which in turn may influence the discussion on the problem of reservations to them. Such special features may also be taken by themselves as justification for the special treatment of human rights treaties.

Human rights treaties are international legal instruments that play a role for promotion, protection and enforcement of human rights which are considered as natural, inalienable, universal, irreducible and equally applicable for all mankind. After World War II, human rights are not only seen as natural value and dignity of all mankind but also their protection has been taken as vital instrument for international peace. Second, more than any other treaties the protection of international human rights treaties has given a certain blow to state sovereignty. Today, the special attention given to human rights protection can be explained by the extent that large-scale and flagrant human rights violation may be a ground for a legitimate intervention by the UN against state sovereignty.[53] Third, in the modern world, unlike other treaties which govern the relations between sovereign states, many human rights treaties include a good number of self-executing provisions that can directly be applicable to individuals. Meaning, such treaties may provide rights and obligations for individuals who increasingly have become international legal subjects and such rights and obligations establish relations between the state and individuals. But it has been suggested that the Vienna Convention on reservation presume relations between states or inter-exchange of mutual obligations which may not necessarily explain the nature of all

[53] Antonio Cassese, supra note at No.1, P.360.

human rights treaties that assume state-individuals relations.[54] Moreover, human rights treaties are one of the most evolving and dynamic international norms whereas the law of treaties is relatively static so that some kind of incompatibility may be inevitable between them.[55]

Fourth, in recent years a good number of human rights treaties are either codified norms of existing customary norms or instruments from which certain important customary norms have gradually evolved. Consistent practice and *opinio juris* show that the banning of slavery, genocide, racial discrimination, torture and denial of the right of peoples to self-determination belong to the corpus of customary law.[56] Those customary norms (codified in the form of treaties or evolved from treaties) bind all states, whether they have ratified treaties or not. Violation of those norms will entail international crimes for the offenders. This situation also results in international responsibility where each state is legally entitled to request states to discontinue any gross violation or take necessary measures.[57] Some of those customary norms are elevated to the status of *jus cogens*, *erga omnes* obligations and rights and non-derogable regimes. We can imagine the possible impact of those norms on reservations made by states in general and the applicability of compatibility test in particular as we see it later.

Article 53 of the Vienna Convention defines *jus cogens* (peremptory norm of general international law) as a norm accepted and recognized by international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The same article provides that a treaty will be void if at a time of its conclusion, it conflicts with peremptory norm of general international law. Even though there is no agreement on the criteria for identifying which norms of general international law have peremptory character or *jus cogens*, due considerations must be made in case a state attaches a reservation to human rights treaties and the determination of compatibility of reservations with human rights treaties must be conducted at utmost caution.

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[54] Human Rights Committee, General Comment 24(52), General Comment on issues relating to Reservations Made up on Ratification or Accession to the Covenant or Optional Protocol thereto, U.N.Doc. CCPR/C/21/Rev.1/Add.6 (1994).

[55] Liesbeth Lijnzaad, *Reservations to UN- Human Rights Treaties: Ratify and Ruin?* , Martinus Nijhoff Publishers, 1994, P.80.

[56] Antonio Cassese, Supra Note at No.1, P.370.

[57] Ibid.

Fifth, because of the above special features and being inspired by the conviction that human rights should be available for all, the universality of human rights treaties is intended as a goal that can be achieved if all or most states become parties to them. But there is another contrasting strong zeal that each and every norm of human rights treaties is an inherent value of human dignity so that the entire content of each human rights treaty shall be respected by states. That means not only the whole text of the treaty shall be accepted by all or most states (the need for universality) but also all or most of human rights treaty provisions must be universally accepted by states (the need for integrity). Because of these contrasting situations, reservations to human rights treaties become complicated and highly controversial. Finally, the fact that human rights treaties have created mechanisms of supervisions of the implementations of obligations laid down in those treaties such as by way of UN monitoring organs or treaty bodies has complicated the issue of reservations to human rights treaties. The scope of powers, jurisdictions and competence of such organs in relations to monitoring reservations vis-a vis states and international courts has added some controversy on how to make reservations to human rights treaties. This is a unique feature of such treaties that need special treatment when compared with non-human rights treaties. We will elaborate the above special features in light of rules of reservations in the following sections.

3.2. The Compatibility of Rules of Reservations with Human Rights Treaties

A) The Problem of "Compatibility Test" to Human Rights Treaties

It has been intended that the rules of Vienna Convention on the Law of Treaties in general and rules of reservation in particular are comprehensively applicable to all treaties including human rights treaties. This stand of the Convention was reaffirmed by ILC (the drafter of the Convention), in its 1997 report, that the rules of reservation stated under articles 19-23 apply equally to normative (i.e., law making) treaties, including human rights treaties.[58] Despite their special features and concern, human rights treaties are put together with other treaties to be regulated in the straight-jacket rules. The situation is worsened by various ambiguities and controversies that emanated from the rules of reservations in the Convention. As a matter of general rule, it may be argued that the making of reservations to human rights treaties, except the fact that it is expressly prohibited under Article 19 (a and b) may not pose

[58] Anthony Aust, Supra Note at No.3, P.123

serious problems. However, the fact that reservations can not be made to human rights treaties (even when there is no an express prohibition to make reservations) if they are incompatible with the object and purpose of the treaty (art.19(c)), creates one of the most serious problems in protection of human rights.

Though the compatibility test was invented to be a useful instrument to maintain the balance between the universality and integrity of treaties, in cases of human rights treaties it is highly difficult to maintain that balance given their special nature. First, the criterion `` incompatible with the object and purpose of human rights treaties`` is too general, vague and highly subjective. The Convention itself does not define what constitute object and purpose of human rights treaties and it has no objective standards, guidelines and rules to determine such criterion. It is said rather unsubstantiated and how and when the compatibility test can be applied remains confused. Lack of established standards in the Convention to determine the criterion is not the only problem. Only few theories and doctrines have been made to develop the concept; the practices of states are patchy and uncertain so that there are inadequate attempts to formulate concrete criteria for the test; there are insignificant number of international courts and monitoring bodies who have defined procedures in the field.[59] All these factors have led to divergence and extreme subjectivity that make impossible to have objective standards to determine the criterion.

Accordingly, different views have been forwarded to apply the compatibility test. Unfortunately, the two major views established with regard to the criterion of compatibility are contradictory though the aspiration is to achieve universal, equal and irreducible application of human rights for all man kinds. The first view considers the whole human rights treaty as object and purpose without any distinctive content.[60] Meaning, human rights norms are a set of rules protecting the fundamental freedoms and dignity of people, in which all component norms have the same importance; hence, making a hierarchy or rank between them or among their provisions defeats the object and purpose of human rights protection.[61] If a treaty prohibits discrimination, each and every provision contributes to such goal of the treaty, and is thought to be part of its object and purpose. This view is somewhat an extreme case that it seems to be absurd as merging the distinction between core obligations

[59] Liesbeth Lijnzaad, Supra Note at No. 55, P.69.
[60] Ibid, at P.82.
[61] Ibid.

and other obligations, that implies a complete prohibition on the making of reservations and makes article19(c) of the convention non-effective in its totality.

Another version of this view accepts some kind of hierarchy or rank among various human rights norms, yet it believes that the whole content of human rights treaty must be taken as object and purpose. It has been argued that reservations contrary to the whole content of higher human rights norms such as *jus cogens*, *erga omnes* obligations, rules of international crimes, human rights treaty codifying customary norms and provisions of the UN Charter shall be taken as incompatible ones.[62] Even in these cases, it is very difficult to assume the total prohibition of reservations and it may be unwise to think in terms of the whole text of such treaties. We have seen that the ICJ has introduced the idea of compatibility test as it has suggested that so long as reservations are compatible to the purpose and object of the Genocide Convention, they can be made to some of the provisions of the Convention. In its comments on reservation made by Guatemala to non-derogable rights, the American Convention on Human rights stated that:[63]

> *... A reservation which was designed to enable a state to suspend any of the non-derogable fundamental rights must be deemed incompatible with the object and purpose of the convention, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as whole of its basic purpose.*

It may be contended that acting contrary to *jus cogens* is already prohibited per se, so that it does not require any additional prohibition under the guise of object and purpose. At the same time it may be said that article 53 of the Convention makes treaties contrary to such norms null and void. Likewise, human rights treaties codifying customary norms may be governed by customary rules independent of the Convention.

Contrary to the above view, firmly believing that giving reasonable effect to the rule of compatibility stated under article 19(c) of the Convention, the second view presupposes the possibility of difference between the full text of a treaty and its core goals. Unless we accept the distinction between all

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[62] Ibid.

[63] Malcolm D. Evans, Supra Note at No.18, P.193.

obligations in the treaty and the core obligations, the compatibility test will be out of vision and the whole purpose of reservations will be defeated. Thus, it is quite possible that reservations are made if they do not touch upon object and purpose, but remain on fringe and to assume core values of the treaty whose object and purpose shall remain intact; otherwise the reservations would be incompatible.[64] Given the whole justifications of reservations and the spirit of the Convention embodied in the compatibility test, this view is logical. The problem is that there are no rules or standards that provide criteria to distinguish those core values of human rights treaties and those which are not. Neither the Convention nor the practice provides necessary tools to identify those human rights treaty norms whose object and purpose are potentially incompatible with reservations and from those non-core norms.

But it is possible to suggest that reservations of general character are considered to be incompatible with the object and purpose of human rights treaties. In the Belilos case, for example, the European Court of Human Rights decided that a declaration made by Switzerland when ratifying the ECHR was in fact a reservation of a general character and therefore impermissible.[65] In most cases reservations that offend peremptory norms or *jus cogens* are incompatible with the object and purpose of human rights treaties.[66] Although treaties which codify customary international law are mere exchange of obligations between states and may allow them to make reservations, it is otherwise in human rights treaties which are for the benefit of persons living within their respective jurisdictions. Accordingly, provisions that represent customary international law (and *a fortiori* when they have the character of peremptory norms such as protection from slavery, torture, genocide) may not be the subject of reservation. Sometimes a case by case approach is essential to resolve the compatibility of reservations by duly considering factors such as the importance of each human rights, the implication to protection and promotion of human rights, particular natures of the treaty etc.[67] In short, the absence of definite standards and criteria in the convention or in practice to determine the compatibility test makes the goal intended to maintain the balance between universality and integrity of human rights treaties unattainable.

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64 Liesbeth Lijnzaad, Supra Note at No.55, P83.
65 Belilos Case, Supra Note at No.27.
66 Human Rights Committee, Supra Note at No.54
67 Liesbeth Lijnzaad, Supra Note at No.55, P.84.

The second serious problem to the determination of compatibility test comes from the question`` who shall authoritatively decide upon it? `` The very general nature of ``object and purpose`` of human rights treaties and lack of objective rules to determine the compatibility of reservations with the object and purpose of the treaty have been worsened by another subjective situation. At a glance three competing entities, namely, contracting states, international and regional courts, and monitoring organs may be suggested to hold authoritative interpretation on the question at hand. Normally, even if they are very few, international courts such as ICJ, European Courts of Human Rights and American Court of Human Rights , as specific treaty provisions have provided judicial power for them to do so, have played important role in assessing the compatibility of reservations with the object of human rights treaties. The competence of the monitoring organs towards the subject matter is still controversial. Articles 19 and 20 of the Vienna Convention seem to have given the ultimate power of determining the compatibility test to each contracting state. As we shall see later, the Human Right Committee has claimed the sole authority to determine what the content of compatibility with object and purpose means whereas states are extremely jealous of having it such power.[68] From the out set, we can conclude that there is an inevitable confusion or lacunae (even some sort of tension) as to the role, and extent of participation and as to who has power of final say on determining the test.

The issue of who may decide on the compatibility test and in what manner becomes complicated by the ambiguity emanating from joint application of articles 19 and 20 of the Convention. From the interpretation of those provisions, two schools of thought have been developed.[69] The first is the permissibility school which is based on two stages assessment: first, the reservation must be objectively assessed for compatibility with the object and purpose of the human rights treaty and if it is not compatible, acceptance by other states can not validate it.[70] If, however, the reservation is compatible with the object and purpose of the treaty, the parties may decide whether to accept or object to the reservation on whatever other grounds. Broadly, this school argues that reservations expressly prohibited by article 19 (a and b), either totally or specifically, and those found incompatible with the object and purpose of human rights treaties are void *ab intio*. In other words,

[68] Anthony Aust, Supra Note at No.3, P.131.
[69] Malcolm D.Evans, Supra Note at No.18, P.193.
[70] Ibid.

impermissible reservations in those three situations are automatically void without any need of acceptance or objection by other parties as required by article 20. The requirements of acceptance and objection stated under article 20 are only for permissible reservations not for impermissible reservations under article 19. For this effect the two provisions must be applied independently.

Of course, it may be argued that the requirement of acceptance or objection made by states under article 20 to reservations which are already prohibited expressly by article 19(a and b) in accordance with the agreement of all parties is unnecessary. If reservations are already prohibited by the treaty, why should states be expected to accept or object again, given the consequence of acceptance and objection? Even here states should be given a chance to object as there may be a conflict over whether the matter of reservations falls on the prohibition or not. But making the incompatible reservations automatically void totally excludes the role of contracting states from participating in determining the compatibility test either in the form of acceptance or objection. This approach could be acceptable and provide a better protection to human rights treaties had we had well developed standards and objective criteria, sufficient number of international and regional courts (there are only few today) and monitoring organs with uncontroversial competence on the matter, to determine the test objectively and declare incompatible reservation null and void. But none of them is fulfilled and hence the total exclusion of states from determining the test may be a danger. Moreover, neither the Convention nor the practice sheds any green light to support this school of thought. The ILC report of 1997 is also totally against the position of Permissibility School.[71] So the school is a normative suggestion or mere recommendation of amendment for the Convention.

On the contrary, the opposability school bases the validity of reservations entirely upon whether it has been accepted by other parties and sees the compatibility test stated under article 19(c) of the Convention as merely a guiding principle for the parties to contemplate when considering whether to accept or object to reservation.[72] This approach wants to give full effect to the requirement of acceptance and objection made by contracting states and it needs the compatibility test to pass through article 20. It argues that the Vienna Convention, instead, vests the other, non-reserving states with the final authority on compatibility and if states accept reservation, or fails to

[71] untreaty.un.org/ilc/sessions/49/49docs.htm.
[72] Malcolm D.Evans, Supra Note at No.18, P.193.

object within the allotted time, this may reflect their considered judgment that the reservation is not contrary to the object and purpose of the treaty, but it is in any event decisive.[73]

From the Vienna Convention's point of view as well as from the prevailing practice, it is true that the question of whether a reservation is contrary to the object and purpose of human right treaty or not is to be decided by each contracting state. But the assessment and determination of compatibility test is left in extreme subjectivity in which decisions of contracting states may highly be diluted by national interest in that human rights treaties are subjected to greatest potential threat of infinite reservations as the compatibility test is not seriously taken. We can safely say that both schools do not provide a healthy solution to the problem. It is also difficult if not impossible to suggest a middle ground. It may better to suggest that there must be some kind of amendments to the Convention with regard to rules of reservations applicable to human rights treaties and the move must be towards objectivity(there must be objective standards for determination of purposes of reservations and an international organization which is appropriate to apply such standards objectively must be established). As we have seen, rules of reservations are designed in a very general manner in such a way that they may applicable to kinds of treaties and are full of subjectivity- The first school seems to be without legal bases and in short of institutions with legal authority to achieve the objective determination of the compatibility test. The second school ultimately rests on the shoulder of contracting states to determine the test, which is unsuitable to human rights protection.

Even if we accept the opposability approach, there is still a more challenging problem. Which shall have the final and decisive authoritative interpretation on compatibility, the reserving state(s) or the non-reserving ones? In my view, the ILC, in its 1997 report has complicated the issue rather than solving it. Though the ILC has accepted that compatibility with the object and purpose is the most important criterion for determining the admissibility of reservations favoured the opposability approach which lets individual states judge for themselves which reservations are compatible with the object and purpose of the treaty, seems to neglect the interests of non-reserving states.[74] As we will elaborate the point below, some rules in the Convention as well as developed in practice, and opposability school of thought entrusts the reserving states with substantial responsibility for

[73] Ibid.
[74] Anthony Aust , Supra Note at No.3, P124.

determining compatibility. The ultimate consequence of all this is that the applicability and enforcement of human rights treaties to which reservations are made remain to be determined by the reserving states than the international community.

B) The Legal Consequences of Impermissible Reservations to Human Rights Treaties

Another lasting debate in human rights law concerns the result of invalid reservations made to multilateral human rights treaties. What legal remedies should follow the determination of invalidity of reservations? Neither the Vienna Convention nor other international instruments provide clear and sufficient rules on admissibility and legal consequences of prohibited reservations. Relying on the rules of the Convention, state practice, scholars' views, and jurisprudence, the following three major consequences of invalid or prohibited reservations will be discussed as available options.

1) ***The state remains bound to the treaty except for the provision(s) to which the reservation related***: This legal remedy is provided by the rules of the Convention under articles 20(4) and 21 which laid down a foundation to opposability approach that dictates the compatibility of reservation (with the object and purpose of human rights treaties) has to be decided solely by contracting states. Once impermissibility has been demonstrated by such states, the prohibited reservation based on incompatibility may not be declared as null and void. Rather, it is maintained as though it were valid and accepted reservation. In other words, the objection of states to incompatible reservation is virtually without legal consequence and it is nearly equivalent to acceptance: the treaty to which reservation is made enters into force between objecting states and reserving states in the same way as between accepting states and reserving states(article 20(4) (a and b)); likewise, the only fate, status and effect of incompatible reservations are to be disapplied between objecting states and reserving states in the same way as between reserving states and accepting sates (article21 (1,2 and 3)).

Obviously, these rules have adverse consequence on human rights treaties. First, though they are more favourable for reserving states to be retained as a party, it is against consent and participation of non-reserving states in their effort to object incompatible reservations.[75] They are left with

[75] Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", *the American Journal of International Law*, Vol.96: 531, P.534.

little incentives since the reserving state will benefit from the reservation regardless of whether a non-reserving state objects as there is no practical difference between accepting the reservation and disapplying the provision entirely. This yields the same result that as if the reservations were enforced. It is true that any objection is without fruit and only for the record unless the objecting state expressly excludes the reserving state from the treaty (21(3)). This is a problem over the problem. The fact that the Convention has authorized contracting states to have a final say on compatibility of reservations to human rights treaties leads to subjectivity. That means states may not even exploit some of the available rules in the Convention due to their carelessness, disinterested relations and giving priority to national interests. These problems of determining the compatibility of reservations are paradoxically worsened by the lack of proper legal remedies for those objections of impermissible reservations. Allowing the same result for both acceptance and objection would negate the purpose of having determination of incompatibility. Why decide if whether the reservation is incompatible? What is the need to object if the remedy for incompatibility is to maintain the same result? [76]

Secondly, the above remedy of the Convention that the state to be bound by the treaty except for the incompatible reservation would infringe the interests of other states in maintaining the object, purpose and the bargained-for elements of human rights norms that may be defeated when the reserving state becomes a party to the treaty with its benefit of incompatible reservation. Growing concerns to maintain the core of an agreement assume special significance in the case of human rights treaties whose very purpose is to codify and maintain minimum level of global standards.[77] Allowing states to join the treaty with incompatible reservations would repudiate or downgrade its normative, or standard setting base and this result can not be achieved by individual state's objections, because state A`s objections apply only between itself and the reserving state.[78] Accordingly, the objecting state can not prevent the incompatible reservations from affecting the constitutive elements of the treaty. This may also make the protection of the most core values of human rights such as *jus cogens* and *erga omnes* difficult.

Third, the rules of the Convention under articles 20 and 21 from which our first remedy for impermissible reservation is derived totally presuppose

[76] Ibid, at P.535.
[77] Ibid 534.
[78] Ibid.

the relations of sovereign states. Specially, rules enshrined under article 21 (1(b) and (3) provide reservations in terms of mutual relations and reciprocity between states. The whole message of such rules is that reservations, whether compatible ones (accepted) or incompatible ones (objected) since they have virtually the same effect, not only modify treaty obligations for the reserving state but also modify those provisions to the same extent for the other parties (both accepting and objecting states) in their relations with the reserving state, not with each other. This reciprocity may serve something good in non-human rights treaties that might intend to promote political, economical, social, environmental relations between states. Reciprocity may also deter reservations if a reserving state's interest in its reservation is outweighed by the harm (to it) of extending the benefit of reservation to the others. But looking human rights treaties in the mirror of reciprocity and mutual relations between states will jeopardize human rights protection. This is totally against their nature and conception. Human rights are to address individuals as subjects of the new international law. They are to govern the relations between states and individuals not between states. If incompatible reservations benefit not only reserving states but also other states in their relations to the former, it means that other states in a way are allowed to make sub-optional reservations to human rights treaties under the guise of reserving state. States may take this as a pretext to erode their obligations of human rights norms even including jus *cogens*, *erga omnes* and other highest norms.

Finally, even though the modern trend including the attempt of the Convention under article 19 dictates the balance between the universality and integrity of human rights treaties, the rules of the Convention under article 20 and 21 in general and the legal remedies provided by them in particular can not achieve such two basic objectives.[79] Of course both universality and integrity are crucial to human rights treaties because of their special nature and the balance must be maintained. As we have said earlier, the assumption of the universality of human rights is inspired by the Conviction that these rights should be available for all and must be binding at a global level. Liberal rules of reservations would promote protection of human rights by enabling as many states as possible to join the treaty at the expense of non-core human rights norms that may not possibly contravene the object and purpose of the treaty as reservations are the necessary price for universal participation.[80] In addition to facilitating ratifications, being a party by way of reservations may

[79] Antonio Cassese, Supra Note at No.1, P.130.
[80] Liesbeth Lijnzaad, Supra Note at No. 55, P.106.

ensure supervisions by monitoring bodies for that particular state. The commitment of reserving states to the majority of the provisions of a treaty may encourage the improvement of the domestic human rights situation. Moreover, being a state party to a particular human rights treaty will prompt the withdrawal of reservations in the future. For example, until 1992 there have been 110 ratifications to Convention on the Elimination of Discrimination Against Women (CEDAW), and 51 reservations to it of which 12 have been withdrawn.[81]

But the above three weaknesses related to the first remedy of impermissible reservations as provided under article 20 and 21 of the Convention can be a good reason to conclude that rules of reservations are too liberal that are inclined to universality than integrity. If all objections to incompatible reservations have more or less same result with the acceptance, it is highly favouring reserving states than non-reserving states and international community as a whole in their interest to protect the core object and purpose of human rights treaties. For that matter, in addition to the three points that we have raised above, pursuant to article 21 (c) of the Convention an act containing reservation is effective as soon as at least one other contracting state has accepted the reservation. What is worse, all contracting states are considered to have accepted the reservations if no objections to the reservations have been raised by the end of 12 months after notification (article20 (5)). These two rules show how the Convention is extremely liberal and favouring maximum reservations. How could the acceptance of one state bring reservations of whatever kind to human rights treaties into valid and effective act? Fixing such strict deadline for objection made to incompatible reservations to human rights treaties is also absurd. It may promote quick responses to reservations. But, delay is unavoidable because of miscalculation, carelessness, confusion on whether such deadline is also applicable to incompatible reservation and the like.[82] In any standard such strict and procedural deadline should not be applicable to incompatible reservations that contravene the very substance, object and purpose of human rights treaties. In short, those highly liberal rules of reservations would achieve only simple adherence to human rights treaties, formal universality without marinating the substantive universality (integrity of human rights

[81] Ibid

[82] Edward T. Swaine, "Reserving," *Yale Journal of International Law*, Vol.31: 307, 2006, P.319.

treaties) in which the substance, object and core human rights have been eroded by infinite incompatible reservations.

2) ***The invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the human rights treaty***: This second option as legal consequence of prohibited reservation has no clear indication in the Convention. One single instance is that the objecting state may exclude the reserving state from the treaty if it clearly expresses its intention to this amount (Article 20(4)). It is also logical to say that contracting states may stipulate provisions that exclude states making incompatible reservations from the treaty. The problem comes when the treaty is silent or the contrary intention of objecting states is not expressed. In this case the practice of states is not consistent to support this option. In 1980 Burundi made a reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973, in which it purported to exclude from its scope alleged offenders who were members of national liberation movements.[83] Four parties objected that the reservation was incompatible with the object and purpose of the treaty, three of them saying that until it was withdrawn they would not consider it as a party.[84] Finally, the reservation was withdrawn. To the contrary, USA was never told the same message while she made reservation to ICCPR in 1992 even though eleven European States objected that the reservation was incompatible with the object and purpose of the Covenant.[85] The total exclusion of a reserving state may exert pressure on it so that it might be forced to join the treaty by disregarding its reservation. But this will be only realized when the benefit that the reserving state obtains from the treaty outweighs the obligations that can be relieved if reservation was successful. In general, however, this second option is highly burdensome for states and may open the door for boycotting human rights treaties.

3) ***An invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provisions to which the reservation related*****:** The idea is that prohibited reservations specially those parts that prove to be incompatible to the object and purpose of human rights treaties must be regarded as null and void, invalid and severed, as if they were not formulated and the original treaty (including the reserved

[83] Anthony Aust, Supra Note at No.3, P.111.
[84] Ibid.
[85] Ibid.

provisions) shall be fully applicable to the reserving state without any benefit from the reservations. The Vienna Convention does not have any basis for such outstanding remedy; rather it tries to find its legal bases from customary law, normative nature of human rights and promotion of utmost protection of human rights.[86] Monitoring bodies such as UN Human Rights Committee are staunch supporter of this position.[87] In a decision of 1999 on Rawle Kennedy case, this Committee have pronounced that if a state enters a reservation to human rights treaty that is inadmissible either because it is not allowed by the treaty itself or because it is contrary to its object and purpose, it shall be regarded as null and void so that the reserved provisions must fully operate with regard to reserving state.[88]

Fortunately, the recent trends of regional human rights courts are in the move towards the position of monitoring bodies in adopting severability as a best remedy for invalid reservations.[89] In Belilos case, the European Court of human Rights laid a particular emphasis upon Switzerland's commitment to the European convention on Human Rights (ECHR), so that the effect of defining the Swiss declaration which was then held to be invalid was that Switzerland was bound by the provision of article 6 in full without benefiting the reservation.[90] The same Court reaffirmed this position in the Loizidou case in which it analyzed the validity of the territorial restriction, i.e. reservations made by Turkey to the provisions recognizing the competence of the Commission and the Court and held that the reservation is impermissible under the terms of ECHR because of its incompatibility.[91] The Court then concluded that the effect of this in light of the special nature of the ECHR as a human rights treaty was that the reservations were severable so that Turkey's acceptance of the jurisdiction of the Commission and the Court remained in place, unrestricted by the terms of the invalid reservations.[92] On the contrary, the practice of states towards severability is not uniform; it is uncertain and inadequate.[93]

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[86] M.N.Shaw, Supra Note at No.9, P.830.
[87] Ibid
[88] www1.umn.edu/humanrts/undocs/845-1998.html
[89] Antonio Cassese, Supra Note at No.1, P.194.
[90] Belilos Case, Supra note at No.27.
[91] en.wikipedia.org/wiki/search?search=Loizidou +Turkey
[92] Ibid.
[93] Anthony Aust, Supra Note at No.3, P.120.

However, the severability approach has encountered a serious opposition from various states, scholars and ILC. The contentions pounded against this approach have something to do with lack of competence and legal authority on the side of monitoring organs (I shall discuss this point in the next section), consent and sovereignty of states. It has been argued that severability has no legal basis in international law as international law currently provides for only two remedial responses for invalid reservations (these remedies are: the reserving state remains party to the treaty but is still not bound by those provisions that the reservation excluded or modified or the state is no longer a party to the treaty at all).[94] Do they mean that international law is merely the Vienna Convention? Is it not possible to trace some rules of reservations from customary law that represent object, purpose and protection of human rights? Is it not unfair to govern human rights of higher values such as having the nature of *erga omnes*, non-derogatory or *jus cogens* by those simplistic rules of Vienna Conventions? The difficulty of establishing such rules can not be a reason to deny their existence. It is also necessary to notice those problems we mentioned in the discussion of the first remedy and we should not repeat them here.

