3(1), Mizan Law Rev. (2009) ISSN-1998-9881

Mizan Law Review

Vol. 3, No. 1 March 2009

Adjudication and Aribitrability of Government Construction Contracts

Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level

Mayhem in Darfur: The Accountability, Peace and Immunity Debate

Underlying Distinctions between ADR, *Shimglina* and Arbitration

---

Sharing Thoughts

Notes Corner

Comment

Cases



Biannual Law Journal Published by
St. Mary's University College, Faculty of Law
Addis Ababa, Ethiopia

PATRONS

Wondwosen Tamrat (Asst. Professor)
President, St. Mary's University College

Ms. Kirsti Aarnio
Ambassador of Finland to Ethiopia

HONORARY PATRONS

Norman Singer (Professor)
University of Alabama, U.S.A

Selamu Bekele
(Asst. Professor)

EDITORIAL COMMITTEE

Elias Nour (Editor, Chairman)
Elise Nalbandian (Editor)
Fasil Abebe (Editor)
Filipos Aynalem (Editor)
Getahun Kassa (Editor)
Muradu Abdo (Editor)
Tsegaye Regassa (Editor)
Meiraf Girma (Managing Editor, Secretary)

EXTERNAL ASSESSORS OF ARTICLES PUBLISHED IN THIS ISSUE

Abinet Zeleke (LL.B, LL.M)
Assefa Fiseha (LL.M, PhD)
Berhanu Taye (LL.B, LL.M)
Fekadu Petros (LL.B, LL.M)
Gebreamlak Gebregiorgis (LL.B, LL.M)
Solomon Negussie (LL.M, PhD.)
Yonas Birmeta (LL.B, M.A)
Zekarias Keneaa (Asst. Prof.)

Mizan Law Review invites the submission of original and previously unpublished articles, comments, book reviews and notes. The opinions expressed in this journal do not necessarily reflect views of the Editorial Committee.

Mizan Law Review
St. Mary's University College, Faculty of Law
P.O. Box 18490 or 1211 (Addis Ababa, Ethiopia)
Mizan <smc@ethionet.et>

ACKNOWLEDGEMENT

***Mizan Law Review* is grateful to the Embassy of Finland in Ethiopia for the financial assistance given to us which covered printing cost and a portion of other expenses.**

MIZAN LAW REVIEW

VOL. 3, NO. 1 ISSN-1998-9881 MARCH 2009

CONTENTS

ARTICLES

Adjudication and Aribitrability of Government Construction Contracts — *Tecle Hagos* — 1

Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level — *Tsegaye Regassa* — 33

Mayhem in Darfur: The Accountability, Peace and Immunity Debate — *Awol K. Allo* — 70

Underlying Distinctions between ADR, *Shimglina* and Arbitration — *Fekadu Petros* — 105

SHARING THOUGHTS

To and From the Community — *Peter L. Strauss* — 134

NOTES CORNER

Notes on Jurisprudence: Positivist Pure Theory of Law— Hart's Concept of Law — *Elise Nalbandian* — 138

COMMENT

River Maiteb's Location in the Ethio-Eritrean Western Border: Critical Reflections — *Elias N. Stebek* — 149

ICJ Judgment (1994) on the Libya/ Chad Territorial Dispute: Brief Overview and Observations — *Elias N. Stebek* — 167

ፍርዶች

ትኩረት- *የውርስ ይርጋ* 189

የፌ/ጠ/ፍ/ቤት የሰ/መ/ቁ 25567፤ **ኀዳር** 12 **ቀን** 2000 **ዓ.ም.**
አመልካች ፡ ወ/ሪት አይናለም ...
አቶ ደገፋ ... 190

የፌ/ጠ/ፍ/ቤት የሰ/መ/ቁ. 34824፤ **ታህሣሥ** 02 **ቀን** 2001 **ዓ.ም**
አመልካች፡- አቶ ፈቃደ ...
ተጠሪ፡- አቶ አስፋው ... 192

የፌ/ጠ/ፍ/ቤት የሰ/መ/ቁ 32982፤ **ጥቅምት** 6 **ቀን** 2001 **ዓ.ም.**
አመልካች ፡ የመቀሌ ዞን ደቡብ ማዘጋጃ ቤት
ተጠሪ ፡ የመምህር ገበያው ... ተተኪዎች 195

የፌ/ጠ/ፍ/ቤት የሰ/መ/ቁ 34940፤ **ታህሳስ** 28 **ቀን** 2001**ዓ.ም**
አመልካች ፡ ወ/ሮ ሐጅራ ...
ተጠሪ ፡ አቶ ሐሺም ... 199

* * *

SUBMISSION GUIDELINES

The following submissions are acceptable for publication upon approval by the Editorial Committee. Publication of an article further involves evaluation by and feedback from two External Assessors.

Articles: Research articles that identify, examine, explore and analyze legal and related principles, concepts and statutory stipulations based on research findings from primary and secondary sources and that aim at interpretation, description, exploration or diagnosis towards the solution of problems in the realms of application and development of laws;

Comments: Case comments that highlight and analyze issues, laws and their interpretation and application in case decisions or fact situations under consideration;

Thoughts, monographs, essays, observations, and reasoned critique from experienced members of the legal profession;

Summary Notes: Notes that shed light on a topic of study and which target at student needs;

Book Reviews.

* * *

Mizan Law Review welcomes contributions from academics, judges, attorneys, legal advisors, public prosecutors, and members of the legal profession (in Ethiopia and abroad):

Materials submitted to Mizan Law Review are required to be previously unpublished.

Submissions shall be in Times Roman, 1.5 space, Font Size 12. Amharic texts shall be in Power Unicode or Ge'ez 1, font size 11. Footnotes shall be in Times New Roman: font size 10 for English and font size 9 for Amharic. Emphasis shall be indicated in *italics* and not in bold or underlined letters.

Articles shall not exceed 30 (or under exceptional circumstances 35) pages. *Comments* may range from five to ten pages. The maximum size for *Thematic Comments* shall be twenty pages.