Those countries such as USA, France and UK contend that severability is totally against the principle of consent and sate sovereignty.[95] For them state consent and sovereignty are higher values than anything else and dictate that as states are totally free to express their consent to the whole treaty or part of the text, they should also be free not to be bound by those provisions they want to exclude their effect. They argued that reservations, valid or invalid, are part and parcel of an expression of consent of states and therefore states shall not be bound by treaty provisions they specifically declined to accept.[96] But severability is criticized being against this concept as it has a tendency to oblige states to be bound by invalid reservations. In line with this, the ILC has emphasized that if a reservation is inadmissible it is the reserving state that has the responsibility to take action (e.g., by withdrawing or modifying the reservation, or foregoing becoming a party).[97]

On the whole, despite lack of support from the Vienna Convention, ILC and some major states, the third remedy is by far an important option for human rights protection and should be considered in the future. As we have

[94] Ryan Goodman, Supra Note at No.75, P.532.
[95] Malcolm D.Evans, Supra Note at No.18, P.195.
[96] Ryan Goodman, Supra Note at No.75, P.531.
[97] Anthony Aust, Supra Note at No.3, P.124.

said, human rights are not contractual in nature and do not create rights and obligations between states on the traditional basis of reciprocity and mutual obligations. So the question of consent and state sovereignty should not be an obstacle for the protection of universal human rights. At least incompatible reservations to core human rights values, central to the object and purpose of the treaty must be severed and applied fully to the state. In such case human rights treaties must prevail over the concern of sovereign states. If there is a conflict between the international community's need for contracting parties to remain bound as far as possible by international standards on human rights, and the intent of one of these parties to diminish the legal impact of such standard, the former must prevail.[98] Severability should also be taken as useful option for third party institutions which are independent, competent and objective (such as domestic courts, national and regional human rights commissions, regional human rights courts and ICJ, UN and treaty supervising bodies) to invoke and determine the validity of incompatible reservations.[99]

Finally, those opponents of severability have one major drawback. They argued that considering the state with invalid reservation as non-party to the human rights treaty is in line with international law and consent of states than severability. But this has a huge negative impact both to the consent of state and human rights protection.[100] If a state consented to most of the provisions of the treaty is considered as excluded from the treaty because of one or few invalid reservations, it is the total exclusion that is more prejudicial to state consent than severability. This is also more harmful to human rights as it exempts more and more states from the treaty obligations for good. In many cases, the harm to state consent in voiding its membership in human rights treaty outweigh the harm in voiding only the invalid reservation and keeping the state bound.[101]

3.3. The Role of Monitoring Bodies in Determining the Validity of Reservations to Human Rights Treaties: A Problem of Competence and Authority

In this section I am not interested in dealing with the organization and working procedures of international monitoring bodies and their general

[98] Malcolm D. Evans, Supra Note at No.18, P.131.
[99] Ryan Goodman, Supra Note at No.75,P.532.
[100] Ibid , at P.536.
[101] Ibid.

powers, functions and roles in human rights protection. Rather, I want to examine some controversies with regard to the authority, competence and specific role of such bodies with regard to reservations to human rights treaties.

The problem of determining the validity of reservations to human rights treaties, in particular assessing the compatibility of reservations with the object and purpose of human rights treaties as well as invoking the legal consequences of impermissible reservations is complicated by the absence of international institutions which have judicial power and competence to pass authoritative decisions on such matters. Currently, there are only few standing tribunals that dispense disputes involving human rights issues both at international and regional levels. Neither is this gap bridged by international human rights monitoring bodies as they are devoid of judicial competence to pass binding decisions.[102] The most common monitoring entities are the UN system monitoring bodies that are established by the UN resolutions (such as Commission on Human Rights, the UN High Commissioner for Human Rights etc) and treaty-bodies established by each human rights treaty (such as UN Human Rights Committee that oversees the implementation of International Covenant on Civil and Political Rights (ICCPR), the Committee on the Rights of the Child and Committee Against Torture). Most modern universal human rights treaties have established supervising bodies.[103] But, neither the UN itself nor treaty system monitoring bodies have authority to come up with a legally binding decision on reservations. Rather, their competence is limited to submitting recommendations to each state.

Quite contrary to this background, the UN Human Rights Committee has introduced the most controversial and revolutionary move with regard to the determination of reservations to human rights treaties. The Committee in its controversial General Comment 24(52) of 1994 regarded itself as the only competent body to determine whether a specific reservation to human rights treaties was or was not compatible with the object and purpose of the International Covenant on Civil and Political Rights (ICCPR).[104] It has established the following reasons for this conclusion:[105]

1) Human rights have special nature in the sense that such treaties and ICCPR specifically, are not a web of inter- sate exchanges of mutual obligations,

[102] Antonio Cassese, Supra Note at No1, P.363.
[103] Anthony Aust, Supra Note at No.3, P.122.
[104] Human Rights Committee, Supra Note at No.54.
[105] Ibid.

rather they concern the endowment of individuals with rights. Thus, the principle of inter-state reciprocity has no place.
2) Those rights (such as enshrined in ICCPR) which represented higher norms of customary international law could not be the subjects of reservations. Yet, in the case of reservations to non-derogable provisions not falling in this category; states had a heavy onus to justify such reservations out of subjectivity.
3) Unacceptable reservations that contravene the object and purpose of human rights treaties shall be severed and then fully applied to the reserving states.
4) Given the above reasons, the Committee stressed that the provisions of the Vienna Convention on the role of state objections in relation to reservations are inappropriate to address the problems of reservations to human rights treaties: states have often not seen any legal interest in or they need to object reservations despite many invalid reservations have been made to human rights treaties; yet, the absence of protest by states can not imply that reservations are either compatible or incompatible with the object and purpose of the treaty .
5) In addition, the Committee claimed that passing an authoritative interpretation on reservation is a task that it can not avoid in the performance of its functions given under article 40 of ICCPR and First Optional Protocol. In order to know the scope of its duty to examine the state's compliance or communication, the Committee has necessarily to assume an authoritative interpretation on the compatibility test. It has been also claimed that the nature of human rights dictates an objective determination of incompatible reservation and the Committee is exactly competent for that mission.

Definitely, the Committee has not invoked any legal authority or bases either from human rights treaties or other international law to support its bold and ambitious assertion of its competence. Article 40 of ICCPR and its First Optional Protocol has clearly stipulated the power and competence of the Committee: its role includes considering, scrutinizing and commenting on periodic reports by the parties on their implementation of the Covenant; to consider and examine individual complaints or communications (petitions) and to pass recommendations or General Comments. Nowhere is the Committee empowered judicial functions to render a legally binding decision.[106] The prevailing intentions of states do also suggest the absence of the judicial competence of the Committee. Because of the adverse attitude of

[106] Anthony Aust, Supra Note at No.3, P.123.

many states towards judicial settlements of human rights at international level, both UN and human rights treaty bodies were established as non-judicial monitoring institutions with less moderate course of actions so as to strike a compromise between state sovereignty and the requirement that states comply with international standards on human rights.[107] In line with this trend, the ILC in its 1997 report, after stating that compatibility test is the most important criterion for determining the admissibility of reservations, it has pointed out that where a human rights treaty establishes a monitoring body, unless the treaty provides otherwise the body is competent only to comment on and make recommendations as to the admissibility of reservations.[108]

Thus, the Committee's assumption that it is the only competent body to have a final say on incompatible reservations seems to be out of legal reality. Such extraordinary position of the Committee may backfire on the credibility of the Committee at least for the moment. In the case of *Kennedy v Trinidad and Tobago*, when the latter acceded to the fist Optional Protocol of ICCPR with reservation to article 1 thereof to the effect that the Committee shall not be competent to receive and consider communications to any prisoner who is under sentence of death, the Committee, in its views on 2 November 1999, determined that the reservation was impermissible and therefore could not produce any legal effect.[109] Trinidad and Tobago did not accept the decision. It not only refused to cooperate any further in the case of Kennedy, but it then availed itself of the opportunity to denounce the Optional Protocol of ICCPR definitively on 27 March 2000.[110] It is clear that the overzealous attitude of the Committee has done more harm than good on maintaining both the universal application and unity and (integrity) of human rights treaties. It may be well argued that the Committee will have some kind of judicial competence, but there must be first some international instruments in the future for its authority, otherwise its mere claiming of authority without legal basis is a cart before the horse.

But, it does not mean that the above reasons invoked by the Committee are irrelevant. It is also not to mean that the rules of the Vienna Convention with regard to reservations to human rights treaties are appropriate. There should be a shift of some judicial power to human rights

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[107] Antonio Cassese, Supra Note at No.1, P.363.

[108] Anthony Aust, Supra Note at No.3, P.124

[109] Press Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University, 2003, P.162.

[110] Ibid.

supervising bodies in order to achieve genuine human rights protection. An absolute reliance on states on the final determination of compatibility of reservations to human rights treaties and sticking to the dogma of state sovereignty as argued by USA and UK does not take us anywhere , which in turn contrary to the spirit of core values of human rights. So there should be some workable reforms in this regard.

4. Conclusion and Recommendations

Based on the findings of my research the following concluding remarks and recommendations can be suggested:

1) As a general principle reservations to human rights treaties have been treated under the rules of Vienna Convention on the Law of Treaties and other international law in the same way other types of treaties have been handled. As a general principle, reservations are not prohibited unless they are exceptionally prohibited by the treaty or found incompatible to the object and purpose of the treaty. This principle is also applicable to human rights treaties pursuant to such rules of reservations. But looking at human rights treaties with the same mirror of other ordinary treaties is a cause of some controversies and there should be a development of special rules of reservations that can suit the nature of human rights. Further, allowing reservations as a matter of principle is contrary to other principle which runs that in principle states must accept the full range of human rights obligations that makes reservations exceptional for human rights.

2) Despite the ambition of the Vienna Convention to achieve the balance between universality and integrity of human rights treaties through compatibility test, it has not come up with some sort of guidelines and objective standards to determine such criteria. Nor have such standards been developed in customary law or by monitoring bodies and international and regional courts. This situation leaves a lot of controversies and ambiguities that cast major obstacle to the determination of incompatible reservations and human rights protection in general. Thus, developing objective standards in the matter is more than necessary.

3) Under the rules of the Convention and prevailing practices contracting states seem to have an upper hand and final say on deciding the validity of reservations and their compatibility with the object and purpose of human rights treaties in particular. This may be welcomed in other treaties. But these

rules are inappropriate and even inadequate to provide protection to human rights. Reservations are left under extreme subjectivity in which the priority of national interest, state sovereignty and reciprocal and mutual relations may influence the determination of reservations to human rights treaties despite their special nature.

4) The problem is further complicated by the fact that some monitoring bodies have claimed the power of assessing and authoritatively deciding on validity and impermissibility of reservations to human rights treaties in spite of lack of any legal basis. In any case, the question that `` who is really entrusted to pass a final decision on the matter`` has created a big confusion and will continue for some times.

5) This problem will be uprooted only when we allocate the decision making-powers (on reservations to human rights treaties) to reserving states, other contracting states and human rights monitoring bodies: the reserving state should have reasonable participation to evaluate the compatibility of any reservation, to consider any objection upon it and to act in good faith as whole; non-reserving states should have proper channel, information, time and sufficient power to consider the compatibility of reservation with core values of human rights treaties, to make appropriate objections and finally to decide on the fate of reservations. If states fail to determine the matter objectively and impartially with due time, a sort of judicial power should be devolved to monitoring bodies to have a final say on the compatibility test and on the fate of invalid reservations so that human rights treaties will be treated centrally, independently, objectively, and impartially with great expertise. Otherwise, the protection of human rights will remain a motto on the paper.

6) The absence of clear international rules on the status and legal consequence of invalid reservations to human rights treaties is really a chronic problem in the area. Should invalid or prohibited reservations be considered as if they were entered into force to benefit reserving state as supported by the Vienna Convention and some major states? This makes the reserving state the sole author on the matter and seriously weakens the incentive and motivation of objecting states. The total exclusion of reserving state from the treaty does not serve either the consent of the state to be a party to human rights treaty or the protection of human rights as the state is to be exempted from the total human rights obligations. In the future, after fulfilling the establishment of impartial

and centralized monitoring bodies with judicial powers, making invalid reservations, specially the ones that erode the very object and purpose of human rights treaties, null and void is the good way out for human rights protection.

7) Finally human rights treaties themselves should make clear provisions on how and by what standards the validity of reservations shall be measured, who shall decide on the matter, where reservations shall be possible and where shall not be. This will avoid or at least lessen the problem of reservations to human rights treaties.

The Impact of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) on the Realization of the Right to Food.

Tilahun Weldie*

Abstract

The incorporation of a strong intellectual property regime under the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) and the consequences of its implementations mostly for developing countries has become an issue of much concern. The implementations of the agreement can have serious repercussions on the realization of some human rights. The purpose of this paper is to examine the impact of the TRIPS Agreement on the human right to food. The obligation of states under international human rights law concerning the right to food is discussed in the first section of this paper. This is followed by comprehensive analysis of the TRIPS Agreement as affecting the right to food. In this paper it is argued that the policy space necessary for many developing countries to undertake obligations related to the right to food in international human rights law is limited by intellectual property rights embodied under the TRIPS Agreement. Finally, the paper proposes bringing the TRIPS Agreement in conformity with the obligations of countries in international human rights law concerning the right to food.

1. Introduction

Some agreements of the World Trade Organization (WTO) have been criticized much as they influence members' policies affecting negatively on a wide range of issues.[1] There has been a growing dissatisfaction over some of these agreements as they do not allow countries to effectively implement measures to protect human rights and other issues of special significance.[2] Instead, it has been observed that some of the agreements of the WTO have an adverse impact on some human rights such as the right to food. This emanates from some of the conflicts or the tensions that exist between the provisions of those agreements and the obligation of states under other international instruments and national laws and/or policies.[3] One of these agreements whose implementation has adverse consequences on some of the human rights

* LL.B (Bahir Dar University), LL.M (University of Pretoria, RSA), Lecturer in Law, School of Law, Bahir Dar University. I am grateful to the anonymous reviewers for helpful comments in earlier draft of this article. All errors remain mine.

[1] Ruosi Zhang, *Food Security: Food Trade Regime and Food Aid Regime*, 7 J. Int'l Econ. L. 565 (2004) at 565.

[2] Christine Caufmann & Simone Heri, *Liberalizing Trade in Agriculture and Food Security-Mission Impossible?*, 40 Vand. J. Transnat'l L. 1039 (2007) at 1041.

[3] Ibid.

is the Trade Related Intellectual Property Rights Agreement (The TRIPS Agreement). This paper focuses on the implications of the implementations of this agreement. However, the scope of this paper is limited to discussions of the impact of this agreement on the right to food.

The incorporation of a strong intellectual property regime under TRIPS and its consequences mostly for developing countries has become an issue of much concern in recent years.[4] Much attention has been given to the impact of TRIPS on access to medicines. The consequence of the TRIPS Agreement on other human rights such as the right to food has also become an issue of special significance. It is believed that the impact of the TRIPS Agreement on the realization of the right to food poses threats of equal significance.[5]

Intellectual property protection as enshrined under TRIPS could be applied to allow monopoly rights on plant genetic materials.[6] This can hamper the ability to reuse, exchange and sell seeds that are used by subsistence farmers. Granting patents for individuals or corporations with little restrictions over their right would make subsistence farmers dependent on patent holders threatening their right to food.[7] It is conceivable that members of the World Trade Organization (WTO) may adopt an alternative *sui generis* system.[8] However, the lack of clarity as to the scope of *sui generis* system has brought about confusion and a wide interpretation leading to problems of implementing such a system.

Another concern in the TRIPS Agreement is its inability to prevent or minimize biopiracy. The lack of protection of the genetic resources and associated knowledge of local communities under TRIPS may leave local communities without any benefit from the sale of products made from their resources.[9] It can also force farmers to buy back seeds and other products at higher prices. Farmers may also be prohibited from selling, exchanging and

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[4] The TRIPS Agreement has been criticized for advancing the interest of individuals by marginalizing much of the needs of the public interest.

[5] Action Aid, *Trade Related Intellectual Property Rights*, (2002). Available at: http://www.actionaid.org.uk/doc_lib/53_1_trips.pdf .

[6] Ibid.

[7] Scott Holwick, *Developing Nations and the Agreement on Trade Related Aspects of Intellectual Property Rights*, 1999 Colo. J. Int'l Envl. L. & Pol'y 49(1999) at 57.

[8] S. K. Verma, *TRIPS and Plant Variety Protection in Developing Countries*, E.I.P.R 1995, 17(6), (1995) at 281.

[9] Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. (2004) at 279.

reusing seeds that were made from the genetic resources available in the local communities. Hence, the implementation of the TRIPS Agreement can have serious repercussions on the realization of the right to food.

Against this backdrop, this paper explores the implications of the TRIPS Agreement on the realization of the right to food. The first section deals with the concept of the right to food. It highlights the importance of the right under international agreements. It also deals with the extent of the obligation of states to take into account the right to food when negotiating international trade agreements. The second section examines the relationship between the TRIPS Agreement and human rights in general and the right to food in particular. It focuses on the general provisions- the principles and objectives of the TRIPS Agreement. This section highlights the lack of policy space available to take measures to protect human rights issues including the right to food. It also examines whether other international human rights law would triumph over the TRIPS Agreement in the event that a conflict arises when measures are taken to implement policies protecting the right to food.

The third section explores the substantive provisions of the TRIPS Agreement that have implications on the realization of the right to food. It mainly focuses on the patent and *sui generis* system under the TRIPS Agreement and their impact on the right to food. This section also deals with the lack of protection of genetic resources and associated knowledge of local communities under TRIPS Agreement and highlights the consequences of this lack of protection. The paper concludes with a summary of the issues discussed and proposals for reform.

2. The Right to Food

2.1 Concept of the Human Right to Food

The right to food refers to physical and economic access at all times to adequate food or to the means of its procurement.[10] The main content of the right to food implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals and accessibility of food in ways that are sustainable and that do not adversely affect the enjoyment of other human rights.[11] Availability refers to the possibilities either for feeding

[10] General Comment 12, *The Right to Adequate Food*(Article 11 of the covenant), Committee on Economic, Social and Cultural Rights, UN Document E/C.12/1999/5, 5 may 1999, Para. 5(hereinafter General Comment 12).

[11] Id. Para 8.

oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems.[12] Accessibility refers to both economic (financial costs associated with the acquisition of food) and physical (food should be accessible to everyone including vulnerable individuals such as infants and disabled ones).[13]

The right to food has been recognized by some international instruments and renowned individuals as the most fundamental human right and basic human need. In the words of former United Nations (UN) Secretary General Kofi Annan it is "the most basic human rights of all."[14] The right to food is also interrelated with other basic human rights.[15] For instance, the Human Rights committee- a body established under the International Covenant on Civil and Political Rights- states that the right to food is closely related with the right to life.[16] In the Universal Declaration of Human Rights it is noted that the right to food is an essential component for the realization of human dignity and the right to life.[17] Hence, it is conceivable that the realization of the right to food is also crucial for realization of other closely related human rights.

The right to food is recognized as a fundamental human right in many international instruments. The Universal Declaration of Human Rights (UDHR) provides that "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food …"[18] The International Covenant on Economic, Social and Cultural Rights also recognizes the right of every person to an adequate standard of living for himself and his family including adequate food[19] and the right of every

[12] Id. Para 12.
[13] Id. Para. 13.
[14] Press Release, Secretary General, *Secretary General Calls on Governments, Civil Society, Private Sector and International Organizations to Fight World Hunger*, UN Doc. UNIS/SG/2685.
[15] Vienna Declaration and Programme of Action, UN Commissioner for Human Rights, 49th session, UN Doc. A/CONF. 157/23 (1993).
[16] The Human Rights Committee, General Comment 6 (30 April 1982) on the right to life in Para. 5 noted that "the right to life has been too often narrowly interpreted. … It would be desirable for states parties to take all possible measures to reduce infant mortality … especially in adopting measures to eliminate malnutrition and epidemics."
[17] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, at preamble para. 5, U.N. Doc. A/810 (1948).
[18] Id., Article 25.
[19] International Covenant on Economic, Social and Cultural Rights, Dec., 1966, 993 U.N.T.S. 3(hereinafter CESCR) , Article 11(1).

person to be free from hunger.[20] The right is part of the social rights category and is believed to include both concepts of adequate food and to be free from hunger.[21] Apart from the above two international human right instruments which are thought to be more specific and important in discussing the right to food, the right has been recognized by International humanitarian treaties as well.[22] Moreover, the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) have provisions relating to the right to food.[23]

The notion has been consequently recognized and endorsed by UN Declarations. In 1996 at the World Food Summit, organized by the United Nations Food and Agricultural Organization (FAO), countries reaffirmed that everyone has a right to nutritious food consistent with the right to adequate food and to fundamentally be free from hunger.[24]

In 2000, 189 member states of the UN and the European Community reaffirmed through the United Nations Millennium Declaration their commitment to eradicate poverty and hunger a goal intended to be achieved by reducing by half the number of people who live on less than one dollar per

[20] Id., Article 11(2).

[21] See Laura Niada, *Hunger and International Law: The Far- Reaching Scope of the Human Right to Food*, 22 Conn. J. Int'l L. 131 (2006) at 151.

[22] The Geneva Conventions (1949) and additional protocols have provisions related to the right to food. For instance, Convention III relating to The Treatment of Prisoners of War under article 26 provides "The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies." In Convention IV which concerns the Protection of Civilian Persons in time of War article 55 provides " To the fullest extent of the means available to it, the occupying power has the duty of ensuring the food and medical supplies of the population …" Additional Protocol II which concerns the protection of victims of non-international armed conflicts in its article 18(2) states " If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population … shall be undertaken…"

[23] Convention on the Rights of the Child , G.A. Res. 44/25, Article 25 (2) (C) (1989) and Convention on the Elimination of all Forms of Discrimination Against Women(CEDAW 1979) , G.A. Res. 34/180, Article 12.

[24] The World Food Summit held in Rome Draw 185 participants and the European Community and introduced the Rome Declaration on World Food Security. See Rome Declaration and Plan of Action (1996), available at http://www.fao.org/docrep/003/w3613e/w3613e00.htm (accessed on 15 January, 2008).

day and those who are suffering from hunger.[25] The right to food also has been reaffirmed in some other UN General Assembly resolutions.[26]

Some authors have even argued that the right to food exists under customary international law. One of such authors- Kearns states that the right to food exists via customary international law. Kearns argument is based upon the examination of United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and recently the World Food Summit Declaration and Plan of Action.[27] Both Kearns[28] and Firer[29] argue that the reaffirmation and commitment of states in international treaties and declarations represents customary international law. Niada also concludes that there exists a customary international law right to food.[30]

2.2 Obligation of States

Article 2 of the ICESCR provides a general framework for the obligation of state parties. It requires states to take steps individually and through international co-operation for the full realization of the rights recognized under the convention particularly through the adoption of legislative measures.[31] The provision which is also applicable to the right to food requires states to "do something" i.e. to engage in activities in order to achieve the realization of the right to food.[32] "To take steps" in the provision may involve the abrogation of legislation that prevents the population from fulfilling food needs through their own effort.[33] More specifically, it is

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[25] United Nations Millennium Declaration, G.A. Res. 55/2, 3, U.N. GAOR, 55th session, Supp. No. 49, U.N. Doc. A/55/499(2000) , Para. 19.

[26] Niada, supra note 20, at 172.

[27] See generally Anthony Paul Kearns, *the Right to Food Exists Via Customary International Law*, 22 Suffolk Transnat'l L. Rev. 223 (1998).

[28] Id. at 254.

[29] See generally Caitlin Firer, *Free Trade Area of the Americas and the Right to Food in International Law*, 1 U. St. Thomas L.J. 1054 (spring 2004).

[30] Niada, Supra note 20, at 173-175. Niada cautions that the fact that the missing practice in some cases for realization of the right cannot preclude its recognition as customary international law. Niada cites an instance where the International Court of Justice in the Nicaragua case sanctioned non-intervention as an international customary norm despite states' contrary practice. Id.

[31] ICESCR, Supra note 18, article 2

[32] Food and Agricultural Organization of the United Nations (FAO), *The Right to Food Guidelines*, Information Papers and Case Studies (Rome, 2006) at 76.

[33] Ibid.

recognized by the convention that there are three levels of states' obligations to the right to food like any other human right: the obligation to respect, protect and fulfill.[34]

a. Obligation to Respect

This is a negative obligation that prevents states from taking actions that reduce access to and availability of food.[35] A negative obligation requires states to refrain from engaging in activities that hamper the realization of rights. The obligation does not require states to take actions for promotion of the right but seeks to ensure that actions of states do not adversely affect the realization of the right. The obligation to respect the right to food essentially requires states not to take measures that would prevent individuals or groups from fulfilling their right to food.[36] The obligation to respect may include a prohibition against the suspension of legislation or state policies that enable people to have access to food, or the implementation of a food policy that excludes segments of a population that is vulnerable to hunger and food insecurity.[37] This level of obligation may also be infringed by the authorization of the state to implement official policies, programmes or actions that destroy people's food sources without valid reason or compensation.[38]

Furthermore, violation of this level of obligation would also take place in a scenario where the government arbitrarily evicts or displaces people from their land, particularly if the land constitutes primary means of livelihood.[39] Hence, the state should be able to recognize the rights of local communities to their land and to the natural resources that are important for the livelihood of the community.

b. Obligation to Protect

The obligation to protect requires states to ensure that individuals or enterprises do not deprive a person of access to adequate food.[40] This would

[34] General Comment 12, supra note 9, Para. 15.
[35] The Secretary General, *Note by the Secretary General on the Right to Food*, Para. 26, Delivered to the General Assembly, U.N. Doc A/56/210 (July, 2001).
[36] General Comment 12, supra note 9, Para 15.
[37] FAO, supra note 31, at 80.
[38] Ibid.
[39] Niada, supra note 20, at 152.
[40] General Comment 12, supra note 9, Para 15.

include requiring states to enforce legislation that protects the most vulnerable segments of society such as small scale-farmers against outside interference.[41] This might also include protecting farmers from the corporate patenting of genetic material of seeds and the subsequent attempt to prohibit the sale, exchange and reuse of seeds. The state should protect individuals and local communities from the misappropriation of their resources by multinational corporations and other enterprises.

It has been noted that states should establish bodies that would have oversight roles, investigative powers and award remedies when the right is violated by subjects under their jurisdiction.[42] The obligation to protect is crucial to curb practices that disrupt the livelihood of small-scale farmers.[43]

c. Obligation to Fulfill

There are two aspects of the obligation to fulfill. The first relates to the obligation to fulfill (facilitate), meaning states should pro-actively take part in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.[44] The state would be given the power to decide on issues of priority with appropriate or reasonable steps to ensure food security.[45] The obligation to fulfill (facilitate) is the most crucial innovation and far- reaching aspect of the right to food.[46] The second feature of obligation to fulfill relates to a duty to provide food, within the means at states' disposal, to individuals or group when they become unable to enjoy the right to adequate food for reasons beyond their control.[47] The duty is then related to cases involving persons who have been affected by natural or man-made disasters which endangered the victim's right to food.

2.3 International Obligations

State parties have obligations at the international level to ensure that their separate or joint actions do not hamper the realization of the right to

[41] FAO, supra note 31, at 81.
[42] Niada, supra note 20, at 155.
[43] Ibid.
[44] General Comment 12, supra note 9, Para 15.
[45] FAO, supra note 31, at 82.
[46] Niada, supra note 20, at 155.
[47] General Comment 12, Supra note 9, Para. 15.

food.[48] As Niada points out, international human rights, in our case the right to food, would be deprived of any meaningful effectiveness if individuals are not protected from the impacts of decisions made in other countries.[49] Hence, states have to make sure that the domestic measures do not violate the realization of the right to food outside their own territories. What is more, as Sajo notes, it is also important to recognize that the domestic obligation to satisfy the right to food by itself entails specific obligations as to the international behavior of the state.[50] The state should not participate in any international regime including international trade agreements that undermine the realization of the right to food.[51]

More importantly, there is an obligation for all member states to the covenant on Economic Social and Cultural Rights to take due account of the realization of the right to food when negotiating international agreements.[52] In the words of the Human Rights Committee " State parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end."[53] This would impose an obligation for member states negotiating international trade agreements to make sure that the trade agreements do not undermine the realization of the right to food. States should take every measure to avoid the inclusion of any provision which would pose any potential danger to the realization of the right to food.

2.4 Is the Right to Food a Real Right?

One of the main issues with regard to social and economic rights is whether they are real ones or just political aspirations.[54] As the right to food falls under this category similar concern surrounds it. Even though the rights have been recognized as part of a legally binding international instrument, some people have considered these rights as merely political aspirations not

[48] Id. Para 36. This Paragraph emphasizes the essential role of international cooperation in realizing the right to food and requires members to act in the spirit of the Charter of the United Nations, the Covenant and the Rome Declaration of the World Food Summit.

[49] Niada, supra note 20, at159.

[50] Andaras Sajo, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U.J. Int'l L. & Pol.221 (fall 2002) at 233.

[51] Ibid.

[52] General Comment 12, supra note 9, Para. 36.

[53] Ibid.

[54] Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to food*, 47 Va. J. Int'l L. 619 (spring 2007) at 628.

subject to immediate implementation.[55] However, consideration of these rights as purely political aspirations "reflects a distorted and largely discredited view".[56] This is because this assertion ignores governing international law that all treaties including ICESCR are entered into by states in good faith.[57] Hence, it can be assumed that states do not commit themselves for the sake of signing treaties. They do so with a view to abiding by the obligations provided under the treaties and ensuring that commitments are implemented.

Furthermore, the assertion that social and economic rights are political aspirations is based on the premise that the rights are to be achieved progressively. For some, this suggests avoidance of any state obligations resulting in the indefinite postponement of the realization of these rights.[58] This is grounded on a misconception of definition of progressive realization and recognized rights. Progressive realization does not relieve states from undertaking their obligations at present and carrying them forward into the future. Rather progressive realization asserts that states should undertake the obligations as expeditiously as possible.[59] Moreover, CESCR in its General Comment 3 states:

> *"…the fact that realization over time, or in other words progressively, is foreseen under the covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in light of the overall objective, indeed the reason d'être , of the covenant which is to establish clear obligations for states parties in respect of the full realization of the rights in question. It thus imposes an obligation to*

[55] Hans Morten Haugen, *the Right to food and the TRIPS Agreement: with a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution*, Martinus Nijhoff Publisher (London, 2007) at 117.
[56] Downes, supra note 53, at 628.
[57] Ibid.
[58] Niada, supra note 20, 155.
[59] General Comment 12, supra note 9, Para 14.

> *move as expeditiously and effectively as possible towards that goal."*[60]

As indicated above, states have some minimum obligations which they should undertake immediately and when the need arises. Accordingly, it is not beyond states obligations to decline international agreements which have the potential danger to undermine the realization of the right to food. Postponement of realization of the right to food by a state in every aspect is not guaranteed and constitutes a violation of the right to food.

There are also emerging precedents (court decisions) which affirm that the social and cultural rights in particular the right to food have judicial remedies. This is evidenced from the decision given by African Commission on Human and People's Rights in the Ogoni case.[61] The Commission determined that the Nigerian government violated the right to adequate food though the right is not explicit in the African Charter.[62] In the words of the African Commission:

> *"… the right to food is implicit in the African Charter, in such provisions as the right to life (Art.4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights,* ***the Nigerian Government tramped upon not only the explicitly protected rights but also the right to food implicitly guaranteed."*** [63]

The Africa Commission also stressed that both the African Charter and international law require and bind Nigeria to ensure access to and availability of adequate food.[64] This case shows how issues related with the right to food

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[60] Commissioner on Economic, Social and Cultural Rights, *General Comment 3: the Nature of States Parties Obligations* (Art. 2, Para. 1) , U.N. Doc. E/1991/23 (Dec., 1990) , Para 9.

[61] The Social and Economic Rights Action and the Center for Economic and Social Rights v. Nigeria is also known as the Ogoni Case. The suit was brought against the Nigerian government for its involvement in oil production through the State oil company which the operations have caused environmental degradation, health problems and other related problems among the Ogoni people. See Decision regarding Communication No. 155/96, Ref: ACHPR/COMM/A044/1 (27th of May 2002), Para. 1.

[62] Id. Para 64.

[63] Ibid.

[64] Id. Para 65.

can be brought before the court (are justiceable) implying that social and economic rights are not merely political aspirations.

The following case, though not particularly on the right to food, is also helpful to show that social and economic rights are increasingly becoming justiceable disproving the traditional thinking that they cannot be defended in a court of law. In a landmark decision by the Constitutional Court of South Africa in *Grootboom and Others v. Government of Republic of South Africa and Others, a* decision was passed stating that the program undertaken by the government violated the right to housing as it failed to provide immediate relief for people in desperate need.[65] The Constitutional Court concluded that the program was not reasonable as it did not provide for the immediate relief of the people who are living in intolerable conditions.[66] The court made a declaratory order that the program fell short of its requirements and ordered the state to devise and implement a program to help those in desperate need.[67]

Ample resources are often necessary to progressively fulfill a country's social and economic rights. However, this should not be an excuse for postponement of obligations. Progressive realization requires states to make a continued effort at every stage with the available resources to ensure that rights are respected. Thus, a state violates the rights of its people if it has failed to make reasonable efforts to respect such rights

3. Purpose and Principles of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) and the Right to Food

The Agreement on Trade Related Aspects of Intellectual Property Rights was a product of the Uruguay Round of the General Agreement on Tariff and Trade (GATT) held in 1994.[68] TRIPS adopted high minimum intellectual protection for all WTO members including developing countries which had minimal commitment to intellectual property rights.[69] One of the

[65] See generally *Grootboom and others v. the Republic of South Africa and Others.* Case No. CCT 11/00. (4 October 200). There were four appellants to Constitutional Court of South Africa: the Government of the Republic of South Africa, the Premier of the Province of the Western Cape, Cape Metropolitan Council and Oostenberg Municipality. The Respondents were rendered homeless as a result of their eviction from their informal houses. Id. Para 4.

[66] Id., Para 99.

[67] See generally Groothboom case.

[68] Robert P. Merges et. al., *Intellectual Property in the New Technological Age* (2nd ed., 2000) at 319-20.

[69] Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?* 5 Minn. Intell. Prop. Rev. 47 (2003) at 54.

reasons that made TRIPS different from previous intellectual property agreements was the fact that non compliance with the agreement brought the consequences of the threat of trade sanctions in accordance with the rulings of the WTO dispute settlement body (DSB).[70] This part examines whether objective and purposes of the agreement give countries enough policy space to implement the agreement in line with their responsibility to bring about the realization of the right to food.

It would be wrong to argue that the TRIPS Agreement is devoid of any concern for human rights. There is some implicit reference to human right issues in the TRIPS Agreement if the agreement is analyzed from a human rights perspective.[71] Principles and objectives of the TRIPS Agreement provide that the protection of intellectual property rights should contribute to the social and economic welfare of the society. To this effect, the TRIPS Agreement recognizes that countries can set different policy goals within the scope of intellectual property rights protection.[72] The objective of the agreement states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology.[73] Article 8 of the TRIPS Agreement also provides that countries may take measures "necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance …"[74] These provisions reveal the tension between the economic interest of intellectual property holders and the greater public interest.[75]

As the objectives indicate, it might be argued that the TRIPS Agreement accommodates human rights. In fact, the prima facie assessment of the objectives of the TRIPS Agreement would lead one to conclude that the agreement accommodates human rights and there is little conflict between

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[70] Id.

[71] Amita Gupta, *Patent Rights on Pharmaceutical Products and Affordable Drugs: Can TRIPS Provide a Solution?* 2 Buff. Intell. Prop. L.J. 127, (2004) at 130.

[72] David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: the Genesis and Application of Sub-Commission Resolution 2000/7*, 5 Minn. Intell. Prop. Rev. 1 (2003) at 9.

[73] Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization* (hereinafter the TRIPS Agreement), Article 7.

[74] Id., Article 8.

[75] Weissbrodt & Schoff, supra note 71, at 9.

protection of intellectual property and protection of human rights.[76] This provides a false conclusion that the TRIPS Agreement provides adequate provisions for states to take necessary measures to ensure that human rights and particularly the right to food is respected. However, a close scrutiny of the agreement and its objectives in particular reveal that there are some fundamental conflicts which are difficult to reconcile.

First, the overall purpose of the TRIPS Agreement is premised on the promotion of innovation by providing commercial incentives.[77] The various links in the provisions to human rights, such as the promotion of public health and nutrition, are expressed in broad terms and are not meant to be guiding principles, but are rather statements that are subject to the provisions of the TRIPS Agreement.[78] This means states cannot derogate from the provisions of the TRIPS Agreement when public health and nutrition issue concerns arise because the provisions condition the acts of states to achieve consistency with substantive provisions of the agreement. This strictly limits the policy space of states in dealing with human rights in general and the right to food in particular. What is more, while the agreement mentions the need to strike a balance between right holders and the public interest, it does not provide guidance on how this can be achieved in line with the agreement.[79]

Prior to the introduction of TRIPS, states could decide the level of protection they would allow in order to meet their development and public needs.[80] As the agreement focuses on the protection developed by many of the developed countries of the Northern Hemisphere, it leaves little space for developing countries to take policy measures that to a large extent take into account social and economic rights.

Furthermore, the balancing role of public interests and right holders has not historically received full support in WTO case law.[81] Many WTO cases show that dispute settlement body has generally given high priority to treaty text.[82] For instance, the WTO panel in *Canada- Patent Protection of Pharmaceutical Products* ruled that "the correct approach was to focus first

[76] Gupta, supra note 70, at 131.
[77] Id., at 132.
[78] Ibid.
[79] Ibid.
[80] See generally Theresa Beeby Lewis, *Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries*, 30 Int'l Law 835 (1996).
[81] Denis Borges Barbosa et al., *Slouching Towards Development in International Intellectual Property*, 2007 Mich. St. L. Rev. 71 (2007) at 98.
[82] Id., at 101.

on the text of the provision to be interpreted read in its context and to discern from this the intention of the parties to an agreement. It was only if this left out a doubt that it was appropriate to seek enlightenment from the object and purpose of the agreement." [83] This sets an example of how the dispute settlement body is reluctant to use the objectives and principles of the agreement as an important tool for implementation. Even if the WTO Dispute Settlement Body were to use the purpose and object as a tool of interpretation, it would be difficult to assume that they would come out with a decision that would either balance or favour human rights issues over intellectual property. This is because the objectives and principles of the agreement are phrased in such a way that they are not guiding principles, but are rather subject to the substantive provisions of the TRIPS Agreement.

Given such facts, it is difficult to use TRIPS provisions for balancing human rights issues over intellectual property. The question becomes whether the WTO dispute settlement body can resort to international human rights law to resolve contradictions between the TRIPS Agreement and human rights. There has not been a conclusive determination and this question remains controversial. However, a restrictive approach has been taken towards the TRIPS Agreement focusing on the text of the agreement.[84] Hence, in the context of the WTO, it is unlikely that international human rights law would be allowed to triumph over provisions of the TRIPS Agreement.[85]

Therefore, it can be argued that the TRIPS Agreement as it stands now allows little room to accommodate human right issues. Though there are flexibilities provided under the TRIPS Agreement, they cannot be used in so far as they are inconsistent with the substantive provisions of the agreement. The obligation of states under international human rights law such as the right to food obligations is unlikely to hold sway over the TRIPS Agreement. For states to have the ability to implement socio-economic policies to protect the right to food as enshrined under international obligations, it is necessary that clear guiding principles supporting such ideas be incorporated under the TRIPS Agreement.

Hence, the TRIPS Agreement becomes one of the bottlenecks for the implementation of human rights in general and the right to food in particular.

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[83] Panel Report, Canada—Patent Protection of Pharmaceutical Products, Complaint by the European Communities and their Member States, WT/DS114/R (March 17, 2000) Para. 51.

[84] Barbosa et al., supra note 80, at 99.

[85] Philippe Cullet, *Human Rights and Intellectual Property Protection in the TRIPS Era*, Human Rights Quarterly 29 (The Johns Hopknis University Press, 2007) at 418.

It was by realizing the potential consequences of the agreement that the United Nations took the initiative to study the relationship between the TRIPS Agreement and human rights.

The U.N. turned its attention to the effect of the TRIPS on human rights in 2000 [86] when the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/7 entitled "Intellectual Property Rights and Human Rights."[87] The Sub-Commission mainly emphasized the issue of the impact of intellectual property rights on the realization of human rights. The Sub-Commission provided that:

> "*Since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health,* ***the right to food****, and the right to self-determination,* ***there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, and international human rights law****."*[88]

Following the adoption of the Sub-Commission's report the debate over the relationship between TRIPS and human rights has continued to be contentious. In general, the agreement seems to have some apparent contradiction with human rights.

4. Substantive Provisions of the TRIPS Agreement and the Right to Food

Objective and principles of the TRIPS Agreement and their implication on human rights in general and the right to food in particular has been discussed in the previous section. This section deals with the substantive provisions of the TRIPS Agreement and their implications on the realization of the right to food.

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[86] J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with Developing Countries?* 32 Case W. Res. J. Int'l L. (200) at 442.

[87] United Nations Sub-Commission on the Promotion and Protection of Human rights, *Intellectual Property and Human Rights,* 52nd Sess., U.N. Doc. E/CN.4/Sub.2/Res/2000/7 (2000).

[88] Ibid.

An issue that has become increasingly important with the introduction of the TRIPS Agreement is biotechnology. The effect of the protection accorded to biotechnology on the realization of the right to food has fuelled a heated debate between developed and developing nations over the scope of intellectual property rights. There has also been a clash over the appropriateness of creating private property protection in sensitive subject areas mainly in biotechnology.[89] Biotechnology refers to the development of processes which create or modify living organisms or biological material, the product of those processes or the subsequent use of those products.[90]

As discussed earlier, the general provisions of the TRIPS Agreement do not seem to allow countries to take measures that can be crucial to the realization of the right to food if the measures are to be inconsistent with the substantive provisions of the agreement. This would mean that states cannot take measures regarding biotechnology if the measures are inconsistent with the substantive provisions of the agreement. The substantive provisions of the TRIPS Agreement which can have implications on the realization of the right to food are discussed below.

4.1 Patents

It is important to note that patent protection is relevant in several fields of technology such as seeds, chemicals, fertilizers, and pesticides. Article 27 of the TRIPS Agreement deals with the protection of intellectual property through patents. It provides that patents shall be available for products and processes in all fields of technology provided that they are new, involve an inventive step and are capable of industrial application.[91] One important element introduced in the TRIPS Agreement is the fact that patents should be available in all fields of technology.

A patent confers an exclusive right on the owner or holder of the right. A product patent confers on its owner the exclusive right to prevent third parties from making, using, offering for sale or importing a patented product.[92] A process patent prohibits third parties from the use of a patented process and the commercialization of the process-offering for sale, selling or

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[89] Carrie P. Smith, *Patenting Life: the Potential and the Pitfalls of Using the WTO to Globalize Intellectual Property Rights*, 26 N.C. J. Int'l L. & Com. Reg. 143 (2000) at 146.

[90] Id. Living organisms refers to plants, animals and microorganisms. Non-living biological material refers to seeds, cells, and enzymes.

[91] TRIPS Agreement, supra note 72, Article 27 (1).

[92] Id., Article 28(1)(a).

importing.[93] Patents provide exclusive monopoly rights over a creation for commercial or other purposes for a certain period of time. Therefore, if a patent is awarded, for instance, for a particular seed variety, farmers would be prohibited from replanting, selling or exchanging the seeds without the consent of the patent holder. This has serious consequences for subsistence farmers in developing countries as farm saved seed account for up to 80% of farmers' total seed requirements.[94] As companies with patent hold a monopoly right on products, there is the possibility that the prices for seeds, pesticides and fertilizers would be set beyond the financial capacity of farmers. For example, farmers must pay royalties to acquire protected seeds and in addition must comply with associated restrictions on saving, replanting, exchanging and selling saved seeds.[95] Many subsistence farmers in developing countries cannot afford such products with the small income they generate from their activities. In this way, the provisions of the TRIPS agreement, as they specifically relate to seed patents, have the ability to restrict access to seeds and therefore food for many farmers' in developing countries.

Another concern in regard to agricultural biotechnology is the term of protection. The length of the patent protection is set at a minimum 20 years from the date of application.[96] This entitles a patent holder to exclusive right for about 20 years counted from the date of application. Given the large number of subsistence farmers throughout the world who still strive to fulfill basic food needs, conferring exclusive rights for such prolonged time in relation to agricultural biotechnology is unreasonable. There is no denying the reality that companies should have some incentive for invention in this area. Hence, conferring exclusive right to patent holders for some period is inevitable to create the incentive. However, restricting the use from being accessible to the public for such long time is disregarding the social aspects of intellectual property.

Reducing the length of time of patent protection for agricultural biotechnology has the advantage of releasing the processes or products such as bioengineered seeds and hybrids to farmers earlier than would be possible

[93] Id. Article 28(1)(b).

[94] Kevin R. Gray, Right *to Food Principles Vis-à-vis Rules Governing International Trade*, British Institute of International and Comparative Law (2003) at 32.

[95] Phillipe Cullet, *Food Security and Intellectual Property Rights in Developing Countries*, (2003) at 10.

[96] TRIPS Agreement, supra note 72, Article 33.

under normal patent structure.[97] This would also enhance the accessibility of plant genetic resources to the general public.[98] The TRIPS Agreement should provide a shorter period of protection, as an exception to the 20 years patent protection, to inventions like seeds, pesticides and fertilizers which are often necessary to prevent crop failure and increase productivity.

Another development in regard to the possibility of adverse consequences on the realization of the right to food is the introduction of Genetic Use Restriction Technology more commonly known as the 'Terminator' technology.[99] Terminator technology prevents farmers from replanting seeds since the genetically engineered plants will not germinate in subsequent generations or fail to have a particular trait such as herbicide resistance unless sprayed with some specific chemicals.[100] These seeds are made deliberately to have such characteristics so that new seeds must be purchased from seed companies every season. Companies use such technology protection systems to secure exclusive intellectual property control over their respective seed varieties and to secure annual profits. These technologies prevent farmers from replanting seeds, forcing them to purchase new seeds every season, which they may not be able to afford. In this way, particularly, for poor subsistence farmers, access to food would be seriously restricted.

This example illustrates how patents for such technologies can have serious repercussions for conventional farming activities throughout the world. This type of technology poses a threat to many farmers thereby adversely affecting the realization of the right to food.

The patent system under TRIPS has also implications on agricultural research. Patents have prevented the traditional flow of access to biological resources and transfer of technology between developed and developing countries where developing countries provided free access to their genetic resources and developing countries freely received the benefits of research that used those resources.[101] Though still today developed countries have

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[97] Lara E. Ewens, *Seed Wars: Biotechnology, Intellectual Property, and the Quest for High Yield Seeds*, 23 B.C. Int'l & Comp. L. Rev. 285, (2000) at 308.

[98] Ibid.

[99] GRAIN, *Intellectual Property Rights: Ultimate Control of Agricultural R&D in Asia*, (2001)
Available at: http://www. Grain.org/briefings/?id=35 (accessed on April 15, 2008).

[100] Ibid.

[101] Jeannette Elizabeth WanjiruMwangi, *TRIPS and Agricultural Biotechnology: Implications for the Right to Food in Africa*, (Unpublished, Lund University) (2002) at 72.

access to the genetic resources of developing countries, the benefits of researches made on such genetic resources are not free or no longer easily accessible.[102] The large number of patents by multinational companies on biotechnology or fundamental research processes has stifled research and complicated the exchange of plant materials and knowledge among researchers.[103] As explained above, access to patented products or processes would be conditioned to the terms by the patent holder. This becomes a bottleneck to the exchange of plant materials and knowledge among researchers, countries, and universities.[104]

Moreover, strong patent protection tends to focus on what will eventually be commercially marketable.[105] These market oriented developments are not in line with the innovations most needed by subsistence farmers.[106] Therefore, there is a possibility that inadequate investment in agricultural research that aims at meeting the food needs of farming communities dependent on saved seeds for their survival will result from a stronger focus on providing patents for genetic resources.[107]

This is not to suggest that patents in the fields of biotechnology do not have benefits for ensuring the protection of the right to food. In fact, protection granted to patents on seeds can be helpful for realization of the right to food. Patents on seeds serve as incentives for researchers in this field and this would help increase the quality and number of improved seeds. This in turn brings about high production of food. However, the TRIPS Agreement does not strike a balance between the rights of patent holders and the larger public interest.

There are few exemptions from patents for plant genetic resources. Articles 27(2) and 27(3) are the two important provisions which provide exceptions from patentability. One of the exceptionally include exemptions from patentability where the prevention within their territory of the commercial exploitation is necessary to protect *ordre public* or morality including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.[108] *Ordre public* more directly relates to public

[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Smith, supra note 88, at 155.
[106] Ibid.
[107] Gray, supra note 93, at 32
[108] TRIPS Agreement, supra note 72, Article 27(2).

policy and has stricter application.[109] To apply the article 27(2) exception, the prevention of commercial exploitation must be necessary to ensure the protection of *ordre public* or morality. What is more, the exclusion should not be made on the mere fact that it is prohibited by national law. The prohibition of the circumstance by national law would not be a sufficient ground for exclusion. Therefore, a high threshold is required to apply article 27(2).[110]

The article more relevant to the type of subject matter that may be excluded from patentability is 27(3) of the TRIPS Agreement. Members may exclude plants, animals and essential biological processes.[111] 'Essential biological process' is thought to depend on the degree of technical intervention involved in creating a process.[112] The greater the need for intervention to create the process, the less likely the process is classified as essentially biological and the more likely it is patentable.[113] Be this as it may, a close look at the provision also reveals that all countries must provide patent protection on micro-organisms (such as viruses, algae, and bacteria), non-biological and biological processes.[114] Members have the obligation to grant patents and cannot exclude these from patentability. Such processes would cover genetically modified organisms giving the owner of the patent exclusive rights over the plants obtained by using the process. What constitutes micro-organisms, non-biological and biological processes are not defined under the agreement which opens the door to different interpretations. The language of article 27 invites much confusion and a wide range of interpretations. For instance, most developing countries are not sure how TRIPS distinguishes plants, animals, and micro-organisms.[115]

Though Article 27(3) (b) creates exceptions for patentability, member states are required to provide a minimum level of protection for plant varieties. Members are required to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by a combination of

[109] Haugen, supra note 54, at 234.
[110] Ibid.
[111] TRIPS Agreement, Supra note 72, Article 27(3)(b).
[112] Smith, supra note 88, at 162.
[113] Ibid.
[114] Jonathan Curci, *The New Challenges to the International Patentability of Biotechnology: Legal Relations between the WTO Treaty on trade-Related Aspects of Intellectual Property Rights and the Convention on Biological Diversity*, 2 Int'l L. & Mgmt. Rev.1 (2005) at 7, See also TRIPS Agreement, supra note 72, Article 27(2)(b).
[115] Id. at 8.

both.[116] The impact of a patent system on the realization of the right to food has been discussed above. Members are given other option-designing a *sui generis* system for protection of plant varieties. What may constitute *sui generis* and its implications on realizing food security is discussed in the section that follows.

4.2 The Sui generis System Option

The TRIPS Agreement does not provide a definition of the *sui generis* system. As a general term, a *sui generis* system is understood to mean "of its own kind" or "unique."[117] In addition to the lack of definition of what the *sui generis* system is, the TRIPS Agreement also requires that such a system must be 'effective.' Unfortunately, what constitutes an 'effective *sui generis'* system is not explained. Though it can be said that *sui generis* systems leave the option to members to design such system as they see fit, this does not mean that there is no minimum threshold that should be taken into account when designing such a system. The requirement for an 'effective' system under TRIPS is indicative that some conditions should be set to qualify the system under the TRIPS Agreement. The lack of definition under TRIPS as to what is an 'effective *sui generis'* has left countries to wonder what kind of *sui generis* system would be consistent with the agreement. This has produced significant confusion for governments seeking to understand and implement their obligations under the TRIPS Agreement.[118]

There are minimum requirements for a *sui generis system*. The wording of the provision is indicative of this fact as it conditions it with the effectiveness test. Though these minimum requirements are not provided under TRIPS, Leskien and Flinter identify different minimum requirements for *sui generis* systems to qualify them as consistent with the TRIPS Agreement. They identified the requirements based on the context of Article 27(3) (b), the context of the agreement as an integral part of the WTO Agreement and from the objectives of the TRIPS Agreement. They have identified the following requirements to qualify as an effective *sui generis* system:

1) The laws of member states have to provide protection of plant varieties of all species and botanical genera;

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[116] TRIPS Agreement, supra note 72, Article 27(3).

[117] Laurence R. Helfer, *Intellectual Property Rights in Plant Varieties: An Overview with Options for National Governments (*2002),(FAO legal Papers Online # 31) at 31. Available at: http://www.fao.org/Legal/Prs-OL/lpo31.pdf , (accessed on April 20, 2008).

[118] Id.

2) The *sui generis* system has to be an intellectual property right. In other words, plant breeders must be conferred with either an exclusive right to control specific acts with respect to the protected varieties or at least the right to remuneration when third parties engage in certain acts;

3) The *sui generis* system needs to comply with the national treatment principle. Member states have to accord the same treatment to foreign nationals with nationals;

4) Members should provide most favored nation treatment;

5) Enforcement mechanisms should be provided in order to enable action against any infringement of rights.[119]

The lack of clear guidance on how the minimum requirements can be met to design a TRIPS-compatible *sui generis* system is responsible for much of the debate and confusion surrounding this issue. In a situation where the TRIPS Agreement fails to set substantive standards, the choice of a *sui generis* system is believed to be narrowed by the effectiveness requirement. The lack of many international instruments that deal with this issue has added fuel to the debate. The only international instrument that deals with *sui generis* system is the International Union for the Protection of New Varieties of Plants (UPOV).[120] Many developed countries assume that UPOV is the model for establishing a minimum standard for a *sui generis* system.[121] In the absence of any model referenced by the TRIPS Agreement, there is a concern that developing countries may end up joining UPOV or designing their own *sui generis* system in line with UPOV requirements.

The main problem with the 1991 UPOV Convention is that the scope of the right it grants to breeders and the lack of adequate protection it provides for farmers' rights. More specifically, UPOV recognizes the exclusive rights of individual plant breeders which provides a requirement of authorization of the breeder for acts such as production or reproduction, conditioning for the purpose of propagating, offering for sale, commercializing, including exporting and importing them, and stocking for production or

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[119] Dan Leskien and Michael Flitner, *Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System*, (1997), (Issue in genetic Resources No. 6) at 26. Available at: http://www.bioviersityinternational.org/publications/pdf/497.pdf , (accessed on May 5th,2008).

[120] UPOV refers to the Convention for Plant variety Protection. It was first signed in 1961 and later amended in 1978 and 1991.

[121] Srividhya Ragavan & Jamie Mayer O'Shields, *Has India Addressed its Farmers Woes? A Story of Plant Protection Issues*, 20 Geo. Int'l Envtl. L. Rev. 97, (2007) at 98.

commercialization.[122] The 1991 UPOV Convention further extends exclusive rights of the breeder to include harvested material, including entire plants or parts of plants obtained through the use of the protected material.[123] Hence, the breeder can license others to produce the variety but reserve to himself the right to sell, exchange or export the product thereby making such use tantamount to infringing upon the breeder's right.[124] This excludes farmers from selling their harvested materials unless authorized by the breeder to do so.[125] The UPOV Convention seems to confer excessive rights for breeders while farmers' rights are marginalized.

However, there are some exceptions provided for farmers' rights. Though under UPOV 1991 unlicensed multiplication of seeds irrespective of the purpose is an infringement, it provides an exception that would in fact restrict breeders' rights. UPOV 1991 allows contracting parties to restrict the breeder's right in relation to any variety so as to allow farmers to use for propagating purposes of the product of harvest which they have obtained by planting on their own holdings.[126] Hence, if contracting parties do not expressly allow farmers to replant their harvest, farmers will not be allowed to save the seeds of their harvest to replant them.

The phrase "which they have obtained by planting on their own holding" is an indication that farmers cannot replant seeds of protected varieties which they have received them from others. This effectively prevents farmers from exchanging seeds between one another. For farmers who in general do not have other sources of income, preventing them from selling and exchanging their harvest is still another policy which prevents the realization of the right to food. Therefore, as Ragavan and O'Shields note, the UPOV's main deficiency is its inability to move away from the patent model.[127]

Though the TRIPS Agreement does not make reference to UPOV and countries are technically not obliged to design their laws in accordance with this agreement, in practice countries are being forced into using such agreements. Developing countries are sometimes pressured by the US and other developed countries to sign bilateral agreements that require them to

[122] Internatonal Union for the Protection of New Varieties of Plants (UPOV 1991), Article 14(1).
[123] Id. Article 14(2).
[124] Verma, supra note 7, at 284.
[125] Ibid.
[126] UPOV 1991, supra note 122, Article 15(2).
[127] Ragavan and O'Shields, supra note 120, at 112.

modify their domestic laws according to Western standards.[128] Notwithstanding the numerous concerns raised by TRIPS regarding biological resources, developed countries entering into bilateral agreements impose the UPOV Convention as the "effective *sui generis*" protection model.[129] Negotiations on bilateral agreements are taking place under the threat of trade sanctions which forces many developing countries to concede to the terms of the developed countries.[130] For instance, a bilateral agreement between Ecuador and the US which provided for the protection of plant varieties through patents or a system compatible with UPOV, failed to be ratified only after massive protest.[131]

In some cases developed countries in bilateral agreements provide patent protection for plants and animals. This is true for Jordan, Mongolia, Nicaragua, Sri Lanka and Vietnam.[132] The lack of clarity as to the scope of effective *sui generis* has opened a door for developed countries to argue that UPOV provides the minimum requirement for plant varieties protection. On this ground, they push developing countries into accepting such model for plant varieties protection.