ARTICLES

- Adjudication and Aribitrability of Government Construction Contracts
- Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level
- Mayhem in Darfur: The Accountability, Peace and Immunity Debate
- Underlying Distinctions between ADR, *Shimglina* and Arbitration: A Critical Analysis

ADJUDICATION AND ARBITRABILITY OF GOVERNMENT CONSTRUCTION DISPUTES

Tecle Hagos Bahta *

Introduction

The construction industry in Ethiopia is regulated by various legislative enactments which mainly come under two different domains; namely, *civil construction laws*, and *government construction laws.* The former laws apply where a private individual or company usually referred to as 'employer' (otherwise known as 'owner' or 'client') enters into a construction contract with a contractor. And the latter involves a government department which intends to have construction works carried out on behalf of the government for public interest. Thus, depending on whether the construction contract involves a private civil/business-to-business engagement or a government-to-business, separate set of rights and obligations apply in the construction industry.

Disputes usually arise in the process of the performance of contractual obligations under construction contracts. When and if construction disputes come to the fore, litigations take years; costs may skyrocket; speed and efficiency give way to drawn out and tedious proceedings resulting mainly in the mismanagement of public fund that should have been otherwise spent on the expansion of public infrastructure. This is unaffordable for the government department and the taxpayer. And, on the other side, hard-won reputation and good will of construction contractors are damaged. In fact, the loss of or damage to the good reputation in the market place will tax the contractor's business heavily due to loss of confidence in the eyes of potential employers, be it private investor or government employer. There is thus the imminent need for an *effective, economic, and efficient* means of settling such disputes.

This article first introduces the legal framework and the role of adjudication, as a new Alternative Dispute Resolution (ADR) method, in resolving government construction disputes, and, secondly, it examines the place of arbitration, i.e., by addressing the issue whether arbitration can validly be

* LL.B (AAU), LL.M in European and Comparative Law (University of Ghent, Belgium), Lecturer in Law, Mekelle University, College of Law and Governance, Department of Law; Director, Human Rights Center, MU; the author can be reached for comments at: pppillars@fastmail.fm

used in resolving government construction disputes in Ethiopia. Section 1 discusses the reason why construction claims and disputes abound in the construction industry. In Section 2, attempt is made to show some attributes that the government construction contracts law, as part of the administrative contracts law, would share in common. Sections 3 and 4 deal respectively with the commonly used ADR and arbitral clauses in construction contracts in Ethiopia and the role that an adjudicator and the civil engineer play in resolving construction disputes. The issue of arbitrability of government construction contracts is analyzed, in Section 5, at greater length in light of recent court decisions and the relevant laws. The Article, finally, concludes by suggesting some points on what can be done to settle the contentious issue of arbitrability of government construction contracts in Ethiopia.

1. Construction Claims and Disputes

Inherent and pervasive uncertainties and risks involved in the construction industry are the factors behind the frequent construction claims and disputes. The substantial portions of the disputes are settled through extra-judicial dispute settlement methods and, thus, go unnoticed. Moreover, the sanctity of the principle of confidentiality in international commercial arbitration coupled with their sensitivity to the reputation of the construction companies keeps many international construction contracts muffled with a view to minimizing their adverse impact. In effect, the numbers of published cases in construction disputes (domestic and international) are minimal as compared to the magnitude of the problems and construction disputes.

A multitude of reasons can be alluded to as the sources of the disputes. Suffice it to mention the following as being a few of the sources that are of the interest to the construction lawyer.

Firstly, disputes may arise due to some negligent behavior on the part of the contractors who fail to give proper and due attention to the tender/ bid and other contract documents at the contractual and post-contractual stages. The following anecdote by a construction lawyer illustrates the point:[1]

> *'*A contractor [colleague of his] was complaining about the horrible conditions of contract that he was being asked to sign which essentially made him responsible for Acts of God and of the Consulting Engineer, the two things being equivalent for him: "If this is so horrible, why do you insist on signing the Contract?" And he took a big sigh and said: "You know contractors have to be optimists. I am convinced that if a contract document said: 'The suc-

[1] Nael Bunni, The FIDIC Form of Contract: the Fourth Edition of the Red Book, 2nd ed., (London: Blackwell Science Ltd., 1997), at 337, citing D.E Cullivan to have told the anecdote in a seminar held in Jakarta in Oct. 1984.

> cessful tenderer will be hanged by the neck as soon as the contract is signed, you would not lack for competitors!' He continued: "They would think, well, perhaps I can negotiate my way out of it. Secondly, I am sure my lawyer will find a clause that will protect me. And failing that, may be, the rope will break."

The story chips in here a bit of a sense of fun. It should be realized, however, that the extreme delays, pervasive below-standard completion and, at times, abandonment of construction projects perhaps tip it a bit of a grain of truth in our country, too.

Second, the apparent technical intricacies and the bundle of a spectrum of legal and technical documents that need to be treated, etc render most construction contracts far flung from the courts and lawyers to the extent that the construction industry is nicknamed by many as 'the closed industry' thereby inhibiting the process of synthesis to come up with workable and coherent construction legal principles.

Third, as George Marcus and Paula Marcus have precisely put it:

> "Construction Contract documents often consist of hundreds, if not thousands, of pages of General and Special Conditions and addenda to those conditions that eliminate, change, or add important language. Government and quasi-government agency rules and regulations are incorporated into the contracts. Furthermore, there are technical specifications describing materials, construction methods, and requirements. To this are added 50 to 100 or more plans detailing the building and its many services. To complicate matters, the plans and specifications are often changed before bid time by addenda that sometimes describe plan changes by word rather than by revised drawings. It is impossible to avoid contradictory and erroneous information in this mass of documents."[2]

Fourth, the construction industry is a breeding ground of disputes as a result of construction claims not only on the basis of variations or modifications throughout the construction period due to the inextricable geological and sub-soil uncertainties but also from the fact that multifarious areas of law have to converge to interplay in a site[3]- i.e., government procurement, contracts, sub-contracts, environmental impact, sanitation, labor, tort, suretyship, intellectual property, property, etc.

Fifth, the fact that many developing countries do not yet have or are yet striving to have efficient, transparent, fair and competitive public procure-

[2] George Marcus and Paula Marcus, *Fact-based Mediation for the Construction Industry*, The Arbitration Journal, Vol. 42, Part 3 (Sept. 1987), at 6.

[3] Charles Molineaux, *Moving Towards a Construction* ***l****ex mercatori****a***: A *lex constructionis*, 14 J. Int. Arb. 1March 1997, at 57.

ment system[4] is also a major factor in the rise of construction disputes. Worse still, this is at many instances compounded by the blatant poor draftsmanship of construction contracts.

Sixth, the absence of comprehensive construction laws in many developing countries is also one reason among the many in the multiplicity of construction disputes.[5]

Finally, in international construction contracts, the continued engagement (sometimes confronted with conflicting interests) of the parties involved (for instance, the employer, the consulting engineer or architect, contractor, subcontractors, quantity surveyors, funding agencies, insurance companies, suppliers, electrical and mechanical engineering companies, *etc*) at a construction site from different countries with different legal orientations and even different legal systems could turn the site into a Tower of Babel,[6] so to say. In connection to this, John Sykes wrote:[7]

> For many employers, the first foray into construction is the only one, and a good or bad reputation is of little concern provided the work is done correctly, on time and the price is as low as possible. To a contractor, however, a good reputation …is a most valuable trading asset, albeit one which can be easily and quickly lost by careless or misguided behavior.

Thus, Sykes advises that employers and contractors should refrain from becoming "embroiled in a public litigious dispute, the aftermath of which could tarnish their reputations and damage future work prospects."[8] In this regard, the Ethiopian approach is no different. It is unequivocally stated, in Government procurement of construction contracts, that, "a consistent history of litigation or arbitration award against the Applicant or any partner of a Joint Venture may result in *disqualification*".[9] [Emphasis added].

---

[4] See Victor Mosoti, *Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya*, ICLQ, Vol. 54 (3), July 2005, at 642.

[5] Charles Molineaux, *Supra* note 3, at 55.

[6] 'And the Lord said, "… *Come let us go down and then confuse their language that they may not understand one another's speech*".' Genesis 11:7

[7] John Sykes, Construction Claims, (London: Sweet and Maxwell, 1999), at 161.

[8] *Ibid*, at 160

[9] Section 3 of The Federal Standard Bidding Document for the Procurement of Works issued by the Public Procurement Agency (PPA), January 1, 2006. The author, however, hopes that the phrase "consistent history of litigation…" should not in any way implicate a contractor who involves himself in the *bid protest (review) processes* because it would otherwise paralyze effective combat against procurement corruption in Ethiopia. For a discussion on the efficacy and necessity of litigation as a procurement oversight mechanism, see generally Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM.U.L.Rev.627 (2001).

2 . Government Construction Contracts: As part of Administrative Contracts

According to Art.3244 (1) of the Civil Code :

> A contract of public works is a contract whereby a person, the contractor, binds himself in favor of an administrative authority to construct, maintain, or repair a public work in consideration of a price.

The foregoing is not only a circuitous definition but also fails to specifically indicate what really 'public works' are. For a better definition, therefore, one can allude to Art.2 (c) of the Federal Public Procurement Proclamation No. 430/2005:[10]

> "Works" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, road, or structure, such as site preparation, excavation, installation, of equipment and materials, decoration, as well as services incidental to works, if the value of those services does not exceed that of the works themselves and includes build, own, operate and transfer contracts.

The Civil Code of Ethiopia of 1960 introduced into the Ethiopian legal system the concept of administrative contracts law.[11] The injection of the administrative contracts provisions into the legal system empowered government departments to choose between two types of contracts: a private law contract or a public law contract (administrative contract). Thus, contracts that are concluded by Government Departments are not necessarily administrative contracts. According to Art.3132 of the Civil Code:

> A contract shall be deemed to be an administrative contract where:
> a) It is expressly qualified as such by the law or by the parties, or
> b) It is connected with an activity of the public services and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service, or
> c) It contains one or more provisions, which could only have been inspired by urgent considerations of general interest extraneous to relations between private individuals.

Whether or not a contract that is concluded by a government department is an administrative contract is to be determined in light of the criteria set under Art.3132 of the Civil Code. The law categorizes some contracts as administrative contracts, *ipso jure*, as per Art.3132 (a). These are:

[10] The Federal Procedures of Public Procurement and Establishing its Supervisory Agency Proclamation No.430/2005, *Federal Negarit Gazeta*, 11th Year, No. 15, pp.2949-2982, 2950.

[11] See also Rene David, *Administrative contracts in the Ethiopian Civil Code*, Journal of Ethiopian Law, Vol. 4, No.1, pp.143-153.

i) Government concession contracts: Arts.3207- 3243,
ii) Public construction contracts (Public works contracts): Arts.3244- 3296, and,
iii) Government supplies contracts (Public supply contracts): Arts.3297-3306.

Thus, Art. 3131 of the Civil Code defines the scope of applicability of the administrative contracts provisions. It provides thus:

(1) Contracts concluded by the State or other administrative authorities shall be governed by the provisions of this Code which relate to contracts in general or special contracts.
(2) The provisions of this Title shall supplement or replace such provisions where the contract is in the nature of an *administrative contract***.** [Emphasis supplied].

The scope of this article does not allow us to delve into an in-depth discussion of the administrative contracts law regime beyond a brief overview. It is to be noted private contracts are the expression of the free will of the two contracting parties who stand on an equal footing. In public law, however, the private individual is opposed by the state, the representative of the public interest. Put simply, the core-essence or central tenet of the administrative contracts law has been that public interests prevail over private interests.[12] As a result, the government department is placed to be in a special legal position and is granted special rights or privileges in order to fulfill its public functions. Accordingly, the government department is entitled to such privileges as to increase, diminish or put an end to the obligations of the contracting party regardless of the terms of the contract. [13]

For the lawyers with the Common Law experience, the difference may not resonate at all. Many lawyers from the continental legal system, on the other hand, must have been long pondering at such concepts as Acts of Government (*théorie de Fait du Prince***),**[14] *theorie de l'imprévision***,**[15] the non-applicability of the doctrine of *exceptio non adimpleti contractus***,**[16] the doctrine of *causa*[17] *(cause:* absence of *cause or cause illicite)***,** supervision**,**[18]

[12] See also Brick Dickson, Introduction to French Law, (Pitman Publishing., London, 1994), at 60.
[13] Arts. 3172-3206 of the Civil Code of Ethiopia of 1960 (Hereinafter the Civil Code) particularly establishes the exorbitant clauses that an administrative contract may be entitled to.
[14] Arts.3190-93 of the Civil Code.
[15] Arts.3183-89 of the Civil Code.
[16] Art.3177 of the Civil Code.
[17] The Doctrine of *causa* (*cause*), for instance, was ingeniously crafted to attenuate its role so as to avoid the import of its intricacies (prevalent in its French progeny) onto the General Principles of Contracts (GPC) in the Ethiopian Civil Code whilst it was fully made to retain its enhanced role in the Administrative Contracts Law regime in the Civil Code as it is in the French *contrats administratiff.*
[18] Arts.3179-383 of the Civil Code.

clause exorbitante du droit commun,[19] etc. These are concepts alien to ordinary civil contracts.[20] The concepts had been introduced to the Ethiopian legal system by Professor Rene David as he drafted the Civil Code of Ethiopia. It is saddening to learn, however, that whilst the French *contrats administratif* has been continuously refined and developed under the case law of the French *Conseil d'Etat*, the Ethiopian Administrative Contracts Law has been perhaps the most marginalized and stagnant area of law.