4.3 Biopiracy

The increased profitability and commercialization of biotechnology has led to increased concern regarding the issue of biopiracy and biotechnology's effect on biological resources.[133] Biopiracy refers to the acquisition of patents for commercial interests, for example those granted to private enterprises based in the developed world over biological resources and associated knowledge from the developing world used to develop seeds or other products.[134] The period since the 1990s has witnessed an increasing interest on the part of multinational companies regarding the biological resources and associated knowledge of local communities in developing

[128] Peter Straub, *Farmers in the IP Wrench – How Patents on Gene-Modified Crops Violate the Right to Food in Developing Countries*, 29 Hastings Int'l & Comp. L. Rev. 187 (2006) at 193.
[129] Curci, supra note 113, at 32.
[130] Straub, supra note 127, at 208.
[131] Ibid.
[132] Curci, supra note 113, at 32.
[133] Valentina Tejera, *Tripping Over Property Rights: Is It Possible to Reconcile the Convention on Biological Diversity With Article 27 of the TRIPS Agreement?* 33 New Eng. L. Rev. 967 (1999) at 971.
[134] WanjiruMwangi, supra note 100, at 68.

countries which has resulted in high levels of biopiracy.[135] Corporations in the developed world have historically claimed ownership of many genetic resources in the developing world including basmati rice and mayacoba bean.[136] This has been exacerbated mainly because of the fact that while products or processes of such companies have been given higher protection under TRIPS, TRIPS has failed to give protection of biological resources and associated knowledge to local communities.

There are significant implications from such practices. Many developing countries may be obliged to buy back resources which were originally taken from them and will not be rewarded any benefits from the sale of the products which are made from the resources of local communities. It may also prevent local communities from using what may originally have belonged to their community.[137] For instance, community based traditional knowledge and farming practices form the basis of scientific breeding.[138] Since such knowledge and resources are not protected under TRIPS, it might easily open a door for misappropriation by enterprises. Hence, plant breeding right conferred on the basis of the current intellectual property system can lead to a situation where farmers or indigenous people would not have access to their own plant breeding techniques and may have to buy the seeds back at higher prices.[139] Such unfair intellectual property system does not effectively protect the biological resources of local communities and instead works to the detriment of local people in their attempt to ensure that they have adequate food.

The implications of biopiracy also extend to a situation where local communities are obliged to pay royalties on the sale of their own harvested seeds or are prohibited from marketing their harvests without the consent of the patent holder. The Enola case is a good example of this. In this case, a

[135] Biopiracy refers to the way in which developed countries benefit from biological resources of developing countries illegitimately. While Developed Countries accuse developing world of intellectual piracy, developing countries accuse industrialized countries of biopiracy. The term was coined by developing countries as a counterattack strategy to show the misappropriation of genetic resources by multinational companies in the developed countries. See Jonathan Curci, supra noten113, at 17.

[136] Erin Donovan, Beans, Beans, *The Patented Fruit: The Growing International Conflict over the Ownership of Life*, 25 Loy. L. A. Int'l & Comp. L. Rev. 117 (2002) at 118.

[137] Kunal Mahamuni, *TRIPS and Developing Countries: The Impact on Plant Varieties and Traditional Knowledge*, Int. T. L. R. 2006, 12(6), (2006) at 137.

[138] Gray, supra note 93, at 34.

[139] Ibid.

community where the staple been which was consumed regularly for many years was prohibited from being marketed in the US and anyone who imported the bean and sold it in the market without paying royalties was considered as infringing the right of the patent holder.

The Enola been is an alleged case of biopiracy, where Larry Procter, the president of seed company POD-NERS, LLC cultivated a yellow bean variety he bought in Mexico for which he received a US patent two years later covering all yellow beans of this variety.[140] Procter admitted that the Enola bean is a descendant of the traditional Mexican known as Mayacoba in Mexico but argued that it has a better yellow color and a more consistent shape.[141]

With the patent, Procter had an exclusive monopoly on yellow beans and could exclude the importation and sale of any yellow bean that exhibited the yellow shade of the Enola beans.[142] Hence, he could sue anyone in the US who sold or grew a bean that he considered to be "his own" particular shade of yellow. Procter also benefited from yellow beans imported from Mexico by imposing on them a six cent-per-pound royalty.[143] Therefore, the patent had given a right over a bean which local Mexicans have been using for many years. However, the patent did not limit the sale or growing of beans identical to Procter's but extended to any bean which shared the particular yellow shade. The beans from Mexico were then either prohibited from being imported to the US or subject to payment of royalties when sold. In this case, a person who misappropriated seeds has effectively prevented local communities from selling or growing of the bean that was taken from them. This has had severe consequences on the people who depended upon the bean for their livelihood.

To protect the patent holder of the Enola bean aggressive enforcement measures were taken which include inspection of the seeds at the US-Mexico border searching for any patent infringing beans being imported to the US market.[144] Such measures coupled with the obligation to pay royalties for the sale of the bean had resulted in a sharp decline in exports of this bean from

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[140] Daniel Goldberg, *Jack and the Enola Bean*, (2003) Available at: http//www.american.edu/TED/enola- bean.htm.

[141] Ibid.

[142] Gillian N. Rattray, *The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips*, 2002 Duke L. & Tech. Rev. 8 (2002) at 2.

[143] See Goldberg, supra note 139.

[144] Rattray, supra note 141, at 11.

Mexico to US driving many Mexican farmers out of the market.[145] They were forced to shift to other crops or were confined to cultivation and sale of the mayocoba bean instead.[146] The production of the yellow bean fell from 250,000 tons to 96,000 tons in the year 2001[147] and the export sale of the bean dropped by over 90%[148] creating significant economic hardship to many farmers in Mexico.

5. Conclusion and Proposals for Reform

Considering the right to food as merely political aspiration is a gross misconception. To argue that social and economic rights such as the right to food are not real rights is flawed. Progressive realization does not mean postponement of obligations but rather imposes some minimum obligations that states must undertake that are reasonably within reach. States have obligations to make reasonable efforts to realize the right to food for their citizens. Accordingly, member states of the WTO, individually and collectively, have the obligation to take into account the right to food when negotiating trade agreements. Member states of the WTO should avoid provisions in agreements which pose threats to the realization of the right to food.

The TRIPS Agreement has critical implications on the right to food. The objective and principles of the agreement do not provide states with the necessary policy space to take measures for the realization of the right to food as they are conditioned in the consistency of the substantive provisions of the agreement. This undermines the efforts to be made for the realization of the right to food. The principles and objectives of the agreement should be stated in such a way that they serve as guiding principles rather than being subject to the substantive provisions.

The patent system in the TRIPS Agreement does not strike the necessary balance between the right of patent holders and the public who depends on agricultural products and processes. The patent system gives exclusive rights for holders who eventually will limit the use of such products to the detriment of those who depend on them, limiting the realization of the

[145] See Donovan, supra note 135.
[146] Ibid.
[147] Ibid.
[148] The reduction in the export sale was not limited to mayocoba bean. It had an impact in other beans too. See Rattray, supra note 141, at 11.

right to food. The system should make some exceptions to allow subsistence farmers to freely replant, exchange or sell seeds. This privilege should not extend to large-scale farmers as policies must allow patent holders to recoup their costs and maintain incentives for innovation.

In order for farmers to access patented products or processes, the period of exclusive right conferred on patent holders should also be reduced from twenty years to fifteen years for agricultural patented products or processes. This will make such products or processes part of the public domain in a shorter period of time.

The patent system should also respond to current developments. Of particular concern is the introduction of Genetic Use Restriction Technology (The Terminator Technology). This technology makes it impossible for farmers to replant a seed after a first harvest because the seeds are made incapable of growing after the first harvest. This obliges farmers to buy seeds after every harvest making them dependent on the corporations that sell the seeds. This can have severe consequences on the realization of the right to food if countries take different positions on the use of such technology. The TRIPS Agreement should respond by expressly banning the use of such technology. The agreement should impose an obligation to prohibit the patentability of such technology on all countries.

In order to allow countries to fully utilize the flexibility of the *sui generis* system, the TRIPS Agreement should clarify the ambiguities. The current provision invites much confusion and wide-ranging interpretations. Many developing countries are concerned with the type of *sui generis* system that would be consistent with the TRIPS Agreement. This has an impact on implementing a system that would help realize the right to food. A well-defined *sui generis* system is needed to avoid problems with implementation.

The lack of protection of genetic resources and associated knowledge under TRIPS has led to wide biopiracy. This in turn has resulted in forcing local communities to buy back products such as seeds which originally were taken from them. Farmers are often forced to buy back products important for increasing production or improving the quality of crops at higher prices without receiving benefits from the proceeds of the products derived from local resources. What is more, farmers may also be prevented from marketing their products without the consent of a patent holder who misappropriated the resources as can be seen in the Enola Case. This often results in great economic hardships for local communities. Hence, the protection of genetic

resources under TRIPS is also needed to avert some of the dangers posed by biopiracy.

There are apparent inconsistencies between the TRIPS Agreement and international human rights law concerning the right to food. The TRIPS Agreement does not satisfy the requirements of international human rights conventions concerning the right to food. The policy space necessary for developing countries to undertake obligations of the right to food is limited by intellectual property rights embodied under the TRIPS Agreement.

Negotiations under the Doha Development Agenda on the TRIPS Agreement should bring the agreement into conformity with international human rights law concerning the right to food. The objectives and principles of the TRIPS Agreement should be guiding principles rather than making their application conditional upon the substantive provisions of the agreement. The agreement should clarify the ambiguities of an effective *sui generis* system. It should also expressly incorporate a *sui generis* system that would give developing countries the necessary policy space to implement their obligations of the right to food under international conventions and national laws and/or policies. The TRIPS Agreement should also expressly incorporate system of protection for genetic resources of local communities to avert some of the dangers to the right to food posed by biopiracy.

Transitional Justice Through Prosecution: The Ethiopian Red Terror Trials in Retrospect

Alebachew B. Enyew*

Abstract

Ethiopia is perhaps the first African country which brought the entire regime before the national court for the heinous crimes committed while in power. In this regard, it is said that the Red Terror Trial is considered as Africa's glaring example of retributive justice; just as the Truth and Reconciliation Commission (TRC) was Africa's contribution to restorative justice.[1] *Soon after the demise of the Derg regime, the new government of Ethiopia decided to address the past state-sponsored human rights violations through judicial means. In accordance with this decision, the Office of Special Prosecutor charged over 5000 members of the defunct regime for the past human rights violations. At the beginning, the decision to prosecute the perpetrators received a great appreciation from inside and outside thinking that the process would heal the wounds of the society, prevent the recurrence of such kind of atrocities in the future, and bring the culture of impunity to an end. However, through the passage of time, it appears that the process has failed to ensure accountability for the past human rights violations while respecting the rights of the defendants in conformity with the international human rights standards and domestic law. Specifically there had been lengthy pre-trial detentions, violations of the rights of speedy trial and of the rights to counsel. Besides, the process has received low public attention. This, in turn, limits significance of the process in providing a lesson to the public. In this article, it is intended to canvass Red Terror Trials as response to past gross human rights violations, and to examine the process from the perspective of the defendants' rights. In view of this, this article has two parts: part I will begin with an overview of transitional justice; and part II will deal with Red Terror Trials.*

1 Introduction

1.1 The Notion of Transitional Justice

The notion of transitional justice has captured much attention and begun to be considered as subfield of human rights that addresses past human rights violations by using judicial and/or non-judicial mechanisms. According to Charles T. Call, transitional justice holds broader significance for giving birth

*LL.B(AAU), LL.M(UIO), M.Phil.(UIO); alebe2007@gmail.com

[1] Kjetil Tronvoll et al, The Red Terror Trials: the Context of Transitional Justice in Ethiopia, in Kjetil et al. (eds.), The Ethiopian Red Terror Trials: Transitional Justice Challenged, Oxford, James Currey Publishers, (2008), p.13.

to "an array of innovative and evolving instruments to expose and punish human rights abusers," and having had "an unexpected influence on state sovereignty and on hopes for global justice."[2] In the past, bringing a head of state or leaders of a country to justice was inconceivable. However, there have recently been an unprecedented number of indicted political leaders in the dock, or, the shadow of its threat: Slobodan Milosevic, Saddam Hussein, Augusto Pinochet, Charles Taylor, Alberto Fujimori, and Omer alBashir.[3]

Although the origin of transitional justice can be traced back to World War I, it came to be understood as both extraordinary and international in the post war period after 1945.[4] In the aftermath of World War II, the establishment of International Military Tribunals in Nuremberg and Tokyo as a reaction to the holocaust was one of the innovation of the international community. The prosecution of German and Japanese soldiers and their leaders for the crimes committed during the war has been remarkable from historical perspective, even though critics charged the tribunals with selective and politicized prosecutions and retroactive punishment.[5]

The term transitional justice does not have a single definition. It has been defined in various ways. According to Teitel, transitional justice can be defined as "conception of justice associated with periods of political change, characterized by legal responses to confront the wrong doing of repressive predecessor regimes."[6] This definition is criticized for ignoring war-torn societies and overvaluing legal responses. As the wording of the definition suggests it is confined to legal mechanism like prosecution without taking in to account other mechanism like truth commission. Besides, it presupposes repressive regime, which may not always be required for transitional justice. It disregards political transition from civil conflict in case of anarchism to peace.

In its broadest sense, "transitional justice refers to how societies 'transitioning' from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek reconciliation, and how they create

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[2] Charles Call, Is Transitional Justice Really Just?, *The Brown Journal of World Affairs*, Vol. XI, issue 1, Watson Institute for International Studies, (2004), p.101.

[3] Ruti Teitel, Transitional Justice: Post War Legacies, *Cardozo Law Review*, Vol.27:4, (2006), P.1.

[4] Ruti Teitel, Transitional Justice Genealogy, *Harvard Human Rights Journal*, Vol.16, (2003), p.1.

[5] Martha Minow, Innovating Responses to the Past: Human Rights Institutions, in Nigel Biggar(ed.), Burying the Past: Making Peace and Doing Justice After Civil Conflict, Washington, D.C., Georgetown University Press, (2003), p.88.

[6] Ruti Teitel, *supra note* 4, p.1.

justice system so as to prevent future human rights violations."[7] This definition appears to solve the shortcoming of the previous definition.

Furthermore, the United Nations Secretary General, in his 2004 report on transitional justice and rule of law, has given a comprehensive definition for transitional justice in the following terms.

> *The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*[8]

As per this definition, transitional justice refers to a range of mechanisms or processes that societies in transition may use to address past human rights wrongs caused by conflict, repressive rule or state failure and includes both judicial and non-judicial approaches like trials, truth commissions, memorials and institutional reform initiatives. Transitional societies have attempted various approaches to serve justice and to attain either individual or collective accountability for the past human rights violations. These approaches are seen to clarify the human rights records, identify victims and perpetrators, to provide reparations to the former and prosecute the latter.

1.2 Models of Transitional Justice

As the name suggests transition involves a passage or journey from one stage to another. This, of course, begs the question of transition from what to what and how. The transformation can be either from repressive rule to the democratic order or from armed conflict to peace. In some cases these two may overlap. The divergence of opinion comes to exist in relation to the question of how to transit or how to deal with the past during transition. In this regard, scholars do not agree on how to deal with the past human rights atrocities even

[7] Charles Call, *supra note* 2, p.101.

[8] The UN Secretary General Report, the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, (2004), S/2004/616, para. 8.

if they appear to hold similar opinion in addressing the legacies of human rights violations. Particularly there is strong debate among scholars on the most effective ways of achieving justice, peace and reconciliation, suggesting a dichotomy between judicial approaches (what some authors call retributive justice) and non-judicial approaches (what some authors call reconciliatory justice or restorative justice).[9] Some others advocate the combination of the two mechanisms by reconstructing the truth, reconciling the parties and prosecuting those responsible for committing massive breaches of human rights. Various transitional societies have attempted one or both of these approaches to discover the truth about the past human rights wrongs, to attain some form of accountability, and thereby to create a stable future.

As noted above, the debate revolves around the question of either to prosecute or forgive or combine the two during transition. It has recently been understood as a dilemma between justice and peace. Put differently, the key issue that emerged in transitional justice has been the question of making peace or doing justice: should we punish massive human rights violations committed under old regimes or give amnesty for the sake of peace and reconciliation? Should transitional regimes buy peace at the price of justice or vice-versa? Are peace and justice mutually exclusive? The tension between peace and justice is the extension of the debate on the mechanisms of transitional justice. Arguments forwarded by proponents of each models of transitional justice are as follows.

1.2.1 Prosecution

Transition to democratic order is usually linked with prosecution and punishment of the old regime. The use of judicial prosecutions is ranging from entirely domestic prosecution by national courts to international intervention through hybrid courts, ad hoc tribunals and permanent courts. Many advocate that prosecution and punishment is the best response to human rights abuses. For them, failure to prosecute such crimes amounts to a tacit endorsement. Besides, it is usually perceived that non-prosecution of gross human rights violations of prior regimes constitutes a subjugation of justice to political compromise.[10] Prosecution, they argue, promotes stability, the rule of law,

[9] Yolanda Gamarra Chopo, Peace with Justice: the Role of Prosecution in Peace Making and Reconciliation, a paper, (2007), p.2.

[10] Kobina Daniel, Amnesty as a Tool of Transitional Justice: the South African Truth and Reconciliation Commission in Profile, Dissertation, Law Faculty of Pretoria University, South Africa, (2001), p.1.

democracy, and deterrence of the commission of atrocities; ensures accountability; and appropriately punishes atrocity perpetrators.[11] And hence failure to prosecute and punish offenders of human rights abuses in times of transition is detrimental to the rule of law and reconciliation at the interpersonal level and to the society at large in its quest for future accountable democratic order. Besides, as one can understand, for instance, from article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, article 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or punishment, and the four Geneva Conventions, states are duty bound to prosecute and punish the perpetrators of the atrocities. Hence, states should include criminal investigation and prosecution as a means to provide justice for the victims and their survivors.

According to this line of argument, prosecution helps legitimate the new government and demonstrates its commitment to address the past and to respect human rights. If the new democratic regime does not establish a precedent for punishing gross violations of human rights, then at some future date the new regime may resort to authoritarianism, or that the democratic order may be toppled by those who believe that there is no cost to human rights violations.[12]

Prosecution is very important for the determination of individual responsibility and not assigning that responsibility to the entire group so that the latter not be blamed for the atrocities committed by just certain members.[13] This, in effect, avoids the trap of collective guilt which inevitably falls along ethnic lines or a group and forestalls collective revenge. This option focuses on pursuing justice through individual responsibility which has an important role in preventing the recurrence of human rights violations. By prosecuting individual perpetrators and holding them criminally responsible for their actions, the aim is to deter them and others from committing such crimes again in the future.[14] Moreover, it is important to create historical record of events and atrocities. In sum, the advocates of this option have the following to say:

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[11] Zachary Kaufman, The Future of Transitional Justice, Stair 1, No.1, (2005), p.66.

[12] Maryam Kamali, Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa, *Columbia Journal of Transnational Law*, (2001), p.100

[13] Mieter Magsam, Coming to the Terms with Genocide in Rwanda: the Role of International and National Justice, in Walfgang Kaleck *et.al.*(eds.), International Prosecution of Human Rights Crimes, German, Berlin Heidelberg press, (2007), p.164.

[14] Yolanda Gamarra Chopo, *supra note* 9, p.24.

> *Seeking justice through the institutions of the law is the best means of determining responsibility for acts of genocide, war crimes, and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for the society as a whole. By holding individuals responsible for their misdeeds, criminal trials may also deter the commission of abuses in the future. Moreover if conducted in strict accordance with legal due process, prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.*[15]

1.2.2 Amnesty and Reconciliation

The second option is amnesty and reconciliation a mechanism whereby an authority grants a pardon for the past offenses.[16] This approach may entail the establishment of a truth commission aiming to uncover the truth about the past atrocities, rather than to punish the perpetrators. There are two amnesty options: conditional and unconditional amnesties. Conditional amnesty is granted in exchange for truthful testimony, including the option of prosecution if that testimony were judged incomplete or untruthful.[17] The Truth and Reconciliation Commission of South Africa can be cited as an example of this kind. For granting of amnesty for the wrongs of apartheid, political motivation for the crime and full disclosure of the facts in a public hearing under cross-examination were required.[18] Those who failed to meet these two conditions were exposed to prosecution. Whereas unconditional amnesty (which usually

[15] Donald Hafner and Elizabeth King, Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability can and should Work Together, *Boston College International and Comparative Law Review*, Vol.30:91, (2007), p.93.
[16] Zachary Kaufman, *supra note* 11, p.63.
[17] *Ibid*
[18] Yolanda Gamarra Chopo, *supra note* 9, p.10.

does not entail truth commission) grants a general amnesty to alleged atrocity perpetrators not based on the breadth or accuracy of testimony or any other condition.[19] Amnesty and reconciliation focuses on the healing and renewal of community relationships.

Advocates argue that overcoming past crimes and injuries will necessitate forward-looking strategies associated with truth telling, forgiveness, reconciliation and rehabilitation. They criticize the proponents of prosecution for assuming that prosecution will be possible in the wake of human rights disasters. Besides, prosecution may prove to be expensive and slow, and may also perpetuate a cycle of vengeance. Not only is an amnesty for human rights abuses often a precondition for securing a smooth political transition, they argue, but many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively.[20] They contend that prosecution has only worked in cases where the military has lost power. Where the old regime's military is powerful, attempts to prosecute its members may spark rebellion. In support of this some argue that the South African reasonably peaceful transition from repression to democracy would instead have become a bloodbath if prosecution had been used without some amnesty provisions.[21] It is mainly because the transitional South African government relied on the military and police of the former white minority regime, and their demands for amnesty had to be met before any change in the government could take place. In such cases, a policy of amnesty and reconciliation is the best way to protect the new democracy. Fragile democracies may be undermined by politically charged trials by increasing rather than decreasing the possibility of renewed conflict.[22] They also put their fear saying that after transition such trials may be politically motivated against opponents of the new regime (so called victor's justice).

In sum, truth and reconciliation commissions are very important to:

> *(i) further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization; (ii) promote a kind of*

[19] Zachary Kuafman , *supra note* 11, p. 63.

[20] Miriam Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, *Harvard Human Rights Journal*, Vol. 15, (2002), p.1.

[21] Maryam Kamali, *supra note* 12, p.121.

[22] Christine Bell, Peace Agreements and Human Rights, New York, Oxford University Press, (2000), p.271.

> *historical catharsis through public exposure of crimes; (iii) delve into historical, social, and political roots of the crimes; (iv) establish a historical record of the atrocities committed; and (v) prevent or render superfluous long trials against thousands of the alleged perpetrators.*[23]

On the other hand, opponents argue that the flaws of these commissions should not be underestimated; they have proved unable to bring about real and lasting reconciliation in many cases.[24] In addition, amnesty undermines the international legal regime on the protection and promotion of human rights and rule of law. Such process tends to send the wrong signal that impunity is an accepted culture; thereby setting the stage for future abuses by political leaders. Owing to this, the viability of amnesty as alternative to a predominantly prosecution-based transitional policy has become more doubtful in light of recent developments in international law.[25] Particularly, third-country prosecution (universal jurisdiction on core crimes) and prosecution before the International Criminal Court (ICC) could lead to a decline in the attractiveness of amnesty as an alternative mechanism.

1.2.3 A Combined Model

As it can be understood from the above arguments, the two approaches of transitional justice are deemed to be fundamentally at odds with each other without having anything in common. And it is traditionally believed that a society must choose one or the other.[26] This view has, however, been challenged by a third alternative approach arguing that transitional societies must strive to realize both retribution and restoration, and balance them in appropriate way. This approach is to combine retribution and reconciliation, with selective prosecutions those who committed egregious crimes or of those who did not step forward to ask for amnesty as in the case of South Africa.[27]

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[23] Antonio Cassese, International Criminal Law, New York, Oxford University Press, (2003), p.10.

[24] *Ibid.*

[25] Antje du Bois_Pedain, Transitional Amnesty in South Africa, United Kingdom, *Cambridge University Press*, (2007), p.300.

[26] Frank Hadmann, A Different Kind of Justice: Transitional Justice as Recognition, a paper, (2006), p.4.

[27] Maryam Kamali, *supra note* 12, p.100.

Transitional justice should not only be understood as backward-looking: punishing wrong-doers, compensating victims for their losses and revealing the truth about the past; but as forward-looking terms.[28] Pursuant to this alternative, peace and justice are not mutually exclusive, but rather mutually reinforcing imperatives. Each model of transitional justice addresses a particular need on the part of victims, and indeed for the society at large.[29] Thus, our approach to transitional justice must be comprehensive.

The purpose of the discussion is not to champion any of the specific alternatives. Rather it is hoped to elucidate the ongoing contrasts different models of transitional justice. As a matter of fact, there is no single formula applicable for all transitional societies. Some argue that the choice between prosecution and non-prosecution alternatives should depend on what one is seeking to achieve. For instance, some societies emerging from mass trauma may demand retribution, while others may focus on compensation; still others may concentrate on strengthening democratic institutions.[30] If different societies want different things, and if prosecution is a more effective tool for achieving some goals than others, we can not presuppose that all societies in transition should choose prosecution.[31] Here one should not be unmindful of the role and the interest of the international community in affecting the choice of mechanisms since grave human rights violations, as opposed to ordinary crimes, are not merely offenses on the particular traumatized society but on humanity as whole. The choice can not be left solely to either the local society or the international community. Thus, transitional justice must reflect the needs, desires, and political realities of the victimized society, while at the same time recognizing the international community's rights and responsibility to intervene.[32] In view of this, some authors state that the key to achieving lasting peace is broadening and incorporating various approaches in order to include restitution, acknowledgement, apology, forgiveness, institutional reform and equality to retributive character of justice.[33]

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[28] Eric Posener and Adrian Vermeul, Transitional Justice as Ordinary Justice, *Harvard Law Review*, Vol.117:761, (2004), p.766.

[29] Andrea Armstrong, The Devil is the Details: the Challenges of Transitional Justice in Recent African Peace Agreements, *African Human Rights Law Journal*, vol.6 No.1, (2006), p.3.

[30] Miriam Aukerman , *supra note* 20, p.45.

[31] *Ibid*

[32] *Ibid*, p.47

[33] Yolanda Gamarra Chopo, *supra note* 9, p.31.

Various approaches of transitional justice are complementary. Bearing this in mind, in the next part we are going to discuss how Ethiopia has dealt with its past.

2. Transitional Justice in Ethiopia: Prosecution

2.1. Atrocities at a Glance

Ethiopia is a diverse country consisting of more than eighty ethnic groups with numerous languages.[34] From 1930-1974, despite its diversity, the country was under an autocratic monarchy ruled by one-man, Emperor Haile Selassie. Nevertheless, the Emperor created a modern state constituting of a structured, centralised government, local governments and a judicial system, all of which were governed by codified laws and a constitution.[35] However, there were no independent legislature and judiciary. The constitution gave recognition for the absolute power and prerogatives of the Emperor in lieu of putting restrictions. In the countryside, peasants were reduced into serfs forced to hand over more than half of their produce to their landlords. Thus, his long reign witnessed varied acts of political opposition including a couple of assassination attempts (in 1925 and in 1969).[36] Only a handful of his opponents were however executed since the Emperor's preferred mode of punishment was imprisonment, marginalization and banishment.[37]

In 1960s and 1970s, opposition to the rule of the Emperor crystallised among the educated in the capital city, Addis Ababa, and abroad in part as people became frustrated with the Emperor's lack of attention to economic development and his refusal to end the feudal system.[38] Several different groups including the military staged widespread protest while the government continued to be unresponsive to the political and economic demands of its people. The Provisional Military Administration Council (in Amharic *Derg*) was formed by junior officers of the Ethiopian army on the eve of the 1974 Popular Revolution. Finally the *Derg* managed to overthrow the monarchy through a widespread uprising without bloodshed and came to power on September 12, 1974.

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[34] Julie Mayfield, The Prosecution of War Criminals and Respect for Human Rights: Ethiopia's Balance Act, *Emory International Law Review*, Vol. 9, (1995), p.556.

[35] *Ibid* p.557.

[36] Bahru Zewde, The History of the Red Terror, in Kjetil Tronvoll et al. (eds.), *supra note 1*, p.28.

[37] *Ibid*

[38] Julie Mayfield, *supra note 34*, p.557.

The revolution appeared to be successful without any bloodshed at the beginning. However soon after the change of the regime, the *Derg* cracked on the military units which precipitated the death of Lt.General Aman Andom (the first leader of the *Derg*) and the execution of sixty former government officials in November 1974.[39] From then on, the *Derg* abandoned the slogan of bloodless revolution; and much blood had to follow.

Following the revolution, splits appeared between different radical elements as reflection of pre-existing divisions in student movement: the Ethiopian People's Revolutionary Party (EPRP) as one group, and the All-Ethiopia Socialist Movement (Amharic acronym MEISON) another.[40] While two of them espoused an almost indistinguishable brand of Marxism, MEISON supported and worked with the *Derg*, and the EPRP opposed the idea of revolution imposed from above, instead called the establishment of provisional people's government.[41] The EPRP thus became enemy of the *Derg.*

After having crushed the ruling class of the monarchy including the emperor, members of the royal family, ministers, senior officers of the army, landed aristocrats and the patriarch, the *Derg* turned face to the 'anti-revolutionaries' and 'anti-unity' elements which were accused of sabotaging the revolution.[42] The *Derg* began a campaign of the "Red Terror" against the EPRP (supported by most students and elites) claiming that the latter had started the "White Terror." The Red Terror was a campaign of urban counter-insurgency waged in the capital, Addis Ababa, and provincial towns against the campaign of which the *Derg* called White Terror advanced by EPRP.[43] At beginning of the Red Terror, the *Derg* and its ally MEISON launched a massive campaign against EPRP which resulted in hundreds of members and sympathizers of the latter to be incarcerated. The EPRP, on its part, began to kill the cadres and leaders of the opposite camp by invoking the act of self-defence. As result, the *Derg* brutally began to kill people suspected of EPRP membership and left the bodies on the streets as a warning to others. After some time, the EPRP lost its prominent members and leaders, and the *Derg* turned its attention to its own ally, MEISON. As a consequence, many

[39] Bahru Zewde, *supra note* 36, p.31.

[40] Human Rights Watch, Evil Days: 30 Years of War and Famine in Ethiopia, New York, An African Watch Report, (1991), p.101.

[41] Julie Mayfield, *supra note* 34, p.559.

[42] Firew Kebede, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice*, (2007), p.3.

[43] Human Rights Watch/Africa, Ethiopia: Reckoning under the Law, New York, Human Rights Watch, (1994), p.7.

members of MEISON were killed. At the climax stage of the terror, every revolutionary became a law unto him and had an unrestricted license to kill "counter-revolutionaries".[44] Both EPRP and MEISON became the target of the terror.

During the Red Terror, thousands of people were arrested, disappeared, tortured, and murdered. In some instances, families of the disappeared and murdered had to pay the government for the bullet wasted to kill their family member, and only by doing this could they recover the body.[45] No one knows how many people were exactly killed, imprisoned, or forced to flee abroad on account of the campaign of the Red Terror. According to Bahru Zewde, the generation gap left behind this Terror is akin to the gap that attended the Graziane's massacre of February 1937 during fascist Italy's occupation of Ethiopia, when the most agile and promising minds were targeted for liquidation.[46] The main target of the Red Terror was a generation of urban people with at least minimal education. Most agree that the best and the brightest perished in the process. In addition to the campaign of Red Terror, the *Derg* was fighting terrible wars with different ethnic-based insurgencies and with Somalia, which were marked by widespread human rights and humanitarian law violations.[47] Between 1976 and the late of 1980s, 1.5 million Ethiopians are estimated to have died, disappeared or been injured as a result of the Red Terror (1976-1978), famine manipulation, forced relocation, and collectivization programmes.[48]

2.2. Dealing with the Past

In May 1991 the communist/military regime headed by the former president Mengistu Hailemariam was overthrown by the military forces of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the Eritrean People's Liberation Front (EPLF), ending seventeen years of repressive rule by the *Derg* regime. Among the immediate problems facing the EPRDF was what to do with the high ranking *Derg* officials who carried out the Red Terror and were accused of committing atrocities against students, intellectuals and other

[44] Bahru Zewde, *supra note* 36, p.37.
[45] Julie Mayfield, *supra note* 34, p559.
[46] Bahru Zewde, *supra note* 36, p37.
[47] Human Rights Watch/Africa, *supra note* 43, p.7
[48] Firew Kebede, *supra note* 42, p.4

persons deemed a threat to the military junta.[49] The issue of how to address the past injustices became a crucial test of the newly established Ethiopian government as a transitional regime. The EPRDF had different choices to opt for in order to deal with the past human rights wrongs. Nonetheless, it decided to pursue criminal justice without, at least publicly, discussing other models of transitional justice, amnesty and reconciliation. In fact, there were indigenous options like amnesty that the Ethiopian government could have considered as an alternative or complementarily to the retributive justice.[50] According to the leaders of the current government of Ethiopia, there were three reasons to opt criminal prosecution during transition: first, the scope of human rights abuses is as heinous as to be a concern of the international community; second, a line needed to be drawn between the present and the past; and third, a court trial is a legal process that all Ethiopians were accustomed to and for which its judgement would be respected and perceived as impartial.[51] Actually, the contributory factors for the choice of criminal prosecution were the legacy of the past, the entire shift of balance of power and the international context at the time of the transition.[52]

When the EPRDF took power in 1991, it detained roughly 2000 former government officials, including *kebele* (smallest administrative units in the country) leaders and members, on the suspicion that they authorised or were in some way involved in the brutality of the *Derg* regime.[53] After a year of detention, the transitional government began to put a mechanism in place for handling the detainees who had to wait to be charged. Thus, in accordance with Proclamation No.22/92 of 8 August 1992, the Special Prosecutor's Office (SPO) was established and mandated to investigate and prosecute "any person having committed or was responsible for the commission of an offence by abusing his position in the party, the government or mass organisations under the *Derg* – Workers' Party of Ethiopia (WPE) regime."[54] As envisaged in article 6 and the preamble of the proclamation, the SPO mandate has two objectives: (1) to bring those criminally responsible for human rights violations

[49] Chuck Schaefer, The Derg Trial Versus Traditions of Restorative Justice in Ethiopia, in Kjetil Tronvoll et al. (eds.), *supra note* 1, p.88.
[50] *Id*, p.89.
[51] *Ibid*
[52]Dadimos Haile, Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: the Case of Ethiopia, Leuven, Leuven University Press, (2000), pp. 31-33.
[53] Human Rights Watch/Africa, *supra note* 43, p.14.
[54] Proclamation No. 22/92, Proclamation No. 22/1992, a Proclamation for the Establishment of the Special Prosecutors Office, *Negarit Gazeta*, (1992), article 6..

and/or corruption to justice, and (2) to establish for public knowledge and for posterity a historical record of the abuses of the *Derg* regime.

Pursuant to its mandate the SPO began the process of gathering evidence and interviewing witnesses. In fact, the initial stages of the SPO were also occupied with strengthening the office by hiring enough staff and raising money to expand its operation. The SPO created four teams, each of which focuses on the gathering of evidence relevant to a particular abuse committed by the *Derg* regime: the Red Terror, forced relocation, war crimes, and manipulation of famine relief.[55] In effect, the SPO came up with dozens of documentary evidence and a substantial amount of eyewitness testimony. In this respect, Mayfield pointed out that the SPO has done an immense amount of work in collecting and cataloguing evidence: 309,215 pages of relevant government documents (many with clear signatures of high ranking officials) were collected, and 3,000 witnesses were prepared.[56] In addition to this, forensic teams were searching for and exhuming dozens of mass graves which contain the bodies of murdered civilians.[57]

In view of the first objective, the SPO has brought over 5000 former leaders and other officials to justice for crimes allegedly committed while they were in power from 1974-1991.[58] The defendants were categorised into three main groups: (a) policy makers (146 defendants) - senior government officials and military commanders – those who deliberated on and designed the plan of genocide in their effort to eliminate their political opponent; (b) field commanders (2133 defendants) - both military and civilians who commanded the forces, groups and individuals that carried out the violations; (c) material offenders – individuals perpetrators (soldiers, police, officers, interrogators) who involved in material commission of the crime in line with the nation wide plan.[59]

In relation to its second objective, the SPO has not yet done anything separately. Article 6 of the enabling proclamation of the SPO has declared that investigating and instituting proceedings against any person responsible for the atrocities is within the power of the Office. However, this particular provision is silent about the task of establishing a historical record. Instead of being listed

[55] Julie Mayfield, *supra note* 34, p.564.
[56] *Ibid.*
[57] *Id*, p.565.
[58] Trial Observation and Information Project, Ethiopia's Red Terror Trials: Africa's First War Tribunal, Consolidated Summery and Reports from Trail Observations made from 1996-1999, Compiled by NIHR's Project, p.1.
[59] *Id*, P.5-6.

within the powers of the Office, such objective is only found in the preamble of the proclamation; which reads as follows: "it is in the interest of a just historical obligations to record for posterity the brutal offences, the embezzlement of property perpetrated against the people of Ethiopia and to educate the people and make them aware of those offences in order to prevent the recurrence of such a system of government."[60] Some argue that the omission of establishing a historical record from article 6 implies that establishing a historical record is not in the office's priority.[61] In this regard, this writer is of the opinion that the legislature deliberately omitted the task of establishing and recording the truth about the past from the said article, for such objective can be served through investigation and prosecution. In fact, large volumes of documentary evidence along with the testimonies of witnesses, and evidence from defendants' side can play a significant role in establishing a historical record. Thus, the omission is not to make the task of establishing historical record a secondary matter, rather to avoid an overlapping function of the Office.

2.3. Red Terror Trials

2.3.1. Charges

As said, with the missions to create a historical record of the alleged abuses of human rights of the former military regime, and to bring to justice those criminally responsible for heinous human rights violations, the Office of Special Prosecutor (SPO) carried out investigation and collected evidence. Following the investigation, in October 1994, the SPO launched charges against the 73 top *Derg* officials including the former president Mengistu before the Federal High Court. The charges filed against these officials were based on genocide in violation of article 281 of the 1957 Penal Code of Ethiopia or alternatively on aggravated homicide, and wilful bodily injury in violation of articles 522 and 538 of the same code respectively, for it is possible to file alternative charges as per article 113 of the Ethiopian Criminal Procedure Code where it is doubtful as to what offence has been committed..[62]

[60] Proclamation No. 22/92, *supra note* 54, preamble.
[61] Dadimos Haile, *supra note* 52, p.29.
[62] *Special Prosecutor v. Mengistu Hailemariam et al*., Ethiopian Federal High Court, File No. 1/87, (2007)

Additionally, they were charged for the crimes of abuse of power and unlawful detention in violation of articles 414 and 416 of the Penal Code of Ethiopia.[63]

Three years later in December 1997, the SPO also charged a total number of 5,198 people (of whom 2,246 were already in detention, while 2,952 were charged in absentia) before the Federal High Court, and before regional Supreme Courts through delegation which otherwise falls under the jurisdiction of the Federal High Court.[64] The vast majority of defendants were charged with genocide and war crimes, and faced alternative charges of having committed aggravated homicide and wilful injury. For instance, the SPO prepared charges against fifty four defendants with war crimes as per article 282 of the Penal Code.[65] Under the 1957 Ethiopian Penal Code, war crimes are defined by cross-reference to customary international law and international humanitarian conventions.

According to Mayfield, at the beginning there was the question of whether domestic or international law should apply as a basis for charges; however, the SPO later decided to use the Ethiopian Penal Code.[66] The use of the domestic code in lieu of international law to file charges of genocide and war crimes was believed to provide the following advantages to the SPO.[67] First, the definition of genocide under article 281 of the Ethiopian Penal Code is broader than the generally accepted definition of genocide under international law. As defined under Genocide Convention, genocide consists of acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group…"[68] The Ethiopian Penal Code has expanded the list of targeted groups by adding political groups. Using the domestic code allowed the SPO to cast a more inclusive net, for the acts of the defunct regime had been directed at political groups like EPRP, MEISON and other insurgents. Article 281 of the Penal Code goes:

Genocide; Crimes against Humanity

Whosoever, with the intent to destroy, in whole or in part, a national, ethnic, racial, religious or political

[63] *Ibid*
[64] Trial Observation and Information project, *supra note* 58, p. 1.
[65] *Ibid*, P. 8.
[66] Julie Mayfield, *supra note* 34, p.572
[67] *Ibid*
[68] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

> *group, organises, orders, or engages in, be it in time of war or in time of peace:*
> *(a) killings, bodily harm, or serious injury to the physical or mental health of members of the group in anyway whatsoever; or*
> *(b) measures to prevent the propagation or continued survival of its members or their progeny; or*
> *(c) the compulsory movement or dispersion of people or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.*[69] (Emphasis added)

From the heading and the whole wording of this article, one can easily note three distinctive features of the Ethiopian Penal Code that are not envisaged in the 1948 Genocide Convention to which Ethiopia is a party since 1949. The first unique feature is inferred from the title of the provision which appears to treat genocide and crimes against humanity as a single offence. When we read the content of the article, it is more or less similar to the definition of genocide under international law. The inclusion of crimes against humanity under the definition of genocide severely limits the scope of application of the provision on a range of heinous violations of human rights that do not fit into the definition of genocide, but which would validly constitute crimes against humanity.[70] However, one can argue that crimes against humanity as an international crime has already acquired the status of customary law and existed as a distinct crime under international criminal law. Hence, the very strange merge of the two crimes under Ethiopia Penal Code can mean nothing in practice. The other unique feature of this article is the incorporation of the act of transferring people or children as constituting genocide which is not the case under international law; the latter refers only the transfer of children. Lastly, as per the Penal Code of Ethiopia, the crimes of genocide may be perpetrated against political groups in addition to ethnic, national, racial or religious groups. Acts targeting politically defined groups are excluded from the purview of article II of the Genocide Convention. The inclusion of political groups makes the Ethiopia criminal law different from the

[69] The Penal Code of the Empire of Ethiopia, *Negarit Gazeta*, Addis Ababa, (1957) article 281.
[70] Dadimos Haile, *supra note* 52, p.50-51.

Genocide Convention. In this regard, the Ethiopian Penal Code goes beyond what is stipulated in the Genocide Convention.

Second, the use of international law as an independent basis for charges of war crimes might pose problem since it has traditionally been conceived that international law requires the armed conflict to be international in scope.[71] And the alleged offences in Ethiopia had taken place in an internal armed conflict. To escape such limitation, the only way to charge the detainees with war crimes was to charge them by domestic law, which does not require the conflict to be international.

Third, the SPO might want to lay charges under the domestic code in order to use the death penalty, for the Ethiopian Penal Code provides for death penalty for crimes of homicide, genocide, crimes against humanity, and war crimes.[72] In fact, several death sentences were passed in the long series of Red Terror Trials.[73]

2.3.2. Proceedings

The main Red Terror Trial against the 73 top officials came to an end when the Ethiopian Federal High Court, after 12 years of trial, convicted all but one of the accused on 12 December 2006 for genocide, crimes against humanity and wilful bodily injury.[74] They were sentenced on 11 January 2007 for terms ranging from life to 23 years' of rigorous imprisonment. One defendant was acquitted.[75] Having been dissatisfied with the decision of the Federal High Court, the SPO filed an appeal before the Federal Supreme Court. So did the defendants for leniency of punishment. Eventually, the appellate court sentenced the former president Mengistu Hailemariam to death in his absence on 26 May 2008, along with 17 senior officials of his regime, overturning a previous life term on appeal. Of all the people originally charged, 33 had been in custody since 1991, 14 others had died in custody and 25 were tried in their absence including the former president Mengistu Hailemariam, who had asylum in Zimbabwe.[76]

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[71] Julie Mayfield, *supra note* 34, p.572.

[72] The Penal Code, *supra note* 69, articles 522, 281, 282.

[73] Amnesty International Report: the State of the World's Human Rights - Ethiopia, UK, The Alden Press, (2007), p.116.

[74] *Special Prosecutor V. Col. Mengistu Hailemariam et al., supra note* 62.

[75] *Asir Aleqa* Begashaw Goremessa (the 41th accused in the list) was acquitted since he defended the charges to the satisfaction of the court.

[76] Amnesty International Report, *supra note* 73, p.116.

Mengistu and his co-accused were charged with 211 counts of genocide and crimes against humanity, or alternatively with aggravated homicide and wilful bodily injury. After having been served with the statement of charges and given time to prepare their defence, the defendants through their legal counsels defended the charges on several grounds, including: immunity of the head of state, the status of article 281 of the penal code, illegal political groups, and statutory limitations. Now let us see the objections of the defence counsels, the counter-arguments of the SPO and the rulings of the court.

By citing article 4 of the 1955 Ethiopian Constitution, the defence counsels raised the immunity of the head of state as an objection against the charges.[77] They claimed that the Provisional Military Administrative Council (*Derg)* as a head of state has right not to be charged. Thus, the defendants as members of the said Council are not accountable for acts they committed since deeds of a head of state are acts of the state. The SPO, on its part contended that such immunity did not apply in case of genocide as per article 4 of the Genocide Convention, and the defendants could not be granted such immunity by any measure of law.[78] The SPO supported its argument by raising the principles of individual criminal responsibility, equality before the law, and international precedents. It was also stressed that the defendants were not heads of states; and article 4 of the 1955 Revised Constitution of Ethiopia gave immunity to the emperor alone and there could be no other beneficiary of the provision.[79] After having examined the arguments of both, the court overruled the defence of immunity based on the principle of equality before the law and the personal nature of the immunity due to the emperor.[80]

The defence counsels also argued in favour of their clients on the ground of statutory limitations mainly related to charges of bodily injury, abuse of power and unlawful detention whose period of limitation is fifteen years at most as per article 226 of the Penal Code.[81] On the contrary, the SPO argued that the period of limitation should begin to be counted after the fall of the regime, for the *Derg* era warranted the acts of the defendants.[82] And this defence was rendered unacceptable.

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[77] Trial Observation and Information project, *supra note* 58, P.3.

[78] The Special Prosecutor's Investigation File No.401/85 on the Case of Col. Mengistu Hailemariam *et al*., Addis Ababa, (May 23, 1995), p. 5.

[79] *Ibid* p.10.

[80] Trial Observation and Information Project, *supra note* 58, p.8.

[81] *Ibid* p.13.

[82] *Ibid* p.14.

Furthermore, the defence counsels objected to the charges based on the content of article 281 of the Penal Code. As said above, the Genocide Convention and the Ethiopian Penal Code define genocide differently in scope. Genocide under the latter is broad enough to include the acts of targeting political groups. The defence counsels were against the inclusion of political groups within the ambit of article 281 of the Ethiopian Penal Code, saying that it is rendered void by the 1955 Constitution of Ethiopia.[83] This Constitution made international treaties ratified by Ethiopia as supreme as itself in the hierarchy of law. That is to say the Genocide Convention, which was ratified by Ethiopia in 1949, is on equal footing with the 1955 Constitution as opposed to other ordinary laws including the Penal Code. And in case of inconsistency between the Convention and the Penal Code, the former obviously prevails over the latter. And hence, they objected the inclusion of political groups as a targeting group under the definition of genocide. Alternatively, if it were said that it validly includes political groups, the victims were not, they argued, members of one or other political groups. The political parties listed in the charges were not formally registered and enjoyed legal protection. In order to refute the defence of the accused, the SPO presented its counter argument against the objection as follows. The 1955 Constitution, which made the Convention overriding the provision of the penal code and in effect rendered the inclusion of political group as a targeted group void, was suspended when the defendants came to power.[84] Thus, the defendants could not use the already suspended law in their defence. Their argument appears to imply that when the 1955 Constitution was suspended, the stipulation about the act of targeting political group under article 281 of the Penal Code which had been repealed by the Constitution would revive. As to the alternative defence of the accused, the SPO argued that the defendants had branded every victims as members of one or the other political party or group.[85] That those who were killed were members of an unregistered underground organization cannot be excuse.

Regarding the allegation of inconsistency between the Penal Code and the Convention, the Court ruled that Ethiopia could go beyond the minimum standards laid down in the Genocide Convention. In favour of the ruling of the court, one can argue that human rights are minimum standards to maintain a decent or minimum good life for human being. States are duty bound to comply

[83] *Ibid* p.12.
[84] *Ibid* p.7.
[85] The Special Prosecutor's Investigation, *supra note* 78, p.32.

with these minimum standards. Any unjustifiable deviation below the minimum norms is prohibited. But states can go beyond the minimum standards to achieve the best for human beings. In this regard, it is correctly pointed out that:

> *Article 281 of the Ethiopian Penal Code framed to give wider human rights protection should not be viewed as if it is in contradiction with Genocide Convention. As long as Ethiopia does not enact a law that minimizes the protection of rights accorded by the convention, the mere fact of being state party to the Convention doesn't prohibit the government from enacting a law which provides a wider range of protection than the convention. Usually international instruments provide only minimum standards and it is the duty of a state party to enact a law that assist their implementation.*[86]

In addition, the defence counsels raised another objection saying that part of article 281 was repealed by Proclamations No.110/1976 and 129/1976 which provided government authorities at all levels with the authority to destroy and take any necessary measures against anti-revolutionary and anti-unity political groups.[87] Since the defendants were under legal duty of agitating and rallying the broad mass for the purpose of attacking and destroying anti-revolutionary and anti-unity forces, they should not be penalized. The SPO response on this issue was that there was no such a law authorising or requiring the commission of genocide; even if it were said that there was a law permitting such acts, it could only be a law of the jungle, not that of the civilised world.[88] The centre of this controversy was whether the Proclamations that allowed the authorities to take actions against anti-revolutionary and anti-unity forces repealed that part of article 281 of the Penal Code that labels targeting political groups in view of destroying in part or in full, as acts of genocide.[89]

[86] Firew Kebede, *supra note* 42, p.6.
[87] Trial Observation and Information project, *supra note* 58, p.13
[88] The Special Prosecutor's Investigation, *supra note* 78, pp.13-14.
[89] Firew Kebede, *supra note* 42, p.8.

On this issue, the Court ruled that no such repeal had occurred. However, one dissenting judge concluded that part of article 281(labelling the acts of targeting political groups as genocide) was inconsistent with the aforementioned Proclamations. The judge invoked article 10 of Proclamation No.1/1974 which declared all prior laws including the Penal Code remain in force so long as they are in line with the laws enacted by the Provisional Military Administrative Council (PMAC) - *Derg*.[90] Looking at the contradiction between part of article 281(regarding the act of targeting political groups as genocide) and the Proclamations (authorising the defendants to destroy anti-revolutionaries), the dissenting judge held that the latter laws had to prevail over the former. Nonetheless, he maintained that the notion of genocide under article 281 is also recognised in international law.

This dissenting opinion was also upheld when the Court issued its judgment on the merits of the case. The Court, by majority, found the accused guilty of 211 counts of genocide, homicide, illegal imprisonment and illegal confiscation of property. In contrast to the majority, the dissenting judge was of the opinion that the accused should have been convicted of homicide and causing wilful bodily injury, not genocide, for the actions of the accused at the time were lawful and measures taken against members of political groups did not amount to genocide in international law.[91] The dissenting judge was criticised for his failure to justify why the laws that purportedly repealed part of article 281 could not have also repealed article 522 on homicide so long as homicide was committed in order to eliminate political groups as authorised by Proclamations No.110/1976 and 129/1976.[92] Against this criticism, this writer found out in decision of the court that the dissenting judge already justified why the alternative charges of homicide and wilful bodily injury were not repealed. In line with the dissenting judge argument, one can argue that the defendants should have been convicted by alternative charges of homicide and wilful bodily injury, rather than genocide. The reason being: it is possible, without violating international obligations, to enact a law which does not consider the act of targeting political groups as genocide. Contrary to this, we can not legalize the act of homicide or wilful bodily injury by promulgation of law, without violating the minimum standards of human rights. Thus the aforementioned Proclamations did not and could not repeal article 522 on

[90] *Special Prosecutor V. Col. Mengistu Hailemariam et al, supra note* 62.
[91] *Ibid.*
[92] Firew Kebede, *supra note* 42, p.8.

homicide and article 538 on wilful bodily injury while they did so part of article 281 of the Penal Code.

2.3.3. The Rights of Defendants

The swift decision of EPRDF to prosecute the members of the defunct regime for atrocities allegedly committed, rightfully earned the respect of the international community at the start. As time went on, however, it became clear that the criminal proceedings would not be or could not be held in conformity with the international human rights standards. Some observers were concerned by the slow pace of the proceedings. In the summer of 1994, a segment of the international community argued that since these former *Derg* officials had remained in prison for three years without having formally been charged, there was a danger that their rights were being violated.[93] In response to this, the SPO filed its first charge against the top *Derg* officials in October 1994. The initial detention of 2000 prisoners occurred before the creation of the SPO; by the time it was created, staffed and went operational, they had already been detained for up to 18 months.[94] The prolonged detention without charge, the delay of trial as result of many and long lasting adjournments, and lack of resources for defence preparation became the most pressing human rights concerns of the Red Terror Trial process.

The detainees have a number of rights recognised in the domestic law as well as in international human rights instruments. According to the Universal Declaration of Human Rights, every one has the right to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charges against him; and has also the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees for his defence.[95] The Transitional Period Charter of Ethiopia (which was later replaced by the 1995 Constitution) domesticated those rights by saying that "individual rights embodied in the Universal Declaration of Human Rights shall be respected fully without any limits whatsoever."[96] By the same fashion, the new Constitution also extends the same protection by stating that the interpretation of rights and freedoms enshrined in the constitution shall

[93] Peter Bach, War Crimes and the Establishment of a Public Defender's Office in Ethiopia, Field Report (1996).
[94] Human Rights Watch/Africa, *supra note* 43, p.19.
[95] Universal Declaration of Human Rights, GA Res.217A (III) (10 December 1948) Articles 10 and 11.
[96] Transitional Period Charter of Ethiopia (1991), Article 1.

be in line with the international instruments adopted by Ethiopia.[97] In June1993, Ethiopia ratified the International Covenant on Civil and Political Rights (ICCPR) which entered into force after three months. As a party to the Covenant, Ethiopia has undertaken to respect and ensure for all individuals within its jurisdiction the rights recognised in Covenant as indicated in article 2 of this covenant. Besides, there are procedural safeguards stipulated in the 1961 Criminal Procedure Code of Ethiopia. The arbitrary arrest and the prolonged detention without charge are in violation of the Charter and the Criminal procedure Code of Ethiopia. However, until 1993 the Ethiopian government was not under obligation to honour acts which could be violations of ICCPR and not covered by the domestic law.

In many instances, the procedural safeguards accorded to the detainees were not adhered to in the process. For instance, as discussed, a considerable number of people were kept in detention without having been charged. Pursuant to article 9 of the ICCPR, an arrested person has the right to be informed the reasons for his arrest and promptly informed any charge against him. Following his arrest, he should be brought promptly before court and be entitled to trial within reasonable time or to release. Besides, he can apply before court of law for his release (habeas corpus) if he is deprived of his liberty unlawfully. As a party to the Covenant, Ethiopia has a duty to observe international standards prohibiting prolonged arbitrary detention. Putting aside the prior detention, even after the entry into force of the ICCPR, those people who were charged in 1994 (save those being tried in absentia) were detained for one year without charge. Furthermore, the vast majority of the detainees waited to be charged until 1997. The UN Working Group on Arbitrary Detention declared the detentions to be arbitrary and requested that Ethiopian government takes steps to conform the situation with articles 9 and 10 of the UDHR, and articles 9 and 14 of the ICCPR.[98]

The Ethiopian government, on its part, tried to justify the detention by raising the danger of the defendants' flight, risk of further offence, suppression of evidence and suborning of witnesses.[99] Article 7 of the SPO Establishment Proclamation No.22/92 further restricts the rights of the detainees by barring

[97] Proclamation No. 1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, *Negarit Gazeta*, (1995), Article 13.

[98] Report of the Working Group on Arbitrary Detention, E/CN.4/1994/27, Decision Nos.45/1992 and 33/1993.

[99] Julie Mayfield, *supra note* 34, p.579.

them from filing habeas corpus petitions for six months which in effect legalised the detention. This article reads as:

> *The provisions of habeas corpus under article 177 of the Civil Procedure Code shall not apply for persons detained prior to the coming into force of this proclamation for a period of six months starting from the effective date of this proclamation in matters under the jurisdiction of the special prosecutor as indicated in article 6 thereof.*[100]

Upon the expiry of the time limit, the detainees submitted the writ of habeas corpus to the Federal High Court since they had been arrested without warrant and not brought before court for long time. Consequently, 200 detainees were released.[101] At this moment, the SPO applied to a lower court for arrest warrant and remand for sufficient time to complete its investigations, which more or less closed the petition of habeas corpus. Later, the permission that the lower court gave to the SPO to detain such individuals indefinitely was endorsed by the higher courts.[102] Here, it is appropriate to cite the decision of the Federal Supreme Court given on one suspect. In that case, the Supreme Court held that the 15 days limitation for filing a charge provided in article 109 (1) of the Criminal Procedure Code would not apply to cases which fall with in the jurisdiction of the Office of Special Prosecutor by virtue article 7(2) of Proclamation No.22/92.[103]

Article 20(1) of the 1995 Constitution of Ethiopia stipulates that an accused has the rights to be tried within a reasonable time after having been charged. Similar entitlement is enshrined under article 9(3) of the ICCPR. However, the Red Terror Trials have taken more than a decade. For instance, the trial of the 73 top officials, which was opened in 1994, came to an end in 2008. And here we should not forget the fact that several defendants have been put in custody since 1991. For those people, the judgment was given after sixteen years of imprisonment. It is clear that there was undue delay of trial in contradiction to the international human rights instruments ratified by Ethiopia as well as the constitutional guarantees. One may raise the number of

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[100] Proclamation No. 22/92, *supra note* 54, Article 7.
[101] Trial Observation and Information project, *supra note* 58, P.1.
[102] Ethiopian Human Rights Council, the Administration of Justice in Ethiopia, Special Report No.9 (January, 1996) Addis Ababa.
[103] *Ibid.*

defendants, the complexity of gathering immense amount of evidence, interviewing thousands of witnesses, and securing of adequate personnel as justifications for delay in trials. But it may yet be hard to justify such delay by any means in any legal jurisdiction. The defendants' right to be tried within reasonable period of time was violated although adequate safeguards exist both under domestic and international law for the protection of the rights of the defendants.