Under French law, contracts can be governed by administrative contracts or private law contracts. An administrative contract is characterized by the provision of a public service or a contract which gives the administration exceptional powers not found under private law contracts. The latter powers are called "*clauses exorbitantes du droit commun*" meaning contractual provisions not found in the ordinary law of contracts. An example would be permitting an administration a unilateral right of cancellation. The term public service is expounded by case law but includes such activities as the provision of gas to a city. The unique feature of the administrative contract is to give protection to the public interest.

Under the doctrine of "*fait du prince*" an act of the administration may affect the rights of the other party under a contract. This cannot be objected to by the other party but may entitle it to monetary compensation. The theory of "*imprevision*" (unforeseeability) imposes (on the administration) the duty to pay compensation to a contractor who encounters unforeseen supervening circumstances under a government contract which would otherwise make it excessively onerous for him to continue. The private person contracting with the administration my not derive benefit from performing his part but may be entitled to compensation for his/her loss.

It is noteworthy, therefore, that administrative contracts law is regulated separately from the civil contracts in Ethiopia. It is against this backdrop that the divide between civil and administrative contracts in the Civil Law countries must be looked into. This is so important in light of the fact that government departments can also conclude civil contracts.

To be specific, as indicated earlier on, public works contracts (also referred to as construction contracts for public works or public works of civil engineering construction) are classed, *ipso jure*, as falling into the administrative contracts legal regime. A look into construction contracts for public works that are concluded by a number of the government departments (public bodies), shows a 'qualifying clause' by the parties in the absence of which it would all the same remain to be an administrative contract.

[19] Art. 3132 (c) of the Civil Code.

[20] *Supra* note 17

3. Adjudication and Arbitral Clauses in Public Construction Contracts

We have tried to explain the reasons why multitudes of disputes arise in the construction industry. If all these disputes should have the light of the day in the courts, it would have proven itself unbearable to the contracting parties, as it is costly and time-consuming to litigate every construction claim and dispute. Therefore, it is of paramount importance to devise proper methods of settling the disputes. Thus, in an attempt to resolve disputes without resorting to court litigations, contracting parties more often than not incorporate specific ADR [21] and/ or arbitral clauses in their contracts.

The following clauses are used in a significant number of government construction contracts as major dispute settlement clauses:

1. ZemZem Plc and Zonal Educational Bureau of Illubabor used the following clause.[22]

   Article 24:

   Disputes between the contractor and the employer, including the Consultant acting under the employer's authority, *shall be* resolved amicably by *informal negotiations.* If no amiable solution can be found after 30 days from the commencement of negotiations, either party *may require* that the dispute be referred to a *3rd party for adjudication or arbitration* in accordance with Ethiopian law. [Emphasis added].

   Article 25:

   The contract shall be interpreted in accordance with Ethiopian law**.**

2. The following dispute settlement clause, for example, is used in the construction contract concluded between the Educational Bureau of Tigray and Ato GebreTsadik Hagos:

   24.1 If the Contractor believes that a decision taken by the Project Manager

[21] The author is of the view (as many authors in the Continental legal system would share it) that arbitration should be considered as a separate dispute settlement method, and that ADR methods are alternative not only to litigation but also to arbitration. Basically, ADR methods include negotiation, conciliation/ mediation, adjudication, rent-a-judge, mini-trial, and their varieties. Although it is not easy to come by with an over-arching definition encompassing all the aforementioned ADR methods, the fact that the parties retain full control of their outcome and that the compromise agreement that is reached at can only have biting teeth on the full blessing of its terms by the parties, unlike litigation and arbitration, can be a distinguishing hallmark.

[22] The Clause giving rise to the *ZemZem PLC* V *Illubabor Bureau of Education*, Federal Supreme Court, Cassation Division file No. 16896, Tikmt 16,1998 E.C, Addis Ababa (On file with the Author).

was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the *Adjudicator* within 14 days of the notification to the Project Manager's decision.

25.1 The Adjudicator shall give a decision in writing *within 28 da***ys** of receipt of a notification of a dispute;

25.2 The Adjudicator shall be paid by the hour at the rates specified in the Bidding Data and Contract Data, together with reimbursable expenses of the types specified in the Contract Data, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be *final and binding.*

3. The Standard Conditions of Contract for Construction of Civil Work Projects published by the Ministry of Works and Urban Development (MOWUD) in May 1994 also reads as follows:

Clause 67: Settlement of Disputes-Arbitration

If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, or the execution of the Works whether during the progress of the work or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so give written notice of his decision to the Employer and the Contractor. Subject to appeal to MoWUD or its Authorized Representative, as hereinafter provided [sic], such decision in respect of every matter so referred shall be final and binding … (and) the Employer and … the Contractor … shall proceed with the execution of the Works with all due diligence whether the Employer or Contractor requires arbitration as hereinafter provided, or not. If the Consultant has given written notice of his decision to the Employer and the Contractor and no claim to appeal has been communicated to him by either the Employer or the Contractor within a period of ninety days from receipt of such notice, the said decision shall remain final and binding upon the Employer and the Contractor. If the Engineer (fails) to give notice of his decision, as aforesaid, within a period of ninety days after being requested as aforesaid or if either the Employer or the Contractor be dissatisfied with any such decision then and in any such case either the Employer or the Contractor may within ninety days after receiving notice of such decision or within ninety days after the expiration of the first named period of ninety days, as the case may be required [sic] that the matter or matters in dispute be referred to MoWUD or his Authorized Representative hereinafter provided. All disputes or differences in respect

of which the decision, if any of the Engineer has not become final and binding as aforesaid shall be *finally settled by MOWUD* or his Authorized Representative. The decision of the *Ministry* or his Authorized representative shall be final and binding.

4. The dispute settlement clause embodied in Article 67.1 of the FIDIC (1987) Red Book Form of Contracts also reads as follows:[23]

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty -fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

[23] Guide to the Use of FIDIC Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, FIDIC 1989, at 36-36.

> Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

And According to Article 67.3 of the FIDIC (1987) Red Book Form of Contracts:

> Any dispute in respect of which:
>
> a) *the decision, if any, of the Engineer* has not become final and binding pursuant to Sub-Clause 67.1, and
>
> b) *amicable settlement* has not been reached within the period stated in Sub-Clause 67.2
>
> shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce *by one or more arbitrators* appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute…

4. The role of the adjudicator and the Civil Engineer in resolving Government Construction Disputes

Reading from the afore-mentioned 'dispute settlement clauses' (1-4 in Section 3), the *consulting engineer, the adjudicator*, and *the arbitrator* feature in resolving Government Construction Disputes. Needless to say, the amicable settlement methods, particularly negotiation and conciliation/ mediation also play their role. As the latter dispute settlement methods are commonly used for resolving any compromisable dispute, this article will focus on the dispute settlement methods that are of particular interest to construction contracts; namely, the role of the consulting engineer-as a quasi-arbitrator, adjudication, and arbitration.

4.1- Adjudication

It should be underlined here that "adjudication"[24] is meant to refer to a disparate pre-arbitral dispute settlement method in the construction industry; it is commonly used in a technical sense. In the construction industry, 'adjudication' can be defined as:

> …a process whereby an appointed neutral and impartial party is entrusted to take the initiative in ascertaining the facts and the law relating to a dispute and to reach a decision within a short period of time.[25]

'Adjudication', as a first tier in dispute resolution, was introduced in the UK by the Latham Report of 1994 and incorporated in the Housing Grants, Construction and Regeneration Act of 1996.[26] This Act provided that in all construction contracts, the dispute is first submitted to adjudication as a condition precedent to the bringing of arbitration or litigation. [27] We are not sure of when and how it was introduced to the Ethiopian construction contracts; it can be safely said, however, that it has become important in the resolution of construction disputes for quite some time now.

According to Art. 34 of the Federal Standard Bidding Document for the Procurement of Works, the adjudicator is required to act as an impartial expert to resolve disputes between the parties as rapidly and economically as is reasonably possible. The Bidding Document further expounds the role of the adjudicator as "to include, but not limited to, requiring and examining any relevant documents and written statements, making site visits, using his own specialist knowledge and holding a hearing". Furthermore, the Adjudicator's decision should "reflect the legal entitlements of the Parties and his fair and reasonable view of how the dispute should be resolved". The Adjudicator's decision is binding on the parties unless challenged within a specified period and then varied in an arbitration or litigation depending on the terms of the contract. If the decision is not challenged within the specified period, it then becomes final and binding.

Whether the role of the adjudicator should be played by a professional lawyer or engineer begs the question. It is true that the construction industry is replete with many technical intricacies making it beyond the easy reach of

[24] See a brief but excellent discussion on adjudication (in Amharic) by Michael Gunta, **የኮንስትራሽን ውል ገድታዎች**፤ Ethiopian Bar Review, Vol. 1, No. 1, 2006, pp. 131-145, at pp. 141-145. Also similar discussion by Eyvind Finsen, The Building contract: A commentary on the JBCC Agreements, 2nd ed., (Cape Town: Juta & Company Ltd., 2005), at pp.222-229. The Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA) Arbitration Institute has adopted its own Rules of Adjudication as of Sept.14, 2007. So far, two construction disputes have been resolved under the Rules of Adjudication, and, according to Ato Yohannes Weldegebriel, the number is recently increasing as currently "… virtually most construction contracts designate the Institute as the adjudicator appointing body". E-mail from Ato Yohannes Weldegebriel, Director, AACCSA Arbitration Institute to this Author (Feb. 9, 2009). (On file with the Author).

[25] Nael Bunni, *supra* note 1, at 437

[26] Keren Tweeddale and Andrew Tweeddale, A Practical Approach to Arbitration Law, (London: Blackstone Press Limited, 1999), p. 85

[27] *Ibid*, at 84.

many legal scholars. It should also be admitted, at least in theory, that the civil engineer or architect must have a general knowledge of the law. To be sure, administration of construction contracts requires a certain minimum amount of knowledge of the law.[28] Thus, the role-players in the construction industry- particularly the civil engineer, the architect, the contractor and the quantity surveyor will be better off if they are equipped with certain minimum knowledge in law. This, however, may or may not be sufficient expertise to qualify them to serve as adjudicators in complex construction contracts. Worse still, it will be too ambitious to look to find a professional who combines both professions in Ethiopia. Thus, an issue would arise whether a lawyer can be an adjudicator, assisted by a civil engineer or architect when and if the dispute at hand is entangled with construction technicalities. It is to be noted that adjudication in disputes involving construction contracts entails a careful and close understanding not only of the complexity of the particular construction project at hand but also the legal intricacies that may potentially arise.

4.2- The Consulting Engineer: As a quasi-arbitrator

The role of the Consulting Engineer to act as a quasi-arbitrator in the settlement of construction disputes is imported to the Civil Law Countries through the FIDIC Standard Form of Contract (The Red Book). For a general understanding, the FIDIC Standard Form of Contract merits a brief discussion here.

As Nael Bunni noted:

> "In the commercial activities of today's highly complex society, standard forms of contract have become an essential part of the day-to-day transactions of most agreements. The majority of standard forms have been developed by commercial organizations for the purpose of efficiency, to build on the experience gained from the repeated use of these forms, but most of all for the optimum protection of one or both parties' interests. Standard forms of contract developed for construction activities, however, have mostly been drawn up by independent professional organizations, rather than by one or other of the parties to the contract, in order to establish or to consolidate a fair and just contract." [29]

The Conditions of Contract (International) for Works of Civil engineering

[28] The reality may, however, be different as, for example, the author knows that no law course is offered to the engineering students at Mekelle University except the senior industrial engineering students who were offered a 2 Credit-hour course on 'Law for Engineers' which unfortunately phased out a couple of years back. (It is believed that the curriculum is similar in all public HEIs)

[29] Nael Bunni, *Supra* note 1, at 3.