Another central issue relating to the rights of the defendants is the right to be represented by legal counsel. In regard to the 73 top *Derg* officials, the issue of legal representation came to exist after the charge was read out to the defendants. When they were asked how they would defend their case, most of them pleaded that a state appointed counsels be assigned to them, for they were in no financial position to hire a legal counsel.[104] As stipulated in the ICCPR and the Ethiopian Constitution, an accused has the right to be represented by legal counsel of his choice or to have legal assistance assigned to him if he does not have sufficient means to pay for it.[105] The Public Defender's Office (PDO) was established in 1994 under the supervision of the Ethiopian Federal Supreme Court.[106] Originally the office consisted of five attorneys, only one of whom was an experienced trial attorney, but later the staff had grown to twenty attorneys.[107] The operation of the office suffered from administrative and financial problems.

Given the grave nature of the charges, the means of proving the innocence of each defendant would undoubtedly require a qualified defence lawyer. However, except those who hired their own defence counsels, all the indigent defendants were represented by counsels who do not have formal legal training and experience in serious trial proceedings.[108] In addition, a single public defender was assigned to defend more than fifty defendants, which is unlikely that the defender could analyze the case of each defendant individually before the defence.[109] Those who could afford to defray the cost for privately hired lawyer were able to defend themselves through experienced lawyers while others were not able to do so.

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[104] Trial Observation and Information project, *supra note* 58, p.10.
[105] International Covenant on Civil and Political Rights, (19 December 1966), article14 (3) (d); and The Constitution of Federal Democratic Republic of Ethiopia (1995), article 20(5).
[106] Human Rights Watch/Africa, *supra note* 43, p.49.
[107] Julie Mayfield, *supra note* 34, p.584.
[108] Trial Observation and Information project, *supra note* 58, P.11.
[109] *Ibid.*

2.4. Shortcoming of the Red Terror Trials

As pointed out in the preceding section, the most fundamental flaw of the Red Terror Trial was failure to ensure accountability while respecting the rights of the defendants in conformity with the international human rights standards and domestic law. There have been breaches of the rights of the defendants since the pre-trial stage. In the process, the rights of defendants have been violated while trying to address the past wrongs and ensure the protection of human rights. The scope of prosecution, the relative absence of infrastructure, the shortage of qualified lawyers, and the questionable impartiality and competence of the court have contributed to violations of the basic rights of the defendants.[110] In relation to the Red Terror Trials, one commentator has said the following:

> *The justifications for a policy that deals with systematic human rights violations lie in its fairness and effectiveness, and in the wider lessons to be learnt from the process of reckoning. The crucially important task confronting the new Ethiopian government was ensuring accountability for the past human rights violations, while upholding due process and fundamental human rights in the process. The government thus far has failed in this dual task. Another disquieting and perhaps singular feature of the Ethiopian experience is the apparent popular indifference about the trials. This is a serious limitation given the fact that the importance of the lessons to be learnt from such trials very much depends on the quality of debate they generate and the opportunity they provide for a new beginning that is based on a society-wide self re-examination. Failure in these respects may only postpone the controversy for the future; thereby depriving the society of the pivotal opportunity to achieve genuine reconciliation and a closure to the country's contested past.*[111]

[110] Dadimos Haile, *supra note* 52, p.62.
[111] *Ibid*, p.9.

As pointed out in the preceding quote and reported at different times, the process received low public attention. The atrocities committed in the past are no longer fresh in the psyche of the population. The indifference of the public in the trial can be attributable to everyday political, social and economical challenges faced by the Ethiopian people.[112]

The other problem of the trial is its sole focus on the members of the *Derg* regime. As indicated in article 6 of Proclamation No. 22/1992, the SPO is mandated to investigate and institute an action only against the members of the defunct regime. The crimes were committed within the context of a revolution, and the political parties that were targeted were allegedly themselves assassinating top military officers of the *Derg* while the country was also fighting against external invaders, liberation fronts and secessionist movements.[113] The brutal measures taken by the targeted political groups have not been investigated by the SPO. In effect, many more, who took part in the atrocities, remained unpunished.

At this juncture, one may wonder whether or not the option chosen by Ethiopia to address its past is a just solution that is acceptable to the victims of the atrocities and is suitable to create stable future. It is very hard to answer this question in abstract, for there is no single formula for coming to terms with years of human rights abuses. Neither prosecution nor amnesty is capable of handling the complexity of a post conflict situation in all circumstances. As discussed in the introductory part, in addressing such issue, we should take into account among other things the needs, the desires and the political realities of the traumatized society. And we should, to the extent possible, look at the past to correct grievances while creating a viable present and future for every group after a conflict.

Arguably one can say that given the ill-equipped Ethiopian judiciary, the complexity of the matter and the huge number of people charged (5271 defendants throughout the country),[114] relying fully on the criminal justice alone should have been seen unaffordable. That is to say amnesty and reconciliation could have been considered along with criminal justice like in South Africa. As one commentator put it, sometimes a collective form of accountability may be a less costly way of healing the wounds of the society

[112] Kjetil Tronvoll, A Quest for Justice or the Construction of Political Legitimacy? The Political Anatomy of the Red Terror Trials, *supra note* 1, p.119.
[113] Firew Kebede, *supra note* 42, p.16.
[114] Trial Observation and Information Project, *supra note* 58, p.1.

than conducting individualised criminal trail.[115] In such a case, it is reasonable to pursue amnesty with certain conditions.

In the course of the trial, 33 top former *Derg* officials formally asked the government to give them a public forum so that they could beg the society for a pardon for mistakes made knowingly or unknowingly while in power.[116] However, no official response was given to them.[117] Even at this stage, it could have been gone beyond prosecution. Had they been given a forum, the forum might have been used to facilitate reconciliation between the victims and the perpetrators by acknowledging and publicising what truly happened. Besides, the process might have got public attention and thereby given a lesson to the society. It would also have enabled the defendants to tell their version of the story.

3. Conclusion

Transitional justice is a process of addressing the past human rights wrongs (caused by conflict, repressive rule or state failure) through judicial means or non-judicial means. In dealing with the legacies of human rights violations, transitional societies should use either of these approaches or a combination of them. In fact, there is no agreement as to which approach is suitable to heal the wounds of the victims and create stable future. And yet it is indispensible to consider the desires and political realities of the traumatized society and to some extent the interest of the international community in choosing any of the approaches.

Regardless of such controversy, Ethiopia decided to address the past state-sponsored human rights violations through judicial means. In accordance with this decision, the Office of Special Prosecutor charged over 5000 members of the defunct regime for the past human rights violations. The commitment of the country to prosecute the perpetrators received a great appreciation from inside and outside, for most believed that the process would heal the wounds of the society, prevent the recurrence of such atrocities in the future, and bringing the culture of impunity to an end. However, through the passage of time, it has become clear that the process would not ensure accountability for the past human rights violations while respecting the rights of the defendants in conformity with the international human rights standards

[115] Maryam Kamali, *supra note* 12, p.141.
[116] Girmachew A. Aneme, Apology and Trials: the Case of the Red Terror Trials in Ethiopia, *African Human Rights Law Journal*, vol.6 No.1 (2006) p.67.
[117] *Ibid.*

and domestic laws. More specifically, there have been lengthy pre-trial detentions, violations of the rights of speedy trial and of the rights to counsel.

Furthermore, the Red Terror Trials have solely focused on prosecuting the members of the Derg regime even if the human rights wrongs were also allegedly committed by the targeted political groups as well, including EPRP and others. This let the alleged perpetrators go free. Besides, the process has received low public attention.[118] This, in turn, limits significance of the process in providing a lesson to the public.

[118] Perhaps, the newly inaugurated Red Terror Victims' Memorial Museum may play its own role in capturing the attention of the public, and thereby giving a lesson to the whole society.

Deck Carriage under the Maritime Code of Ethiopia: A Comment on the Decision of the Addis Ababa High Court in *Girma Kebede v. Ethiopian Shipping Lines Case*[*]

Hailegabriel Gedecho[**]

1. Synopsis of the Case

A certain Girma Kebede contracted with Ethiopian Shipping Lines for the carriage of some goods (a car and some electronics items kept in the car) from Rotterdam, the Netherlands, to the Port of Assab, Ethiopia. The goods kept in the car were mentioned in the bill of lading; and they were carried on deck. Though the car was delivered at the port of Assab, the items kept inside the car were not delivered. Subsequently, Ato Girma sued the shipping lines for a total of 12,000 Eth. Birr – which, according to the plaintiff, was the total value of the items undelivered.

The shipping lines, in its part, argued, *inter alia*, that it is not liable for the lost items as they were carried on deck.[1] In response to this argument, the plaintiff invoked the Amharic version of Art.180 (4) of the Maritime Code which, according to the plaintiff, does not free the carrier from liability for loss or damage of goods carried on deck. Accordingly, the English version of Art.180 (4) of the Maritime Code, which arguably frees the carrier from liabilities related to on-deck carriage of *any* goods, is superseded by the Amharic equivalent which permits exoneration *vis-a-vis* only one type of deck cargo, i.e. on-deck carriage of live animals.

2. The Decision of the Court

The Addis Ababa High Court, which first appeared to down play the importance of the discrepancy between the Amharic and English versions of Art.180 (4) of the Maritime Code, upheld the argument of the defendant that the law frees the carrier from liability for loss or damage of any goods carried on deck. Yet, the court, on a different ground, held the shipping lines limitedly liable for the lost goods.

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[*] *Girma Kebede v. Ethiopian Shipping Lines/Maritime Transit Services Corporation*, the High Court of Addis Ababa, Civil File Case No.689/76[E.C].

[**] LL.B, LL.M(University of Groningen), Lecturer in Law, Bahir Dar University.

[1] Deck is the outer part of a vessel.

3. A Critique

The Ethiopian law on deck carriage is contained in a single provision of the Maritime Code – Art.180 (4). As could be understood from the facts of the case summarised above, the Amharic and the English versions of this provision are not equivalent. While the English version stipulates the exclusion, from the scope of Section 5, Chapter 2, Title IV of the Maritime Code, of the transport of *live animals* and *goods carried on deck*, the Amharic version excludes only *the transport of live animals carried on-deck* [it reads: በመርከቡ ደጅ(ደክ)ላይ ስለ ተጫኑት ህይወት ያላቸውእንስሶች እነ ዚህ ድን ጋጌዎች አይፈፀሙባቸውም]. Thus, the discrepancy has practically become a cause for judicial litigations. Called to rule on the issue, the High Court of Addis Ababa held:

> "*The discrepancy between the Amharic and English version of Art.180 (4), Maritime Code, should not have been a bone of contention. Rather, one should look into why the legislator has treated on-deck carriage and under-deck carriage separately*."[2]

Subsequently, the court went on searching for the legislative intent behind the provisions of Art.180 (4). And, it held the legislative intent is "to exculpate the carrier from liabilities associated with on-deck carriage of goods." In so doing, the court finally concluded that the provisions of Art.180 (4) favour the defendant – not the claimant.

The court's effort to ascertain the legislative policy behind Art.180 (4) of the Maritime Code is worth praising. Yet, the court's search for legislative intent was ironic as we are unclear whether the court was looking for the legislative intent behind the Amharic or English version of Art.180(4). The holding of the court that Art.180 (4) exonerates the carrier from liabilities for cargoes [both live animals and any other goods] stowed on deck appeared to imply the court was concerned with the legislative intent behind the *English* version of Art.180 (4).[3]

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[2]Translation mine.

[3] The court cannot possibly reach at this assertion based on the Amharic version of the provision which does not extend the exoneration (if any) from liability for deck carriage beyond the expressly mentioned on-deck carriage of *live animals*.

Nonetheless, the court's avoidance of the Amharic version, which normally is the controlling one, is questionable. The rejection of the otherwise decisive argument "Art.180 (4) should include or exclude *any* goods [other than live animals] carried on deck" is less plausible as the clear textual discrepancy between the two versions of Art.180 (4) is too decisive to ignore. Moreover, the court's avoidance of the question relating to the discrepancy between the two versions of Art.180 (4) was inevitably unsuccessful as it indirectly left the court at a juncture where it had to choose between the two competing versions.

It is also interesting to note that the court, which tried to approach the problem over the interpretation of Art.180 (4) through a search for legislative intent, failed to further look into any legislative rationale – if any – behind the omission of "goods" from the Amharic text of Art.180(4). Such a search for reasons behind the legislative omission of the term or, alternatively, a look into a legislative history of the pertinent provisions would have saved the court from any unsuccessful attempts to avoid the rather important question relating to the omission of an important term from the Amharic text of Art.180 (4).

A look into the historical material sources of Art.180 (4) of the Ethiopian Maritime Code appears to suggest the Amharic version is a flawed translation of its English equivalent – which was presumably drafted first. The Ethiopian law on the carriage of goods by sea in general and Art.180 (4) in particular are inspired by the 1924 Hague Rules on Bills of Lading[4] – which, by the time the Ethiopian Maritime Code was prepared, was the leading international instrument on the carriage of goods under bills of lading.[5] Alike the English version of Art.180 (4) of the Ethiopian Maritime Code, the equivalent provisions in the Hague Convention[6] and other similar[7] maritime

[4] Formally known as the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. Countries which either adopted or incorporated the rules in their laws are known as "Hague countries".

[5] Hailegabriel G., *Maritime Law: Teaching Material*, Addis Ababa, JLSRI, 2008, at 14.

[6] Art.1(c), the Hague Rules.

[7] For instance, see § 1301(c), the United States Codes, Title 46 (the title containing the US Carriage of Goods by Sea Act) (2000) and Art.1(c) of the 1968 Hague-Visby Rules which are applied in many jurisdictions including United Kingdom.

legislations generally lay down a rule that limit the application of the rules on carriage of goods under bills of lading to the transport of all kinds of cargoes but *live animals* and *deck cargoes*. As a result, the High Court's tacit preference to the English version of Art.180 (4) – which appears to be congruent with the equivalent provisions of its historical material sources – seems sensible.

In addition, the holding of the court that the legislative intent behind Art.180 (4) is to exculpate the carrier from liabilities associated with on-deck carriage of goods is *partly* true if seen in light of the historical background of the original law on deck carriage. As rightly pointed out by the High Court, the exclusion was designed to cover the increased risks of loss or damage to the carriage by both categories of cargo.[8] Yet, it is not safe to interpret Art.180 (4) as a provision that in all instances exonerates the sea carrier from liability for loss or damage to goods carried on deck. Art.180 (4) does not expressly deal with liability issues. It rather states: "[The provisions of section 5[9]] shall not apply to the transport of live animals and goods as are being carried on deck under the contract of carriage." Hence, the possible implications of the inapplicability of the rules [in section 5] to the transport of deck cargo are not clear from the simple reading of Art.180 (4).

Instead, two important inferences from the provisions of Art.180 (4) help identify the unwritten Ethiopian law on deck carriage and, for our purpose, the implications of the inapplicability of the rules in section 5. *Inter alia*, the readings of Art.180 (4) may imply the inapplicability of (1) the statutorily recognised carriers' duty of care to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried[10] or (2) the principle of carrier's limitation of liability.[11] Assuming that the former is the

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[8] See, e.g., Evans J., *Law of International Trade: Textbook*, 3rd ed., London, Old Bailey Press, 2001, at 220 *et seq*.; Gillies P. & Moens G., *International Trade and Business: Law, Policy and Ethics*, Sydney, Cavendish Publishing, 2000, at 187; Whitehead J., *Deviation: Should the Doctrine Apply to On-Deck Carriage?*, 6 Maritime Lawyer 37(1981).

[9] These are the provisions of Arts.180-208, Maritime Code; they contain special rules regarding contract of carriage under bills of lading.

[10] These duties are contained in Art.196, Maritime Code.

[11] This principle, one of the most important elements of the law of sea carriage, is contained in Art.198, Maritime Code.

case, the carrier will escape liability for the loss or damage of goods carried on deck as the risks of loss or damage to goods carried on deck are higher than those carried under-deck. In the meantime, if we assume the readings of Art.180 (4) imply the inapplicability of the limitation of liability principle under Art.198, the carrier will be strictly liable when he carries goods on-deck.

Practices, in jurisdictions where comparable statutory rules exist, show that the applications of rules contained in Art.180 (4) may either imply the full liability of the carrier or the complete exoneration of the same from liability for loss/damage to goods carried on deck. If the parties *agree* to carry goods on deck and the goods so carried are lost or damaged, no liability for loss or damage will fall on the carrier.[12] The absence of such agreement, however, has been interpreted to only authorise *under*-deck stowage.[13] Accordingly, unauthorised deck carriage of goods results in full liability whenever the goods so carried are lost or damaged due to risks associated with such carriage. Thus, in other jurisdictions, the applications of rules identical to that contained in Art.180 (4), Ethiopian Maritime Code, does not exculpate the carrier from liabilities related with on-deck carriage of goods unless there is an express agreement[14] to on-deck stowage of cargos. Hence, the holding of the High Court that the application of Art.180 (4) [always] exonerates the carrier from liability is less plausible in the face of the jurisprudence relating to deck carriage established in other "Hague countries".[15]

Incidentally, it is worth noting that modern legislations on sea carriage have replaced the rule comparable to that contained in Art.180 (4) by a new and practical one. Accordingly, the rules on sea carriage [under bills of lading]

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[12] Gillies P. & Moens G., *supra* n. 9, at 186; see also the 20th century United States court decisions in cases including *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio Janeiro*, 263 U.S. 119, 124, 44 S.Ct. 30, 68 L.Ed. 201 (1923) and *Clamaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd*., 650 F.2d 633 (5th Cir. Unit B 1981).

[13] *Ibid*; Evans J., *supra* n. 9, at 221.

[14] Note also that the burden of proving such agreements is shouldered on the carrier; see, e.g., the decision of a US court in *Ingersoll Milling Machine Co. v. M/V BODENA*, 829 F.2d 293 (2d Cir. 1987).

[15] These are countries applying the Hague Rules or its equivalents; they include leading maritime nations such as USA, Germany, and [formerly] UK.

apply to all kinds of cargo including live animals and deck cargo. The equal treatment of deck cargo and any other cargo was necessitated as the historical rationale behind the rule was no longer viable due to dynamics in maritime transportation. The now customary containerised deck carriage has greatly reduced the risk of loss or damage to goods carried on deck. Hence, carriers, who under the Hague Rules would be required to prove express permission from the cargo owner to carry cargos on deck, would under the modern rules be able to avoid strict liability [for loss resulting from unauthorised carriage of cargoes on deck] by showing the carriage on deck was the customary practice for the shipment in question.[16]

4. Conclusion

The High Court's interpretation of Art.180 (4) of the Maritime Code is partly faulty. The court's dismissal of the otherwise persuasive argument that the Amharic version of Art.180 (4) the Maritime Code overrides its English equivalent is problematic as the Amharic version is normally the controlling one. Despite this, the court's undeclared preference to the English version of Art.180 (4) looks sensible as it picked the text that is harmonious with equivalent provisions contained in the original material source. Nonetheless, the holding of the court that Art.180 (4) exonerates the carrier from liability needs a proviso. This is because Art.180 (4) does not relieve the carrier from [strict] liability for loss or damage to goods resulting from unauthorised on-deck carriage.

[16]This is particularly the case under the 1978 United Nations Convention on the Carriage of Goods by Sea – commonly known as the Hamburg Rules.

Issue Framing and Allocating Burdens of Proof in Civil Cases: *A Comment on Ato Gebru G/Meskel V Priest G/Medhin Reda Case*[*]

Worku Yaze [**]

1. Synopsis of the Case[1]

Plaintiff Ato Gebru G/Meskel instituted a claim before the High Court of Mekele Zone, Tigray Regional State, asserting that a loan contract had been entered into between him and defendant priest G/Medhin Reda. He averred that he, upon request for loan by defendant through telephone, transferred 50,000 Birr through Wegagen Bank from Addis Ababa to Mekele which he said defendant collected in due time. Expressing that defendant failed and refused to pay back the loan money, he requested the court to give an order that compels defendant to perform his obligation including payment of legal interest, lawyer's fee and other litigation costs.

In his statement of defense defendant denied existence of the alleged contract of loan but admitted collecting the alleged sum of money. The defendant said that plaintiff had taken 50,000 Birr from him in loan some time before; that the money he collected from the bank was that which plaintiff owed to him. He thus asked the court to dismiss plaintiff's claim as baseless and unacceptable.

The High Court examined the matter and identified the main issue to be: *which party bears the burden of proof?* It then held that burden of proof lies on the defendant. Further, it maintained: "defendant didn't adduce any evidence that proves pre-existing debt which plaintiff had to pay; thus he should pay 50,000 birr with legal interest."

Defendant appealed to the Regional Supreme Court stating that the High Court wrongly held him to bear the burden of proof and to pay

[*] The author would like to express his gratitude for the Editorial Committee and for those who offered constructive comments on the earlier draft of this work. Any error remains the responsibility of the author.

[**] Director and Lecturer, Law School, Bahir Dar University

[1] *Ato Gebru G/Meskel V Priest G/Medhin Reda,* Federal Democratic Republic of Ethiopia Supreme Court Cassation Division, File No. 31737 (Decided on 27 Yekatit 2000, E.C).

a debt that didn't exist. However, the Supreme Court didn't accept his argument and it confirmed the decision of the High Court.

Next, defendant/appellant petitioned to the regional Supreme Court's Cassation Bench alleging that the High Court and the regular division of the Supreme Court committed fundamental error of law. In this Bench, respondent/plaintiff argued that the two courts didn't commit any error and prayed for confirmation of the decisions.

After thorough examination, the Cassation Bench held:

> *The bank transfer document couldn't be evidence of the alleged contract of loan. The fact that defendant admitted collecting the stated sum of money couldn't be taken as an admission of plaintiff's claim since he said that it was what plaintiff owed to him. As defendant denied of the alleged contract of loan, plaintiff bears burden of proving its existence. To hold that defendant bears burden of proof in this circumstance is wrong.*[2]

Thus, the Cassation Bench reversed the decisions of the two courts and dismissed plaintiff's claim.

Again, plaintiff petitioned to the Cassation Division of the Federal Supreme Court. He alleged that the Cassation Bench of Tigray Regional Supreme Court committed fundamental error of law. Respondent, on his side, said that there was no ground to interfere with the Bench's decision. Generally both of them reinforced their side repeating those previously expressed facts and legal arguments.

2. Holding of the Cassation Division

The Cassation Division of the Federal Supreme Court, on its part, examined the matter and arguments of the parties' thoroughly in light of Art 2472(1) of the Ethiopian Civil Code (1960). And there was no unanimity in this panel. The majority (4 of the 5 judges) held that:

> *Though respondent said he lent the stated amount of money to the petitioner, he didn't prove it with any of the means provided under*

[2] Translation mine

> *Art 2472(1) of the Civil Code; he didn't discharge his burden of proof. On the other hand, petitioner adduced a bank transfer document that also proves the existence of contract of loan; thus, petitioner has discharged his burden of proof.*[3]

In conclusion, the majority held that the Cassation Bench of Tigray Regional Supreme Court committed fundamental error of law and thus it reversed its decision. On the other hand, the dissenting judge (the minority) maintained that the existence of contract of loan has to be proved in writing, or through formal admission or oath taken in Court (Art 2472 (1) of the Civil Code) and held that the bank transfer document couldn't be evidence. He stated that 'the respondent didn't deny collecting the money from the bank; yet respondent said that it was a payment for a pre-existing debt.' According to this judge the issue in this case should have been '*whether there was contract of loan as alleged by the petitioner or not;* and the *party that bears the burden of proof should have been the plaintiff*'. In his opinion, therefore, the decision of the Cassation Bench of Tigray Regional Supreme Court should have been maintained and confirmed.

3. Comments

a) Issue Framing

Before talking about the party that bears burdens of proof in a given judicial proceeding, it is first necessary to identify the fact or facts that need to be proved. Introduction of evidence presupposes such an identification of the facts that are objects of proof. The facts that are objects of proof are those facts that appear in the pleadings and oral allegation of parties. But every such fact is not an object of proof. It is only facts in issue, facts relevant to the facts in issue and collateral facts that are objects of proof.[4] It is thus necessary to identify

[3] Translation mine.

[4] See D.W. Elliott, Phipson and Elliott Manual of the Law of Evidence, 11th ed. (First Indian Reprint 2001), at 15. The expression "facts in issue" denotes to those facts, which the plaintiff must prove in order to establish his claim or the defendant must prove in order to establish his defense. On the other hand, "relevant facts to the fact in issue" is referring to those other facts that have some connection, such as in cause and effect or any other relation, with the fact in issue in a case. "Collateral facts" are those other facts that relate to other side

the fact(s) in issue in a case, and/or depending on the unique feature of each particular case and the nature of the dispute those other relevant facts to the issue and collateral facts, if any.

Courts do play vital roles in identifying such facts that need to be proved through relevant and admissible type of evidence. As provided under Art 241(1) of the Ethiopian Civil Procedure Code (1965), at the first hearing the court reads the statement of defense of the defendant in the case, conducts oral examination and determines their respective positions. If the case is such a nature that it cannot be resolved at that first hearing, the court needs to frame the issue(s) that should be resolved through evidence at trial. Art 246(1) Civil Procedure Code provides:

> *"…the court shall ascertain upon what material propositions[5] of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

When courts are faced with different versions of a fact or law by litigating parties, it is necessary to frame and record that disputed fact or law as an *issue*.[6] As Sedler correctly observed and as Art 247(1) of the Civil Procedure Code expressly provides an *issue arises when a material proposition of fact is affirmed by one party and denied by the other*.[7] Art 248 of the same Code has provided guidelines for courts regarding materials from which issues may be framed.[8]

In the case at hand, plaintiff requested repayment of loan money. He alleged the existence of contract of loan that served as a ground for him to transfer 50,000 Birr through bank to the defendant. But,

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issues such as relating to competence or credibility of a witness, admissibility of evidence, cogency of evidence.

[5] Art 247 (2) of the Civil Procedure Code provides:

"*Material propositions are those propositions of fact or law which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense."*

[6] Briefly stated, an *issue* in litigation refers to the *point on which disputing parties disagre*e. See Robert Allen Sedler, *Ethiopian Civil Procedure* (1968), at 121.

[7] Id, at 178.

[8] These are:

(a) allegations made in the pleadings,

(b) the contents of documents produced by either party, or

(c) Allegations made by parties, or representatives or pleaders during oral examination at the first hearing.

defendant denied the existence of such a contract saying that the transferred money was rather a repayment of a debt plaintiff owed to him (defendant). Admission of receipt of the money on the part of the defendant should not be confused with admission of the alleged contract of loan. These are two distinct and separate *material propositions*. Denying the alleged contract, defendant admitted collecting the stated amount of money from the bank. It was clear that he expressly denied the existence of such a contract. In effect, he alleged non-existence of obligation. This was a crucial point where the two litigating parties were in disagreement.

Art 2471 of the Ethiopian Civil Code (1960) provides a definition for loan of money. It is defined as a contract whereby a lender undertakes to deliver to the borrower a certain amount of money and to transfer to him the ownership thereof on the condition that the borrower will *return* to him that same amount. Defendant denied of the existence of such a contract alleged by plaintiff and thus contended that he didn't bear any obligation to return the money he collected from Wegagen Bank. All the courts from the High Court through the Cassation Division of the Federal Supreme Court recognized that defendant expressly denied the material proposition of the plaintiff relating to existence of loan of money. It was for that reason that the High Court didn't give judgment on the basis of *admission* as provided under Arts 242 and 254 of the Civil Procedure Code.

As the defendant unequivocally denied of the alleged loan of money, the High Court at Mekele zone should have, therefore, first framed and recorded the issue of *whether there was loan of money between them as alleged by plaintiff.* To our understanding that was the very issue upon which the right decision of the case depended. Plaintiff's request to recover the stated amount of money and its legal interest presupposed existence of valid and enforceable contract, i.e., loan of money. And it was when breach of the alleged contract was proved that the court would go on determining in accordance with plaintiff's prayer, save any other lawful reason or defense.

Defendant's allegation that there was prior contract of loan, i.e., loan of money, entered into between him as lender and plaintiff as borrower was quite another factual allegation called in defense - different from the present fact in issue. This was not raised as an

affirmative defense. It was not a counterclaim or set-off.[9] Defendant totally denied the existence of that contract of loan alleged by plaintiff. He contended that plaintiff had no legally recoverable money and posed a separate allegation that attempts to bring justification for the receipt of the alleged money.

It appears that the regional High Court failed to identify and properly record the *issue* in the case. It proceeded without appreciating the material fact on which the plaintiff relied for his very claim and without giving due attention for the material fact on which defendant purported to rely for his defense. Out of the blue, it can be said, it simply framed burden of proof as an issue- a point which was not raised by any of the parties, or which couldn't be extracted from the only documentary evidence, i.e., from the bank transfer paper. It is also clear from the file that subsequent courts were wrongly taken away by the erroneously framed issue of the High Court. The observation of the dissenting judge in the Federal Supreme Court Cassation Division on this point is correct and it goes in line with Arts 246 (1) and 247(1) of the Civil Procedure Code.

As mentioned above, the High Court framed "who bears burden of proof?" as an issue in the case. Nevertheless, the idea of burden of proof cannot come into the picture without first identifying and framing an issue in the case. Burden of proof cannot arise in the vacuum. It at least presupposes one contested issue of fact. As Christopher Allen observed "talk about the burden of proof in any given case makes no sense unless you relate that burden to a particular issue of fact."[10] In the case at hand, the contested issue of fact was whether there was loan of money as was alleged by the plaintiff. Determination of the party that ought to carry burdens of proof in such disagreement was an attendant matter to follow during the trial stage. What the High Court did, with due respect, amounts to putting 'the cart before the horse.'

b) The party who bears the burdens of proof

Once the proper issue is identified, framed and recorded at the pleading and pre-trial stage, the next activity during the trial phase is to

[9] Read Arts 234 (1), (f), 234-239 of the Civil Procedure Code; Sedler, note 4, at 129- 132.
[10] Christopher Allen, *Practical Guide to Evidence*, 2nd ed. (2001), at 99.

require litigating parties to introduce evidence in support of his side.[11] This cannot be accomplished simultaneously or haphazardly. It has its own principles and rules. This brings us to the idea of *burdens of proof.*

As so many legal scholars observed, the term "burdens of proof" has at least two principal senses.[12] In one sense it refers to *the obligation* (it can be also treated as a right) *of a party to lead evidence of a particular fact in issue*. It signifies "the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation."[13] This is commonly referred to as the '*burden of going forward with evidence'* or as '*burden of production of evidence'* or simply as the *'evidential burden'*.[14]

The other and commonly used sense refers to *the obligation* (or right) *of a party to persuade the existence or non-existence of a disputed matter of fact to the satisfaction of the judge with the necessary amount and quality of evidence.* It denotes "the obligation of a party to meet the requirement that a fact in issue be proved (or disproved) either by a preponderance of the evidence [in civil cases] or beyond reasonable doubt [in criminal cases]…."[15] It is also known by a number of other names including '*burden of persuasion', 'risk of non-persuasion', 'probative burden', 'ultimate burden', and 'legal burden'.*[16]

The obligation of a litigating party in the first sense of burdens of proof signifies *the duty of that party to introduce some evidence in*

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[11] Sedler notes that Ethiopia follows a common law approach to litigation and procedure and that the hearing process involves two well-defined stages, i.e., (i) the pleading and pre-trial stage, and (ii) the trial stage. See Sedler, note 4, at 120.

[12] Read for instance Raymond Emson, *Evidence*, 2nd ed. (2004), at 420-421; John W. Strong, McCormick On Evidence, 4th ed. (1992), at 568-569; D.W. Elliott, Phipson and Elliott Manual of the Law of Evidence, First Indian Reprint 2001, at 51-64; Colin Tapper, Cross and Tapper On Evidence, 9th ed. (1999), at 106-115. There are other less commonly known burdens of proof such as the so-called *tactical or provisional or forensic burden* and *burden of proving the admissibility of evidence*.

[13] Tapper, note 10, at 109.

[14] Id; Allen, note 8, at 99,116-118; CRM Dlamini, *the Burden of Proof; Its role and Meaning*, 14 S*tellenbosch. L. Rev*. (2003), at 68 ff.

[15] Tapper note 10, at 108.

[16] Emson, note 10, at 419.

support of a particular issue to make it a live one.[17] The burden of persuasion, on the other hand, *is the duty the law imposes on a party to prove or establish a particular fact in issue.*

In the case of persuasive burden, the party is expected not only to support his assertion of a fact in dispute with evidence but also he has to establish or prove its existence or non-existence to the required degree to the satisfaction of the judges. Mere introduction of *prima facie* evidence doesn't suffice; one has to prove with the required degree of proof.[18] The party that bears this burden in a civil proceeding carries *the risk of losing on that issue* if the evidence is evenly balanced or non-existent.[19] Such burden, which mostly is determined and allocated by the legislature in making substantive laws,[20] determines *which party will lose if the court is not satisfied that the fact under investigation has been proved to the standard required*.[21] It should be also mentioned that such burden necessarily presupposes the adduction of *relevant* and *admissible* type of evidence. It is essential, therefore, to bear in mind that determination of the party that bears the persuasive burden on a particular fact in issue has serious legal consequence.

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[17] Strictly speaking it is not a burden of *proof*. It is "an obligation *to demonstrate that sufficient evidence* has been adduced or elicited in support of an assertion of fact so that it can become a live issue." (Id, at 420). This is particularly important in a legal system that involves dual tribunals (tribunal of fact- the jury system- and tribunal of law- judge of law) to pass the tribunal of judge successfully and get reference of ones case to the tribunal of fact for final determination on the basis of evidence to be adduced before the juries. In non-jury trials such as ours, the burden of persuasion, which also consists of burden of production, is the most important and determinative one.

[18] As is well known, there is difference in respect of required degree of proof in criminal and civil cases. 'Proof beyond reasonable doubt' standard is applicable in criminal cases while 'preponderance of the evidence' is the required standard in most civil cases. Sometimes a higher degree of proof- i.e., clear and convincing standard of proof- may be required in some civil cases such as disowning of a child.

[19] Emson, note 10, at 419.

[20] The legislature apportions burden of persuasion taking into account various factors. Quoting another author Stephen I Dwyer has listed the following factors that are to be taken into consideration in the allocation of burden of proof as between parties:

(1) the natural tendency to place the burdens on the party desiring change (i.e. on the plaintiff);

(2) special policy considerations such as those disfavoring certain defenses

(3) Convenience (4) fairness (5) The judicial estimate of the probabilities. See Stephen I. Dwyer, *Presumptions and Burden of Proof*, 21 *Loy. L. Rev.* (1975), at 380.

[21] Andrew Palmer, *Principles of Evidence* (1998), at 33.

Thus, judges of courts must identify and determine which party to the dispute bears the persuasive burden on *a particular fact in issue* under that risk of losing on that particular issue. Judges must also properly identify and determine which other party bears the burden of persuasion on another particular issue, if any, under risk of losing on that other fact in issue. It is wrong to simply talk about burden of proof in a case as such. Generally speaking, however, the burden of proving of a disputed fact is on the party pleading or asserting it. Plaintiff *has to prove allegations in his statement of claim and defendant has to prove affirmative defenses or any other grounds of defense averred in his statement of defense;* [22]*he who asserts shall prove it* is the general premise. When it comes to an actual civil case, it is always necessary to identify the party that bears burden of persuasion on such identified specific and particularized fact(s) in issue in the case. If there is more than one fact in issue, one party may bear such burden on one issue and the other party may bear on another issue.

Coming to the case at hand, one of the parties, either plaintiff or defendant is necessarily under duty to bear the burden of persuasion on the fact in issue. As made clear above, the fact in issue is *whether there was contract of loan between the parties as alleged by plaintiff.* So we need to determine which party bears the burden of persuasion under risk of losing his case on that issue. Arts 258(1) and 259 (1) of the Civil Procedure Code provide that the plaintiff shall be entitled *to begin his case* and *to produce his evidence* in support of the issue *which he is bound to prove*. If the type of evidence introduced by any of the parties is documentary evidence or if that is what is required in law, the court has to examine such adduced document(s) bearing in mind the party that bears burden of persuasion in respect of a particular issue of fact. The court should not act arbitrarily or as any document is available to it by any of the parties. Also, Art 2001(1) of the Civil Code provides that "*He who demands performance of an obligation shall prove its existence*."

By virtue of these provisions it is pretty clear that the plaintiff is the party that bears burden of persuasion on the issue of whether there was loan of money as he was the one who demanded performance. It is the plaintiff that carried the risk of losing on this issue (and for that

[22] See Dwyer, *note 11*, at 379.

matter on the case as a whole) *if no evidence* or if *no sufficient evidence* was introduced on this issue at the end of the proceeding.

Furthermore, the type of evidence that can be introduced in this case to prove the identified fact in issue is determined by the Civil Code. Clearly, it cannot be proved or disproved with witnesses' testimony as Art 2472 of the Civil Code specifically enacts the type of evidence or mode of proving/disproving of a loan of money that involves an amount of more than 500 Birr. Sub (1) of this article provides that the contract of loan may only be proved in *writing* or *by a confession made or oath taken in court.*

The holdings of the High Court, the regular division of Tigray Regional Supreme Court and majority of the Cassation Division of the Federal Supreme Court in respect of the party that borne burden of proof were thus contrary to what is provided under Art 2001(1) of the Civil Code. It appears that these courts erred on this point for two reasons: Viz.,

(a) They failed to identify the particular issue of fact, and

(b) They didn't test who would lose the case if no evidence or no sufficient evidence were adduced- to determine the party that carried burden of persuasion.

Perhaps these courts were also taken astray by the admission of receipt of the money on the part of the defendant. It should be clear that the facts of transferring money through Wegagen Bank and collection of that money by defendant were not facts in issue. As both parties agreed on these facts, there was no need to waste time and energy in examining such already admitted facts.

As the only issue in the case was *whether there was a loan of money as alleged by the plaintiff*, it is completely wrong to talk about the defendant's burden of proof to establish another pre-existing loan of money which was alleged by the defendant. It is wrong because:

(a) whether there was a pre-existing contract as alleged by the defendant was not at issue in the case: and,

(b) to require the party that denies existence of contract to bear burdens of proof is contrary both to the general principle of law of evidence and to Art 2001 of the Civil Code.

Whether there was a pre-existing contract as alleged by defendant could have been an issue to be investigated if the suit was one of say, unlawful enrichment or undue payment made to the

defendant. Or, it could have been an issue in defense to be investigated by the court if plaintiff adduced sufficient evidence of the existence of loan of money as he alleged and made the issue a live one. If that was the case, the defendant that admitted receiving of the money could have been required to prove its background, i.e., his alleged pre-existing contract or any other lawful ground that enabled him to collect the sum of money.

4. Conclusion

In the case under discussion, the judges that seized the case from the High Court through the Cassation Division didn't properly attempt at identifying the *issue* in the case. The only exception is the dissenting judge in the Cassation Division of the Federal Supreme Court. In the opinion of this writer that was the serious flaw that entailed attendant wrong analysis of the case and wrong allocation of burden of proof. Though the Cassation Bench of Tirgay Regional Supreme Court shares this blame, as it didn't rectify the wrongs of the other courts in this regard, it has properly addressed the party that carried burden of proof in the case. The analysis of this Bench and the dissenting judge in the Federal Supreme Court is thus commendable. It goes in line with the general principle of Law of Evidence and Art 2001(1) of the Civil Code.

In civil proceedings, unless there are presumptions in favor of plaintiff or unless otherwise the other party admits the factual allegations of the plaintiff, the plaintiff bears burden of proving the facts pleaded in his statement of claim, i.e., his cause of action. On the other hand, defendant carries the burden of proving any other facts pleaded in his statement of defense such as affirmative defenses – and not the non-existence of the facts asserted by plaintiff.

With regard to issues that involve contractual matters, the legislature in Ethiopia has already apportioned burden of proof as between parties. As clearly enacted under Art 2001 of the Civil Code, a party that demands performance of an obligation that arises from a contract shall bear the *burden of proving of the existence of the alleged contract*. On the other hand, a party that admits the existence of a contract asserted by the other party and intends to avoid liability bears *the burden of proving the nullity, variation or extinction of that contract* as provided under Art 2001(2) of the Civil Code.

Judges of the Cassation Division of the Federal Supreme Court, the High Court at Mekele zone and those that entertained this case in the regular division of Tigray Regional Supreme Court, with due respect, need to revisit their stand in light of authoritative rules of both the Civil Procedure Code and the Civil Code. Finally this writer would like to underscore the importance of *issue framing* and *determination of the party that bears burden of proof* in civil proceedings. Partly, the correctness and propriety of court decisions are greatly dependent upon the handling of these points.

Case Reports

Note

The following reports are cases decided by the Cassation Division of the Federal Supreme Court of Ethiopia. The purpose of publishing the cases is to make them known to the members of the legal profession. The case reports in a single issue of the *Journal* bring together interesting decisions on a give area of law. For this issue judgments on the subject matter of Labour law are chosen.

In selecting a particular judgment for publication the Editorial Committee do not want to imply that the judgment is definitive on any proposition or that it contains erroneous propositions. The judgments are chosen for the interesting issue(s) of law they raise.

ሐምሌ 29 ቀን 1997 ዓ.ም.
የመ/ቁ. 18180

ዳኞች፡ – አቶ መንበረፀሐይ ታደሰ
አቶ ፍሥሐ ወርቅነህ
አቶ አብዲልቃድር ማዙመድ
ወ/ሮ ስንዱ ዓለሙ
አቶ ሚስፍን ዕቁበዮናስ

አመልካች --የኬኬ ብርድ ልብስ ፋብሪካ መ/ሰ/ማ/(56) ሰዎች ወኪል ሰይድ ሀሚድ ቀረበ
ተጠሪ---- የኬኬ ጨርቃ ጨርቅ ኢንዱስትሪ የቀረበ የለም

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል፡፡

ፍርድ

በዚህ መዝገብ የተያዘው ክርክር ከአሠሪና ሠራተኛ ጉዳይ ውሣኔ ቦርድ የጀመረ ነው፡፡ ጉዳዩ አሠሪ የሆነው የአሁን ተጠሪ ሠራተኛ በሆኑት በአሁን አመልካቾች ላይ የወሰደውን የቅነሣ እርምጃ የሚመለከት ነው፡፡

አመልካች በሠራተኛ ማኅበራቸው አማካኝነት የተወሰደብን የቅነሣ እርምጃ ሕገ ወጥ በመሆኑ የተቋረጠብን ክፍያ ተሰጥቶን ወደ ሥራችን እንመለስ ሲሉ በተጠሪው ላይ ክስ መሰርተዋል፡፡ ተጠሪም የመጀመሪያ ደረጃ መቃወሚያ እና የቅነሣውን ተገቢነት ይገልጻል የሚለውን መልስ አቅርቦ ተከራክሯል፡ክሱ የቀረበለት ቦርድ ደግሞ የተደረገው ቅነሣ አዋጅ ቁ.42/85 አንቀጸ 28 እና 29ን የሚጥስ በመሆኑ አመልካቾቹ በአንቀጽ 42(2) መሠረት ወደ ሥራቸው ሊመለሱ ይገባል በማለት ወስኗል፡፡

ከዚህ ውሣኔ ላይ በተጠሪ አማካኝነት በመ/ቁ.30769 ይግባኝ የቀረበለት የፌዴራል ከፍተኛ ፍ/ቤት በበኩሉ ግራ ቀኙን ከአከራከረ በኋላ ቦርዱ ይህን የሞት ሥልጣን የለውም በማለት ከፍ ሲል የተጠቀሰውን የቦርዱን ውሣኔ ጥቅምት 25/1997 ዓ.ም. ሽሮታል፡፡

በመቅጠል አልካቾች ይኸ የፍ/ቤቱ ውሣኔ የአዋጅ ቁ.42/85 አንቀጽ 147/(2)ን እና 154(2)ን የሚጥስ መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ነውና ይሻርልን በማለት አቤቱታቸውን ለዚህ ችሎት አቅርበዋል፡፡ ተጠሪም የቀረበው አቤቱታ ተቀባይነት ሊያገኝ አይገባም የሚልበትን ምክንያት የሚረዝር መልስ አቀርቦ ተከራክሯል፡፡

ይህም ችሎት ክርክሩ ሊያስነሣ በቻለው አወዛጋቢ የህግ ነጥብ ላይ ብቻ በማተኮር መዝግቡን መርምሯል፡፡በዋነኛነት ለፊቱ የሚባቸው የነገሩ ጭብጦችም፡ –

1ኛ. የሠራተኛ ቅነሣን አስመልክቶ የቀረበውን ይህን ክርክር የመዳኘት ሥልጣን የማን? የፍርድ ቤት ነውን? ወይስ የቦርድ?

2ኛ. ፍ/ቤቱ በቦርድ የተሰጠን ውሣኔ ለመሻር ሥልጣን አለው? የሚሉት መሆናቸውን ተገንዝበናል፡

ለመጀመሪያው ነጥብ ምላሽ የማገኘቱ ጉዳይ ስለ ሠራተኛ ቅነሣ፣ ስለ ቦርድ እና ስለ ፍርድ ቤት ሥልጣን የሚልጸትን የአዋጅ ቁ.42/85 ድንጋጌዎችን ተመሳርቶ ጭብጡን መመርመርን ይጠይቃል፡፡ ቦርድ ሊቀርቡ የሚባቸው ጉዳዮች ፍርድ ቤት ሊቀረቡ ከሚባቸው፡፡ በዚህ ረገድ ግንዛብ እንድናገኝ የሚደርገን ደግሞ ስለ ቦርድ ሥልጣን የሚዩበትን ምክንያት መረዳትን ይፈልጋል፡፡ የአዋጅ ቁ.147(1)[1] እና ስለ ፍ/ቤት ስልጣን የሚነግገው የአዋጅ አንቀጽ 138(2) ይሆናል፡፡

ስለ ቦርድ ሥልጣን ከተደነገገበት የአዋጅ ቁ.4285 አንቀጽ 147(1) ወጣ ለዚህ ጉዳይ አግባብነት የሚረው በንዑስ አንቀጽ (1) (ሀ) ላይ ቦርዱ በአንቀጽ142(1) ላይ የተመለከቱትን የሥራ ክርክሮች የመዳኘት እና ተከራካሪዎቹን የሚታረቅ ሥልጣን አለው በሚል የተመለከተው የሕጉ ክፍል ነው፡፡ እነዚ ሀለት ድግንጋጌዎች ተጣምረው ሲነበቡ ቦርዱ በአንቀጽ142(1) ስር በተዘረዘሩትና በሌሎች የወል የሥራ ክርክሮች ላይ ሙሄ የመለሕ ሥልጣን እንደተሰጠው መገንዘብ ይቻላል፡፡ በሌላ በኩል ደግሞ በአዋጁ አንቀጽ 138(1)የተዘረዘሩትንና መሰል የግል የሥራ ክርክሮችን የመዳኘት ሥልጣን ለፍ/ቤቱ መሰጠቱን ከዚህ ድንጋጌ መረዳት ይቻላል፡፡

የወል የሥራ ክርክሮች ለቦርድ፣የግል የሥራ ክርክሮች ደግሞ ለፍ/ቤት የሚቋርቡ ናቸው ሚለት ብቻውን ግን ሀለቱ ተቋማት በዚህ ረገድ የላቸውን የዳኝነት ሥልጣን ከፍፍል በግልጽ እንድንለየው የሚደርገን አይደለም፡፡ ይልቁንም የወል የሥራ ክርክር ሚለት ምን ሚለት ነው? የግል የሥራ ክርክር ሚለትስ ምን ሊሆን ይገባል? የሥራ ክርክሮችን በምንና እንዴት የወል ወይም የግል የሥራ ክርክር ብለን ልንመድባቸው እንችላለን? የሚሩና ሌሎችንም መሰል ጥያቄዎችን እንድናነሣ የሚደርገን ነው፡፡ ለእነዚህ ጥያቄዎች ምላሽ መከተሉችን ደግሞ የሚቋርቡ የሥራ ክርክሮችን ከየትኛው እንደምንፈርጃቸው የሚመለከተንና በዚህ ተጨማሪ ጉዳይ ለተያዘውም የመጀመሪያ ጭብጥ መፍቻ እንድናገኝለት የሚዳን ነው፡፡

ስለ የወል እና የግል የሥራ ክርክር አይነቶች

የአዋጅ ቁ. 42/85 ለወልም ሆነ የግል የሥራ ክርክር የሰጠው ትርጓሜ የለም፡፡ የሥራ ክርክር በዚህ አዋጅ የተተረጎመ ቢሆንም ትርጓሜው የወልና የግል የሥራ ክርክርን እንድንለይ የሚስችለን አይደለም፡፡ ስለሆነም በሀለቱ መካከል ያለውን ልዩነት በግርድፉ ለመከቀመጥ ሌላ መለኪያ እንድናበጅ የሚከይቀን ነው፡፡

እንደሚታወቀው ከአሠሪ ጋር የሚዲገባ የሥራ ክርክር በሠራተኞች ማነበር ወይም ቁጥራቸው ከአንድ በላይ በሆነ ሠራተኞች ወይም በአንድ ሠራተኛ ብቻ የሚሄድ ነው፡፡ የወል የሚለው ቃል አገላለጽ የጋራ የሆነ ጉዳይ መኖሩን ለማሳከት ያህል የሚነቃ መሆኑም እርግጥ ነው፡፡ ይሁን እንጂ የወሉን ከግል ለመለየት የተከራካሪዎቹን ሠራተኞት ቁጥር እንደመለያ መስፈርት መመሰድ አንደምንችል የሚከቁመን የሕግ ድንጋጌ የለም፡፡ ይህ ደግሞ ሕጉ ሀለቱን ክርክሮች ለመለየት የፈለገበትን ሌላ መንገድ እንድንፈትሽ ያደርገናል፡፡ ለዚህም ሀለቱ የክርክር አይነቶች በምሳሌነት በተናጥል የተዘረዘሩበትን የአዋጅ ቁ.42/85 አንቀጽ 142(1)ን እና 138(1)ን መሠረት ሞድረጉ አሣማኝነት ያለው መደምደሚያ ላይ እንድንደርስ ይጠቅመናል፡፡

አዋጅ ቁ.42/85 አነቀጽ 142(1)

ሀ. ስለደመወዝና ሌሎች ጥቅምን አወሳሰን፣
ለ. አዲስ የሥራ ሁኔታዎችን ስለመሳረት፣
ሐ. የሕበረት ስምምነት ስለመዋዋል፣ስለማሻሻል፣ ፀንቶ ስለሚይበት ጊዜና ስለሚፈርስበት፣
መ. አዋጁን፣ የሕበረት ስምምነት ወይም የሥራ ደንብ ድንጋጌዎችን በሚሳከት የሚሣ የትርጉም ክርክር፣
ሠ. ስለሠራተኛ አቀጣጠርና እድገት አሰጣጥ ሥርዓት፣
ረ. አጠቃላይ ሠራተኞችንና የድርጅቱን ሕልውና የሚኩ ጉዳዩች፣
ሰ. ዕድገተ ዝወወር እና ሥልጠናን በሚሳከት አሠሪው በሚስዳቸው እርምጃዎች ምክንያት የሚቸር ክሶች፣
ሸ. የሠራተኞች ቅነሣ እና የማሰሉት የሥሪ ክርክሮች የወል የሥራ ክርክሮች መሆናቸወን ደንግጓል፡፡

እንደዚህም አብዛኛዎቹ የድንጋጌው ክፍሎች በወጩቻቸው የሀሉንም ሠራተኞች መቦትና ጥቅም የሚሳከቱ ጉዳዩችን ያቀፉ መሆናቸወን በግልጽ አማክተወናል፡፡ ለምሣሌነት በንዑስ አንቀጽ 1(ሀ)፣ (ለ)፣ (ሐ)፣ (ሠ)፣(ረ) እና (ሸ) የተጠቀሱትን የሥራ ክርክር አይነቶች መሣከት ይቻላል፡፡ እነዚህ የድንጋጌው አብዛኛው ንዑስ አንቀጾች ክርክሩ የወል ለመባል የጋራ የሆነን የሠራተኞቹን መቦትና ጥቅም የሚሳከት ሊሆን እንደሚባ በግልጽ ካሣዩን ደግሞ በቀሪዎቹ ንዑስ አንቀጾች ላይ የተጠቀሱትንና ሌሎችንም በድንጋጌው ያልተካተቱትን ተመሳሳይ የሥራ ክርክሮችን የወልነት ፀባይ ከሠራተኞቹ የጋራ መቦትና ጥቅም ጋር ካለው ግንኙነት አኳያ ልንመዝነው የሚባን ይሆናል፡፡ ስለሆነ ም ጥያቄው የደመወዝም ሆነ የሌላ ጥቅም፣ የቅጥርም ሆነ የእድገት አሠጣጥ፣ የዝወወርም ሆነ የሥልጠና የሕግ ትርጉም ነክም ሆነ ወይም ሌላ የወል የሚኘው ጉዳዩ በጋራ በሆነ የሠራተኞች ማህትና ጥቅም ላይ አሉታዊም ሆነ አወንታዊ ወጩ የሚያስከትል ሆኖ ሲገኝ ብቻ ሊሆን ይገባዋል፡፡
በሌላ በኩል ደግሞ የአዋጅ ቁ.42/85 አንቀጽ 138(1)

ሀ. ከሥራ ማሰወጣትን ጨምሮ ሌሎች የዲስፕሊን እርምጃዎችን የሚሳከቱ ክሶች፣
ለ. የሥራ ወል መቋረጥ ወይም ማሰረዝን የሚሳከቱ ክሶች፣
ሐ. የሥራ ስዓትን፣ የተከፋይ ሂሣብን፣ ፈቃድንና እረፍትን የሚሳከቱ ክሶች፣
መ. የቅጥር ማሰረጃ ሠርተፊኬት ማሰጠትን የሚሳከቱ ክሶች፣
ሠ. የጉዳት ካሣን የሚሳከቱ ክሶች እና
ረ. በአዋጁ መሠረት የሚቀርብ ማናቸውም የወንጀልና ደንብ መተላለፍ እንዲሁም ሌሎች ተመሳሳይ ጉዳዩች የግል የሥራ ክርክሮች መሆናቸው ተደንግጓል፡፡ የዚህ ድንጋጌ ይዘት ከፍ ሲል እንደተጠቀሰው ድንጋጌ የጋራ የሆነን የሠራተኞች ጉዳይ እንደሚጠቅልል የሚልጽ አይደለም፡፡ ስለሆነ ም የሥራ ክርክሩ በእነዚህ በተዘረዘሩትም ሆነ በተመሳሳይ ጉዳዩች ላይ ተመስርቶ ሲቀርብ ከግል አልፎ በጋራ መቦት ላይ የሚመጣው ለወጥ ያለመኖሩ ጉዳይ ክርክሩን የወል ሳይሆን የግል የሥራ ክርክር እንዲሆን ያደርገዋል፡፡

እንግዲህ አንድ የሥራ ክርክር በአንድ ወይም በብዙ ሠራተኞች መቅረቡ ጉዳዩ የወል ወይም የግል የሥራ ክርክር መሆኑን የሚረጋግጥልን አይደለም። ይልቁንም ክርክሩ የወል መሆኑን የሚሳየን ወጪው ከግል አልፎ የሠራተኞቹን የጋራ መብትና ጥቅም የሚነካ የመሆኑ ጉዳይ ሲሆን ክርክሩ የግል ነው የምንለው ደግሞ ወጪው በተከራካሪው ሠራተኛ ላይ ብቻ ተወሰኖ የቁር ሆኖ ስናገኘው ነው።

ወደ ጭብጦቹን ስንመለስ አመልካቾች ተጠሪው የቅነሳ እርምጃ ለመውሰድ የሚያስችል ምክንያት የለውም፣ ቅንሳውም በአዋጅ ቁ. 42/85 አንቀጽ 29 የተመለከተውን ቅደም ተከተል ያከበረ አይደለም በሚል ተከራክረዋል። ይህ ደግሞ በተጠሪው የተወሰደው የቅነሳ እርምጃ መላውን የድርጅቱን ሠራተኞች መበትና ጥቅም የሚዳ ነው በሚል አይነት መግታቸውን ያሳየናል። እንደሚታወቀው የሠራተኞች ቅነሳ መላውን የድርጅቱን ሠራተኞች ከግምት በማገባት በሕግ አግባብ ሊከናወን የሚባ ተግባር ነው። የአመልካቾች ክርክር ደግሞ በዚህ መልኩ የቀረበ መሆኑ ከፍ ሲል ተመልክቷል። ስለሆነም ጉዳዩ የወል እንጂ የግል የሥራ ክርክር የሚኝበት ምክንያት አይኖርም። ክርክሩ የመዳኘቱ ሥልጣንም በአዋጅ ቁ.42/85 አንቀጽ 142(1) (ሸ) መሠረት የቦርድ እንጂ የፍ/ቤት አይሆንም።

የፌደራል ከፍተኛ ፍ/ቤት በሰጠው ውሳኔ በግራ ቀኙ መካከል የነበረው የሥራ ወል የተቋረጠ መሆኑን ምክንያት በማድረግ የቅነሳውን ህጋዊነት የመመርመር ሥልጣን የፍ/ቤት ነው ሲል ወስኗል። ይሁን እንጂ ከፍ ሲል እንደተገለፀው አንድ የሥራ ክርክር በቦርድ ወይም በፍ/ቤት እንዲዳኝ የሚደርገው ብዙኛ ምክንያት የወል ወይም የግል የሥራ ክርክር መሆኑ እንጂ የሥራ ውሉ የመቋረጥ ወይም ያለመቋረጡ ጉዳይ አይደለም። ስለሆነም ፍ/ቤቱ ለውሳኔው መሠረት ያደረገው ምክንያትም ከሕጉ ጋር የሚጥመም አልሆነም።