Construction was prepared by the *Fèdèration Internationale des Ingènieurs Conseils* (the International Federation of Consulting Engineers, FIDIC) and the *Fèdèration Internationale du Bàtiment et des Travaux Publics* (the International Federation of Building and Public Works, now known as the International European Construction Federation, FIEC).[30] As its cover was printed in red, it became to popularly known as the 'RED BOOK'.[31] FIDIC is the international Federation of duly elected associations of consulting engineers representing the profession in their respective countries.[32]

Since 1913, the *Fèdèration Internationale des Ingènieurs Conseils* (FIDIC) has produced the contract forms used in the majority of all transnationally financed civil engineering projects carried out in the developing world.[33] Of the various contract forms introduced by FIDIC, the FIDIC Fourth Edition has claimed an unparalleled success throughout the world today and this success is also owed to the World Bank.[34] The World Bank,[35] the largest financing agency in the international field, produced the first edition of its standard bidding documents for the procurement of works of civil engineering construction ("SBDW").[36] The use of SBDW was made a *conditio sine qua non* for contracts financed in whole or in part by the World Bank for construction works estimated to cost more than USD 10 million and it is submitted that the SBDW is almost entirely based upon the FIDIC Red Book.[37]

According to Bunni "The adoption of the Red Book by the World Bank in its SBDW is a major vote of confidence and an endorsement of the FIDIC Red Book." [38] Nael Bunni, added that " …in view of the importance of the World Bank as a financing agency for works of civil engineering construction in the developing countries, the use of the Red Book has escalated considerably."[39]

The British model "allots a high degree of authority to the project consulting engineer that appears to have offended developing country governments, contractors, civil law proponents and common law lawyers".[40] The consulting engineer may provide services such as counseling services, preinvestment studies, design, preparation of documents and supervision, project management, etc. Under the FIDIC Red Book, however, "the engineer must also resolve most of the day-to-day differences of opinion which frequently

[30] *Ibid*, at 6.

[31] *Ibid*. See similar background discussion at Robert Knutson, FIDIC: An Analysis on International Construction Contracts (edited by Robert Knutson), (The Netherlands: Kluwer Law, IBA, 2005), p. xiii.

[32] *Ibid*

[33] M. Beth Lyon, *The Role of the Consulting Engineer in Developing Country Construction under the FIDIC Form Contract*, 26 Law & Policy Int'l Business, 1994-1995, at 273.

occur in multi-million or multi-billion dollar projects involving years of works by multiple sub-contractors. It is this broad spectrum of decisional powers, binding both the contractor and the employer, which makes "the FIDIC engineer uniquely strong and independent." [41] The consulting engineer, who is the agent of the employer in the particular project, is entitled to the pre-arbitral decision-making process whose non-acceptance by the parties will lead to the initiation of arbitration. This decision-making power may even apply to disputes relating to the engineer's own design, specifications or instructions handed down to the contractor on the employer's behalf.

In response to the severe criticism, FIDIC came up (in November 1996) with a document entitled '*Supplement to Fourth Edition 1987*-Conditions of Contract for Works of Civil Engineering Construction-reprinted 1992 with further amendments.'[42] This document was aimed at providing, *inter alia*, an alternative to clause 67 of the Red Book for the '*settlement of disputes*', i.e., offering an option to the quasi-arbitrator consulting engineer with a 'Dispute Adjudication Expert or Board" that gives decisions on any dispute referred to it, subject to further referral to arbitration.

In connection with this, it is worth to note that construction projects that are partly or wholly funded by the World Bank are treated differently. The World Bank's SBDW provides for the use of the three-member Dispute Review Board (DRB) for the construction contracts with the estimated value exceeding USD 50 million. For other contracts under the SBDW, the employer will be free to choose from the DRB, a one-member Dispute Review Expert (DRE), or the independent consulting engineer under clause 67 of the FIDIC Red Book.[43] It should be noted here that, it is being widely used notwithstanding the irreconcilable divergence between the FIDIC Form and the existing construction principles (especially principles of public works contracts) in the Civil Law Countries.[44]

[34] *Ibid*, at 274.

[35] In this Article, the World Bank refers to the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA) as the procurement procedures for both institutions are the same. The 'World Bank Group' normally also refers to the three more institutions: the International Financial Corporation (IFC), The Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID).

[36] *Ibid*

[37] Nael Bunni, *supra* note 1 at 466. The document is officially referred to as Standard Bidding Documents for the Procurement of Works- Major Contracts (over US$ 10 Million); The World Bank, Washington D.C., January 1995.

[38] *Ibid*, at 467

[39] *Ibid;* it can be said that it has pervasive applicability in Ethiopia, too.

[40] Lyon, *Supra* note 33, at 273.

[41] *Ibid*, at 276.

[42] Nael Bunni, *supra* note 1, at 15

At this juncture, it is noteworthy that Clause 67 of the MoWUD Standard Conditions of Construction Contracts (1994 Edition), as presented verbatim above, empowers the consulting engineer to act as a quasi-arbitrator. This clearly indicates the fact that the idea of appointing the consulting engineer to serve as a quasi-arbitrator has already had a foothold in Ethiopia. Construction lawyers need to closely examine if this scheme conforms to the Ethiopian principles of agency in light of the powers and duties of the consulting engineer as embodied under Clause 2 of the afore-mentioned Standard Conditions and the BATCoDA Standard Conditions of Consulting Services for Design and Supervision of Construction Works (The January1990 edition). It can nevertheless be easily observed that the MoWUD Standard Conditions of Contract has been dominated by an unchecked influx of the Common law contract principles; arguably, it seems a rehash of the FIDIC Red Book Form.

The afore-said Standard Conditions of Contract, under Clause 67, stipulates that any dispute or difference in respect of which the Engineer failed to give a decision or has given a decision and either party is dissatisfied with is to be referred to MoWUD for final settlement through arbitration. Although it is not unusual for parties to nominate a neutral third party (physical or juridical) who is entrusted with appointing (an) arbitrator(s), it is unusual to appoint a juridical person as arbitrator. To begin with, why would MoWUD be an arbitrator in the face of the fact that the dispute or difference involves a Government Department (including, if not in majority cases, MoWUD itself) and a private Contractor (international or national) and that the award rendered at the hands of MoWUD would be 'final and binding'? It simply flies in the face of one of the basic natural justice tenets: *nemo judex in causa sua*. Yet again, one is left in limbo as to why the Standard Conditions, under Clause 5(1)(b), stipulated that, "… [The] Courts of Ethiopia shall have exclusive jurisdiction over any matter arising out of or in connection with this Contract." It sounds hardly plausible for Clause 5(1)(b) to sit comfortably with Clause 67.