በሁለተኛ ደረጃ የተያዘው ጭብጥም አግባብነት ከአለው የአዋጅ ቁ.42/85 አንቀጽ 154(2) ጋር ተገናዝቦ ተመርምሯል። በዝህ ድንጋጌ የቦርድ ውሳኔ የሕግ ስህተት ያለበትና የሕግ ስህተቱም የውሳኔውን ወጤት አዛብቶት የተገኘ እንደሆነ ይግባኝ የቀረበለት ፍ/ቤት ጉዳዩን ከዝርዝርና ከአጠቃላይ መመሪያ ጋር ለሚጪሻ ወሳኔ ወደ ኮርድ እንደሚመልሰው፤ ነገር ግን ለማርም ሆነ ለማሻሻል እንደሚችል ተደንግጓል።

በእርግጥ በዚህ ጉዳይ የፌደራል ከፍተኛ ፍ/ቤት የቦርዱን ውሳኔ እራሱ መሻሩ የውሳኔ አሰጣጡ ከተጠቀሰው ሕግ ጋር አለመጣጣሙን ያሳያል። ይሁን እንጂ ፍ/ቤቱ የቦርዱን ውሳኔ የሕግ ስህተት ለሚም እንዲችል በዚሁ ሕግ ሰፊ ሥልጣን ተሰጥቶታል። ውሳኔውን በይግባኝ ሊሽረውም ሆነ ሊያሻሽለው ባይችልም የሕግ ስህተቱ ታርሞ በጉዳዩ እንደገና ውሳኔ ይሰጥበት ዘንድ ክርክሩን ወደ ቦርድ እንዲመልሰው ሕጉ በግልጽ ፈቅዶለታል።

ስለሆነም የፌደራል ከፍተኛ ፍ/ቤት የቦርዱን ውሳኔ እራሱ ለመሻር ሥልጣን የሌለው በመሆኑ የፍርድ አሰጣጡ ከተጠቀሰው ህግ አግባብ ሊቃና የሚባው ሆኖ አግኝተነዋል።

ውሳኔ

1ኛ. ለዚህ ክርክር መሻሻ የሆነው የሠራተኛ ቅነሳ የወል የሥራ ክርክር በመሆኑ ጉዳዩን የመዳኘት ሥልጣን የቦርድ እንጂ የፍርድ ቤት ሊሆን አይገባም በማለት ተወስኗል።

2ኛ. ይግባኙ የቀረበለት የፌዴራል ከፍተኛ ፍ/ቤትም ይህንኑ ተገንዝቦ ወደ ክርክሩ በመግባትና በቦርዱ የተሰጠው ፍርድ ከሕግ አኳያ ስህተት ያለበት መሆን

አለመሆኑን በመሞመር ጉዳዩ ከመሞያ ጋር ወደ ቦርድ ሊመለስ የሚባው በመሆን አለመሆኑ ረገድ ውሳኔ ሊሰጥበት ይገባል በሚትም ተወስኗል፡፡

3ኛ. የፌደራል ከፍተኛ ፍ/ቤት ክርክሩን ሞት እንዲቀጥል ያስችለው ዘንድም ጉዳዩ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.343(1) መሠረት ተመልሶለታል፡፡

የካቲት 29 ቀን 1998 ዓ/ም
የመ/ቁ

.22130

ዳኞች፡ - 1. አቶ መንበረፀሐይ ታደሰ
2. " ዓብዱልቃድር ማሕሙድ
3. " ጌታቸው ምህረቱ
4. " ሚኪፍን ዕቁበዩናስ
5. ወ/ሪት ሂሩት ሚላሰ

አሚልካች፡ -ቅዱስ ዩሴፍ ትምህርት ቤት
ሚልስ ሰጭ - አቶ ግርማ ሚሻ

ፍርድ

በዚህ ጉዳይ የቀረበው የሕግ ነጥብ የአሰሪና ሠራተኛ አዋጅ ቁጥር 377/1996 ተፈጻሚ በሚሆንበት የአሰሪና ሰራተኛ ግንኙነት ሰራተኛው በጠፈታ ምክንያት ከስራ የሚናበትበትን የህግ አግባብ የሚሚከት ነው፡፡ በጉዳዩ ሚልስ ሰጭ በአሚልካች ት/ቤት ወስጥ ተቀጥረው ሲያገለግሉ ከቆዩ በኋላ አሚልካች ሚልስ ሰጭ እድሜቸው የጠፈታ መመጫ የሆነው 60 ዓመት ላይ ደርሷል በሚል ሚልስ ሰጪ ከስራ አሰናብቷል፡፡ ሚልስ ሰጭ ስንብቱን በመቃወም ለፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት በአቀረቡት ክስ ፍርድ ቤቱ ጉዳዩን ሚገሞ ስንብቱ በአዋጅ ቁጥር 377/96 አንቀጽ 24 (3) መሠረት የተፈፀመ በመሆኑ ሕጋዊ ነው በማለት የሚልስ ሰጪ ክስ ወድቅ አድርጐታል፡፡ ጉዳዩ በይግባኝ የቀረበለት የፌደራል ከፍተኛ ፍርድ ቤት በበኩሉ ሚልስ ሰጭ የጠፈታ መመጫ እድሜ በሆነው 60 ዓመት ላይ ደርሰዋል የተባለው በመንግስት ሰራተኞች የጠፈታ አዋጅ መሠረት በመሆኑና አሚልካች እና ሚልስ ሰጭ ያደረጉት የስራ ወል የሚዛው በአዋጅ ቁጥር 377/96 በመሆኑ ስንብቱን ለመድረግ የሞስችል ሕጋዊ ምክንያት የለም በማለት የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት የሰጠውን ወሳኔ በመሻር አሚልካች ሚልስ ሰጪ የአንድ ዓመት ወዝፍ ደመወዝ ከፍሎ ወደ ስራ እንዲሚልሳቸው በማለት ወስኗል፡፡

አሚልካች የፌደራል ከፍተኛ ፍርድ ቤት የሰጠውን ፍርድ በመቃወም ያቀረበው የሰበር አቤቱታ ተመርምሮ ጉዳዩ ለሰበር ችሎት እንዲቀርብ በተሰጠው ትዕዛዝ መሰረት አሚልካችና ሚልስ ሰጭ ክርክራቸውን ለችሎቱ በቃል አሰምተዋል፡፡

ችሎቱም የአሰሪና ሰራተኛ አዋጅ ቁጥር 377/1996 ተፈፃሚ በሚሆንበት የአሰሪና ሰራተኛ ግንኙነት ሰራተኛው በጠፈታ ምክንያተ ከስራ የሚናበትበትን የሕግ አግባብ መሰረት በመድረግ ጉዳዩን መርምሯል፡፡

የአሰሪና ሰራተኛ አዋጅ ቁጥር 377/96 የስራ ወል በሕጋዊ መንገድ የሞቋረጥባቸውን ምክንያቶች በዝርዝር ይደነግጋል፡፡ በአዋጅ አንቀጽ 23(1) መሠረት እነዚህ ሕጋዊ የስራ ሞቋረጫ ምክንያቶች በአሰሪው አነሳሽነት (በአዋጁ በአንቀጽ 27፣ 28 እና 29 መሠረት) ወይም በሰራተኛው አነሳሽነት (በአዋጁ በአንቀጽ 31 እና 32 መሠረት)፣ በሕግ በተደነገገው መሠረት (በአዋጁ በአንቀጽ 24 መሠረት) ወይም በህብረት ስምማት መሠረት ወይም በተዋዋይ ወገኖች ስምማት መሰረት (በአዋጁ በአንቀጽ 25 መሠረት) ናቸው፡፡ አንድ

የስራ ውል በህገ ወጥ መንገድ ተቋርጧል የሚለው የስራ ውሉ የተቋረጠው ከላይ ከተጠቀሱት ምክንያቶች ውጭ እንደሆነ ነው።

ከላይ እንደተጠቀሰው የስራ ውል በህጋዊ መንገድ የሚቋረጥባቸውን ምክንያቶች አንዱ በህግ በተደነገገው መሠረት በአዋጁ በአንቀጽ 24 መሰረት ነው። የዚሁ ድንጋጌ ንዑስ አንቀጽ 3 ሰራተኛው አግባብ ባለው የጠፈታ ህግ መሰረት በጠፈታ ሲገለል የስራ ውሉ በህግ መሰረት እንደሚቋረጥ ይደነግጋል። ሆኖም የአሰሪና ሰራተኛ አዋጅ ቁጥር 377/96 ተፈጻሚ በሚሆንበት የስራ ውል ተፈፃሚ የሚሆን የጠፈታ ህግ የሌለ ሲሆን የመንግስት ሰራተኞች የጠፈታ አዋጅ ቁጥር 345/1995 ደግሞ የአሰሪና ሰራተኛ አዋጅ ቁጥር 377/96 ተፈፃሚ በሚሆንበት የስራ ውል ላይ ተፈጻሚ የሚሆን አይደለም። በመሆኑም የአዋጅ ቁጥር 377/1996 አንቀጽ 241(3) ሰራተኛው አግባብ ባለው የጠፈታ ህግ መሰረት በጠፈታ ሲገለል የስራ ውሉ በህግ መሰረት እንደሚቋረጥ የሚነግገው ተፈጻሚ የሚሆነው እንዴት ነው የሚለውን መመርመር አስፈላጊ ይሆናል።

በመሰረቱ የትኛውም ህግ አንድ ሰራተኛ በጠፈታ ምክንያት ከስራ እንዲሰናበት ሲደነግግ አንድ ሰራተኛ ዕድሜውን በሙሉ ብቃት ያለው ሰራተኛ ሆኖ እንደሚይዘልቅና የሰው ልጅ ዕድሜ መገፋት በስራ ውጤማነት (የመሰራት ችሎታ) ላይ አሉታዊ ተጽዕኖ እንዳለውና ሰራተኛው ዕድሜውን በሙሉ በተቀጠረበት ስራ ላይ እንዲቀጥል ቢደረግ የአሰሪው (የድርጅቱ) ጥቅም ያለአግባብ እንደሚዳ ግንዛቤ ወስጥ በማስገባት ሰራተኛው ከስራ ተሰናብቶ አሰሪው ብቃት ያለው ሰራተኛ በቦታው እንዲተካ ለማስቻልና ሰራተኛውም ከስራ ከተሰናበተ በኋላ ከጠፈታ ሰርዓት ተጠቃሚ የሚሆንበትን መንገድ ለማመቻቸት ነው። የጠፈታ ህጎች የጋራ መሻ መሰረታዊ ነጥብም ከተወሰነ የጠፈታ ዕድሜ ደረጃ በኋላ የሰራተኛው የስራ ብቃት በስራው ላይ እንዲቀጥል የሚስችለው አይደለም የሚለው ነው። በዚህ ጉዳይም በአዋጅ ቁጥር 377/96 24(3) ታሳቢ የተደረገው የጠፈታ ህግ ባለመመጣቱ ምክንያት በድንጋጌው አፈጻጸም ላይ የሚያጋጥም የህግ ክፍተት ለመሙላት ከላይ የተመለከተውን የጠፈታ ህጎች የጋራ መሻ መሰረት በሚደረግ የጠፈታ አዋጅ ቁጥር 345/1995 ድንጋጌዎችን መነፈስ ተጠቅሞ ክፍተቱን መሙላት የአዋጅ ቁጥር 377/96 24(3) ድንጋጌን የተቃረነ ነው የሚል አይደለም።

በዚህ ጉዳይ አመልካች ሚልስ ሰጌቻ ዕድሜቸው የጠፈታ መመጫ ዕድሜ የሆነው 60 ዓመት ላይ ደርሰዋል በሚል ከስራ ያሰናበታቸው በአዋጅ ቁጥር 377/96 24(3) ታሳቢ የተደረገው የጠፈታ ህግ ባይወጣም በመንግስት ሰራተኞች ላይ ተፈጻሚ የሚሆን የጠፈታ አዋጅ ቁጥር 345/1995 ድንጋጌዎችን መሰረት በሚደረግ ነው። ከላይ እንደተመለከተው በአዋጅ ቁጥር 377/96 24(3) ታሳቢ የተደረገው የጠፈታ ህግና በመንግስት ሰራተኞች ላይ ተፈጻሚ የሚሆነው የጠፈታ አወጅ ቁጥር 345/1995 ጠፈታን የሚመለከቱ እንደመሆናቸው የሚጋሩትን የጠፈታ ህግ መሰረት መሻ በሚደረግ የአዋጅ ቁጥር 377/96 24(3) ድንጋጌን ተፈጻሚ ለመድረግ የጠፈታ አዋጅ ቁጥር 345/1995 ድንጋጌዎችን መነፈስ ተጠቅሞ ክፍተቱን መሙላት የአዋጅ ቁጥር 377/96 24(3) ድንጋጌን የተቃረነ ነው የሚል አይደለም። በመሆኑም የፌደራል ከፍተኛ ፍርድ ቤት በጠፈታ አዋጅ ቁጥር 345/1995 አንድ ሰራተኛ ዕድሜው 60 ዓመት ሲሞላው በጠፈታ ከስራ እንደሚሰናበት የተደነገገው ለመንግስት ሰራተኞች ነው በሚል ስንብቱ ህገ ወጥ ነው በማለት የሰጠው ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ሆኖ ተገኝቷል።

ውሳኔ

- ይህ ችሎት መልስ ሰጭ ከስራ የተሰናበተው በአግባቡ ነው በሚል ወስኗል፡፡
- የፌደራል ከፍተኛ ፍርድ ቤት በመ/ቁ 38757 ህዳር 13 ቀን 1998 ዓ/ም የሰጠው ወሳኔ ተሽሯል፡፡
- አመልካችና መልሰ ሰጭ በዚህ ችሎት ያወጡትን ወጪና ኪሳራ የየራሳቸውን ይቻሉ፡፡

መዝገቡ ተዘግቷል፡፡

የሚነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰበር መ/ቁ. 18419
ግንቦት 4/1998

ዳኞች፡ - 1. አቶ መንበረፀሐይ ታደሰ
2. " ዓብዱልቃድር ማሕሙድ
3. " ጌታቸው ምህረቱ
4. " ሚስፍን ዕቁበዩናስ
5. ወ/ሪት ሂሩት ሚላሰ
አመልካች፡ - ሐሚዉርቅ ቅ/ሚርያም ቤ/ክርስቲያን ሰበካ ጉባዔ ጽ/ቤት
መልስ ሰጭዎች፡ - እነ ዲያቆን ምህረት ብረሃን

ፍርድ

ጉዳዩ ለዚህ ችሎት የቀረበው የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት መ/ሰጭዎች በአመልካች ቤተክርስቲያን ወስጥ መንፈሣዊ አገልግሎት ተቀጥረን ስናገለግል ከቆየን በኋላ አመልካች ሕገወጥ በሆነ መንገድ ከስራ ያሰናበተን በመሆኑ ወደ ስራ እንድንመለስ ይወሰንልን በሚል ባቀረቡት ክስ የአዋጅ ቁ. 42/85 ድንጋጌዎችን ተፈፃሚ በማድረግ ስንብቱ ሕገወጥ ነው በማለት መ/ሰጭዎች ወደስራ እንዲመለሱ የሰጠውና የፌዴራል ከፍተኛ ፍ/ቤት ያፀናው ውሣኔ መሠረታዊ የሕግ ስህተት ተፈጽሞበታል በሚል አመልካች የሰበር አቤቱታ በማቅረቡ ነው፡፡ ጉዳዩ ለሰበር ችሎት እንዲቀርብ በተሰጠው ትዕዛዝ መሠረት መ/ሰጭዎች የአመልካች አቤቱታ ደርሷቸው መልስ የሰጡ ሲሆን አመልካችም የመልስ መልስ እንዲያቀርብ ተደርጓል፡፡

በጉዳዩ በዚህ ችሎት መታየት ያለበት የሕግ ነጥብ በአዋጅ ቁ.42/85 አንቀጽ 3(3) (ለ) መሠረት የሚሰትሮች ምክር ቤት ሊያወጣው የማችለው ደንብ የኃይማኖት ተቋማት መንፈሣዊ አገልግሎት ከሚሰጡ ሰራተኞችቻቸው ጋር ያላቸውን የስራ ግንኙነቶችም ሊጨምር ይችላ? ወይስ አይችልም? የሚለው በመሆኑ ችሎቱም ነጥቡን ሞምሯል፡፡ አዋጅ ቁ 42/85 በአዋጅ ቁጥር 377/96 የተሻረ ቢሆንም ነጥቡን በሚመለከት ሁለቱ አዋጆች አንድ አይነት ድንጋጌዎች የያዙ በመሆኑ ችሎቱ የአዋጅ ቁ. 42/85 ድንጋጌዎች መሠረት አድርጎ በተሰጠው ነጥብ ላይ የሚጠው የህግ ትረጉም ለአዋጅ ቁ. 377/96 ድንጋጌዎችም አግባብነት ያለው ነው፡፡

ይህ ችሎት በዚህ ጉዳይ የሕግ ትርጉም ለሚጥበት ከላይ ለተመለከተው ነጥብ ቀጥተኛ አግባብነት ያለው የአዋጅ ቁ. 42/85 አንቀጽ 3 ነው፡፡ ይኸው አንቀጽ አዋጁ በንዑስ አንቀጽ 2 ከተመለከቱት በቅጥር ላይ ከተመሠረቱት የስራ ግንኙነቶች ወጪ በሰራተኛ እና በአሰሪ መካከል በሚደረግ በቅጥር ላይ በተመሰረተ የሥራ ግንኙነት ላይ ተፈፃሚ እንደሚሆን ይደነግጋል፡፡ የኃይማኖት ተቋማት መንፈሣዊ ተግባር ከሚያከናውኑ ሰራተኞች ጋር ያላቸው የስራ ግንኙነት አዋጁ ተፈፃሚ እንደሚሆንባቸው በአንቀጽ 3(2) ከተዘረዘሩት የስራ ግንኙነቶች ወስጥ ያልተካተተ ሲሆን ይልቁንም የአዋጁ አንቀጽ 3(3)(ለ) የኃይማኖት ወይም የበጎ አድራጎት ድርጅቶች በሚመሠረቱት የስራ ግንኙነቶች ላይ አዋጁ ተፈፃሚ እንዳይሆን የሚሰትሮች ምክር ቤት በደንብ ሊወስን ይችላል በሚል ይደነግጋል፡፡ የስር ፍ/ቤት ጉዳዩን በአዋጅ ቁ. 42/85 መሠረት ለማየት ውሣኔ የሰጠው በአንቀጽ 3(3)(ለ) መሠረት የተጠቀሱት ድርጅቶች በሚመሠረቱት የስራ ግንኙነት አዋጁ ተፈፃሚ እንዳይሆን የሚሰትሮች ምክር ቤት ደንብ እስካላወጣ ድረስ ድርጅቶቹ በሚመሠረቱት የስራ ግንኙነቶች ላይም አዋጁ ተፈፃሚ ይሆናል በሚል ነው፡፡ ይህም በስር ፍ/ቤት ለአንቀጽ 3(3)(ለ) የተሰጠው ትርጓሜ የሚሰትሮች ምክር ቤት የኃይማኖት ድርጅቶች መንፈሣዊ አገልግሎት የሚሰጡ ሰራተኞቻቸው ጋር ባላቸው የስራ ግንኙነቶች

ላይ የአዋጅ ቁ. 42/85 ተፈፃሚ እንዳይሆን በደንብ ሊወሰን ይችላል የሚል ድምዳሜ መሠረት ያደረገ መሆኑን መገንዘብ ይቻላል፡፡ ይህ አተረጓጎም የሕጉን መንፈስ ተከትሎ የተሰጠ መሆኑን አለመሆኑን ለመመርመር የአሰሪና ሰራተኛ አዋጅ የሚፍናቸውን የስራ ግንኙነት ጉዳዮች መመልከት የግድ ይላል፡፡

የአሰሪና ሰራተኛ አዋጅ የስራ ወሌ ስለሚመሠረትበት ሁኔታ የስራ ወሉ ስለሚቋይበት ጊዜ፣ የሰራተኛውና የአሰሪው መቦትና ግዴታ የስራ ግንኙነት ስለሚቋረጥባቸው ወሰን ሁኔታዎች የስራ ወሉ ሕጋዊ ወይም ሕገወጥ በሆነ መገድ በሚቋረጥበት ጊዜ ስለሚከተሉ ውጠቆች የሚነግጉ ድንጋጌዎች የያዘ ሆኖ ይታያል፡፡ በአጠቃላይ ሕጉ ከአሰሪና ሰራተኛ ግንኙነት ጋር ተያያኽነት ያላቸው ጉዳዩችን በአንዳንድ ሁኔታዎች ከሚጋጥሙልዩ ጉዳዩች በቀረ አካቶ የያዘ መሆኑን መረዳት ይችላል፡፡

ከላይ የተመለከቱትን ከአሰሪና ሰራተኛ ግንኙነት ጋር ተያያኽነት ያላቸው ነጥቦች መፈፀሣዊ አገልግሎት በሚሰከት የኃይማኖት ተቋማት በሚሳርታቸው የሥራ ግንኙነቶች ወሰጥም የሚሱ ቢሆንም በሌሎ የሥራ ግንኙነቶች ከሚያጋጥሣት አኳኃን ለየት ባለ መገድ የሚጋጥሙ ሁኔታዎችም አሉ፡፡ ምክንያቱም በአንድ ኃይማኖት ተቋም ወሰጥ ሊመሰረት የሚቻል የተለያየ የስራ ግንኙነት በመኖሩ ነው፡፡ በአንድ በኩል የሚጠቅ አገልግሎት ድረጅቱ ከሚከተለው እምነት ጋር ቀጥተኛ ግንኙነት ያለወና ከእምነቱ ጋር ተነጥሎ ሊታይ የሚቸል ሰራተኛን፣ እንደ ቄስ፣ ካህን፣ ዲያቆን ወዘተ ... ያሉ ሲሆን በሌላ በኩል ደግሞ የሚጠቅ አገልግሎት ከእምነቱ ጋር ያልተቆራኘ እንደ ሂሳብ ሰራተኛ፣ የንብረት ክፍል ሰራተኛ፣ የስታስቲክስ ሰራተኛ ወዘተ... አሉ፡፡ በመሆኑም የኃይማኖት ስራውን ከሚነሱት ሰራተኞች ጋር የሚሳው የአሰሪና ሰራተኛ ሁኔታ ከሌሎች ሰራተኞች ጋር ከሚሳው የተለየ ነው፡፡ ቀጥተኛ የኃይማኖትን ወይም መፈሳዊ ስራ የሚነሱትን ሰራተኞች ስንመለከት የስራቸው ፀባይ የኃይማኖት ተቋሙ ከሚከተለው እምነት የሚሳሜና ከእምነቱ ጋር ጥበቅ ትስስር ያለው በመሆኑ መፈሳዊ አገልግሎት ለመለጠት ብቁ ሆኖ ለመገኘት መሟላት የሚባቸውን ነገሮች፣ ለምን ያህል ጊዜ አገልግሎት ላይ መቆየት እንደሚቸል፣ የኃይማኖቶቹ እና የመፈሳዊ አገልግሎት ሰጭ መቦትና ግዴታ፣ አገልጋዩ መፈሳዊ አገልግሎትን እየሰጠ እንዲቀጥል የሚደርጉ ሁኔታዎች፣ አገልጋዩ አግባብ ባልሆነ መገድ አገልግሎቱን እንዳይሰጥ በተደረጉ ጊዜ የሚከተሉት ሁኔታዎች እና ሌሎች በስራ ግንኙነቱ ሊነሱ የሚቸሉ ጉዳዩች እያንዳንዱ የኃይማኖት ተቋም ከሚከተለው እምነት ጋር የተያያዙ ናቸው፡፡ የመፈሳዊ ሥራ ግንኙነት የሚያስነሳቸው የአሰሪና ሰራተኛ ጉዳዬች ከእምነቱ ተነጥለው የሚዩ ባለመኖራቸው በሥራ ግንኙነቱ ወሰጥ ጣልቃ መግባቱ በእምነተ ወሰጥ ጣልቃ መግባትን ያስከትላል፡፡

በሌላ በኩል ከእምነቱ ጋር ተያያኽነት ያለወን ሥራ የሚሩ ሠራተኞች ከድርጅቱ ጋር የሚፈራቸው ግንኙነት ሊያስነሣ የሚቸለው ጉዳይ ከእምነቱ ጋር የሚያያዝ እና ይልቁንም በማኅኖም የአሰሪና ሰራተኛ ጉዳይ ከሚሱ ሁኔታዎች የተለየ አይደለም፡፡

ከላይ እንደተመለከተው የመፈሳዊ የሥራ ግንኙነቱ የሚያስነሳቸው ሁኔታዎች ከኃይማኖቱ ተነጣጥለው ሊታዩ የሚችሉ በመኖራቸው የሥር ፍርድ ቤት ለተጠቀሰው አንቀጽ በሰጠው ትርጉም የሚስትሮች ምክር ቤት የመፈሳዊ ሥራ ግንኙነትን በሚመለከት ህግ የሚወጣ ከሆነ በኃይማኖት ጉዳዬችም ለይ ጣልቃ መግባቱ ይሆናል፡፡ ይህ ደግሞ የኢፌድሪ ህገ መንግስት አንቀጽ 11 "መንግስት እና ኃይማኖት የተለያዬ ናቸው፣ መንግስት በኃይማኖት ጉዳዬች ጣልቃ አይገባም" በሚለት ከተደነገገው ጋር የሚጋጭ ይሆናል፡፡ ነገር ግን የኃይማኖቱን ሥራ ከሚሩት ሰራተኞች ውጭ ያሉና በኃይማኖት ተቋም ከሚሩ ሰራተኞች ጋር ያለው የሥራ

ግንኙነት የሚያስነሳው ጉዳይ ሌላው የአሰሪና ሰራተኛ ግንኙነት ከሚያስነሳው ጋር ተመሳሳይ መሆኑን የሚስትሮች ምክር ቤት በአ.ቁ. 42/85 አንቀጽ 3(3)(ለ) መሠረት ሊያወጣ የሚችለው ደንብ እነዚህን ሠራተኛን በተመለከተ እንጅ መንፈሳዊ አግልግሎት ለመስጠት ከኃይማኖት ተቋማት ጋር የሚደርጉትን ግንኙነቶች የሚዳሠር ሊሆን አይችልም፡፡

በመሆኑም ደንቡ እስካልወጣ ድረስ የአዋጅ ቁጥር 42/85 በመንፈሣዊ የሥራ ግንኙነቶች ላይም ተፈፃሚ ይሆናል የሚለው ትርጉም የሕግ መሠረት የሌለው ይሆናል፡፡

ከፍ ሲል በተዘረዘሩት ምክንያቶችም ማኛውም የሥራ ክርክር ሰሚ አካላት መንፈሣዊ የሥራ ግንኙነቶች ተመልርቶ የሚሱ ክርክሮች በአ/ቁ. 42/85 መሠረት አይቶ ለመወሰን ሥልጣን የሌላቸው ሲሆን ክርክሮቹ የኃይማኖት ተቋማቱ በሚሠሯቸው አለመግባባቶች በሚፈጠበት መንገድ የሚሄዱ ናቸው፡፡ ይህ ችሎትም የስር ፍ/ቤት በዚህ ጉዳይ በታየው የህግ ነጥብ የሰጠው የሕግ ትርጉም መሠረታዊ የሕግ ስህተት ያለበት ሆኖ አግኝቶታል፡፡

ውሣኔ

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2/ ግራ ቀኙ ወጪ ኪሣራቸውን የየራሣቸውን ይቻሉ፡፡ መዝገቡ ተዘግቷል፡፡ ይመለስ፡፡

አምስት ዳኞች ፊርማ አለበት

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Books:

Brownlie,I., *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, New York, 2003(first published in 1966), p. 5, [hereinafter Brownlie, *Principles of Public International Law*]

Contributions in edited books:

Fleck, Dieter, the Law of Non-International Armed Conflicts, *in* Fleck, Dieter (ed.),*The Handbook of International Humanitarian Law*, Second Edition, Oxford University Press, Oxford, New York, 2008, p. 613, [hereinafter Fleck, *The Handbook of International Humanitarian Law*]

Articles in Journals:

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Treaties:

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Resolutions:

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Cases:

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የኢትዮጵያ መድን ድርጅት vs. ጊታሁን ሀይሉ፤ ጠቅላይ ፍርድቤትሰበር ሰሚ ችሎት፤ መ.ቁ. 14057፤ 1998 ዓ.ም.

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