[43] Recently, however, the World Bank and eight other Multilateral Development Banks (MDBs) issued mandatory contract conditions for all infrastructure work financed by those institutions, entitled, "The Conditions of Contract for Construction, MDB Harmonized Edition, 2005, or otherwise known as *"The Harmonized Edition, 2005"* wherein a 'Dispute Board (DB)' is adopted rather than Dispute Adjudication Board (DAB). For further discussions on the issue, see Armando Ribeiro de Araujo, Red Book Onside: Harmonization of Procurement Procedures in developing countries, *Construction Law International*, Vol.1, No.1, (2006), pp.21-22.

[44] See the brief mention, for example, of those principles in the Ethiopian Administrative Contracts Law above in Part II.

5. The Arbitrability of Government Construction Disputes

Arbitration has been widely accepted and used as a means of settling construction disputes. The scope of this article does not allow us to delve into the details of arbitration procedures. One key issue that should be properly addressed and which has been a bone of contention in the Ethiopian arbitration law and practice, however, is whether administrative contract disputes can be validly submitted to arbitration.

The issue of arbitrability is very crucial. Redfern and Hunter wrote:[45]

> The concept of arbitrability is, in effect, a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations which matters may be settled by arbitration and which may not. If the arbitration agreement covers matters incapable of being settled by arbitration, under the law of the agreement or under the law of the place of arbitration, the agreement is ineffective; it will be unenforceable. Moreover, recognition and enforcement of an award may be refused if the subject matter of the difference is not arbitrable under the law of the country where enforcement is sought.

Disputes or differences arising from or relating to a specific legal relationship, be it civil or commercial, can be classified into two categories: *arbitrable* and *non-arbitrable*. It is worth mentioning, *en passant*, that parties to international commercial arbitration need to know what are arbitrable:

i. Under the arbitration laws of the seat of arbitration (*Lex Loci arbitri*);

ii. Under the laws of the state to which the parties would like to refer to as governing their arbitration (*lex electionis*) other than the *lex loci arbitri*, if any, and;

iii. Under the laws of the state in which recognition and enforcement may ultimately be sought (*lex executionis*).

Insofar as the arbitrability of administrative contract disputes is concerned, scholarly writings have been divergent on the issue.[46] In the same vein, Ethiopian courts have been addressing the question from diverse perspectives. The following cases demonstrate as to how our courts have been deal-

[45] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 1st ed., Sweet and Maxwell: London, 1986, p.105. Also see a discussion on the issue of 'Arbitrability' by Zekarias Keneaa, *Arbitrability in Ethiopia: Posing the Problem*, Journal of Ethiopian Law, Vol. XVII (1994), pp.116 -136.

ing with the problem of arbitrability (or non-arbitrability) of administrative contracts disputes.

5.1- *High Way* v *Solel Boneh Ltd* [47]

The holding of the Court in this case was the following:

> Although by Art.3194(1) of the Civil Code, a court may not order administrative authorities to specifically perform their obligations, a court is not thereby precluded from ordering specific performance of an agreement to submit disputes to arbitration.

As Tilahun Teshome noted:[48]

> A suit to enforce an arbitration clause or a separate submission to arbitrate is a special proceeding and is considered as an action for the specific performance of an agreement to arbitrate.

Specific performance is defined as: "…a process whereby the creditor obtains as nearly as possible the actual subject matter of his bargain, as opposed to compensation in money for failing to obtain it".[49] Can we then invoke specific performance to arbitrate against an administrative body? Art.3194, under the heading of compulsory performance of contracts, states thus:

1. The court may not order the administrative authorities to perform their obligation.
2. It may, however, make an order for the payment of damages unless the administrative authorities prefer to perform their obligations.

In its decision, the Supreme Imperial Court reasoned that, "… according to art. 3194(1) of the Civil Code, the Court cannot order administrative authori-

[46] Bezzawork Shimelash, *The Formation, Content, and Effect of an Arbitral submission under Ethiopian Law*, Journal of Ethiopian Law, vol.xvii, 1994, pp.83-86, arguing, mainly on the substantive/ procedural laws dichotomy, in favor of the arbitrability of administrative contracts disputes; Ibrahim Idris, arguing against the arbitrability as cited by Bezzawork, pp.83-84; See also an in-depth discussion on the issue by Zekarias Keneaa, *supra* note 39, pp.119-121; Also a brief discussion on the issue by Tilahun Teshome, *The legal Regime Governing Arbitration in Ethiopia: A Synopsis*, Ethiopian Bar Review, Vol. 1, No.2, pp.125-127.

[47] Supreme Imperial Court of Ethiopia, May 14th, 1965 published at The African Law Reports, Vol. 1, 1966, pp. 41-44.

[48] Tilahun Teshome, *supra* note 46, p.136

[49] Mahdi Zahraa and Aburima Abdulllah Ghith, *Specific Performance under the Vienna Sales Convention, English Law and Libyan Law*, Arab Law Quarterly, [2000], Kluwer Law international, The Netherlands,p.305.

ties to perform their obligations, but that it can order specific performance in procedural matters".[50] The ramification of this ruling was far-reaching; it is believed that this decision triggered the inclusion of the "prohibitive clause" under Art.315(2) of the Civil Procedure Code.

5.2- Ethio Marketing Ltd. v Ministry of Information [51]

The decision of the Ethiopian Supreme Court reads:

> A contract concluded pursuant to the provisions of the Civil Code is law between the two parties. The Appellant and the Respondent having, on the basis of the Civil Code, agreed to resolve the dispute between them by arbitration, the Civil Procedure Code should not prevent the enforcement of this contractual agreement.

Simply put, the Court's decision is based on the argument that procedural laws should neither limit nor extend substantive rights. We think this argument is too difficult to maintain. Suffice it to mention the words of the famous Italian procedural lawyer, Prof. Mauro Cappelletti and American Prof. Bryant Garth:

> For more than a century lawyers and scholars have tried to distinguish between "procedural law" and "substantive law", only to find that it is impossible to draw a clear line between the two. If one tries to argue that procedure becomes substance when it determines the particular "outcome" of a legal dispute, then it appears necessary to concede that almost everything is substance. On the other hand, if procedure is confined to the methods by which legal claims are initiated and proved, there is little doubt that much of the substantive law governs procedure.[52]

Perhaps, the procedural/ substantive law dichotomy must have been a perplexing issue for those of us, academicians and practitioners alike, who attempt to specialize in the area of private international law (PIL).[53] On top of that the investment of any or some disputes exclusively to the courts' jurisdiction could not have been better positioned anywhere else in Ethiopia than the Civil Procedure Code. Traditionally speaking, procedural laws not only

[50] *Ibid*, p.42. In its dictum, the Court, in fact, committed an error in believing that, under art.3194, damages must be awarded if specific performance is not granted; and if no damages can be assessed for failing to perform an obligation, as in arbitration, specific performance should be granted.

[51] Ethiopian Supreme Court decision of March 29, 1975, Cited by Jeremy Winter, *International Arbitration under public works contracts*, Baker and McKenzie, June 1, 1998, pp.175-183, p. 180; See also similar substantive/ procedural laws arguments by Bezzawork Shimelash, *supra* note 46, pp. 69-94.

[52] Mauro Cappelletti and Bryant Garth, *Civil Procedure*, International Encyclopedia of Comparative Law, Vol. XVI, p.13.

confer jurisdictional powers upon the courts, but also divest or deprive, if need be, the jurisdiction of any judicial proceeding from the courts or any tribunal. This is exactly what procedural rules do as in the case of Art.315 (2) which allocates the power to resolve disputes arising from or related to administrative contracts exclusively to the courts.

5.3- Gebre Tsadik Hagos v Tigray State Bureau of Education [54]

The Tigray State Supreme Court's holding in *Gebre Tsadik Hagos* v *Tigray State Bureau of Education* [55] has the following**:**

> We have concluded that article 315(2) does not permit Government organs to settle their disputes through 'gilgil' [sic] [arbitration]…and, thus, legal prohibitive clause cannot be derogated from via any working procedures, manuals or directives issued by the Government organ. [Author's translation]

Despite the obvious contractual agreement to settle disputes between the parties first through adjudication and, then, arbitration, the Tigray Supreme Court reversed the decision of the Mekelle Zonal Court that gave the deference to the arbitration agreement. The Tigray Supreme Court, thus, remanded the case to the Zonal Court so that the latter can hear the merits of the case. What was most unfortunate about this case was the fact that the parties had to litigate their case for about a year and a half to reach a similar decision as that of the Project manager whose decision the parties agreed will be binding if not referred to an adjudicator within 14 days of the notification of the decision. The Contractor failed to refer it to the adjudicator within the agreed time frame and it should have become final and binding. Instead, the Con-

[53] See George Panagopoulos, *Substance and Procedure in Private International Law*, Journal of Private International Law,Vol. 1 (2005), pp. 69-92, wherein various efforts are deployed in an attempt to classify specific issues into substance and procedure, particularly limitations of actions, remedies, and equitable rights. See also Janeen M. Carruthers, *Damages in the Conflict of Laws- The Substance and Procedure spectrum* : *Harding* v *Wealands*, Journal of Private International Law, Vol. 1,(2005),pp. 323-334; Robert Allen Sedler, The Conflict of Laws in Ethiopia, (HSI University, Faculty of Law: AA, 1965), pp.148-155, generally supporting the assertion made above (in ft note 52) by Profs. Mauro Cappelletti and Bryant Garth. The author would like to note that while it is an inveterate doctrine in PIL that matters of procedure are governed by the *lex fori* and that matters of substance are governed by the *lex causae*, it has always been far easier to state it than to apply.

[54] Tigray State Supreme Court, Civil Appeal file No. 962/96 (10/06/96 E.C, Mekelle), (Unpublished), p.1 (On file with the author.

[55] Tigray State Supreme Court, Civil Appeal file No. 962/96 (10/06/96 E.C, Mekelle), (Unpublished), p.1 (On file with the author)

tractor instituted an action in the Zonal Court and the Zonal Court ruled that the parties should submit the dispute to arbitration as requested by the Bureau of Education. As discussed above, however, adjudication is an ADR method for settling construction disputes that is a condition precedent to arbitration. The clause [56] conveys in no uncertain terms the message that the parties had this in mind at the time of making of the contract.

5.4- Zemzem PLC v Illubabor Zonal Dep't of Education [57]

This case relates to a dispute arising out of a contract concluded between Illubabor Zonal Department of Education and ZemZem PLC for the construction of an elementary school to be built within the Illubabor Zone of the Oromiya State. The Illubabor Zonal Department of Education, as an organ of the Oromiya State, is an Administrative Body whose contracts of Public Works would fall under Art.3244 *et seq*. This enables the contract of public works that was concluded between the two parties to be qualified as an Administrative contract. At this juncture, we will be confronted with basic questions: Is an arbitration clause inserted in a public works contract valid? If so, should the court give deference to it whether or not the parties invoke it?

The ADR clause (Article 24 of the contract) used in the construction contract between Zemzem PLC was cited under Section 3 above. It is cited again for the purpose of convenience:

> Disputes between the contractor and the employer, including the Consultant acting under the employer's authority, *shall be* resolved amicably by *informal negotiations*. If no amiable solution can be found after 30 days from the commencement of negotiations, either party *may require* that the dispute be referred to a *3rd party for adjudication or arbitration* in accordance with Ethiopian law. [Emphasis added].

Moreover Article 25 of the contract reads "*The contract shall be interpreted in accordance in Ethiopian law.***"** A fundamental question one would raise is: What was the intention of the parties by inserting the ill-drafted clause 25 in their agreement? Moreover, various issues capture our attention. Is the contract being given an international flavor and that a conflict-of-laws rule being devised? If so, why does it dissect a limb of the total contractual relationship, i.e., the interpretation, and subject it to the Ethiopian rules of interpretation? Which law would, then, govern the validity, the performance, breach of performance, consequence of nullity of the contract, capacity of the parties, etc? There is also no need of incorporating such a clause when the construction contract does not have a foreign element.[58]

[56] The contractual clause is reproduced *verbatim* above in Part III of this Article.

[57] *Supra* note 22.

[58] The author witnesses a plethora of such clauses being used in public works construction contract documents.

The Federal Supreme Court's Cassation Division ruled in its holding that the term of the contract is clear and does not need interpretation. The Court also added that contractual agreements entered into by parties are laws among the parties and are binding as between the parties by virtue of art.1731 of the Civil Code. The Federal Supreme Court did not make any reference to the term 'adjudication' in its dictum; it simply stated that according to art.24 of the contract, if negotiations fail, parties should settle their disputes through arbitration or '*begelagay dagninet'*. Thus, the Federal Supreme Court reversed the decision of the Oromiya Supreme Court and ordered the Illubabor Zonal Bureau of Education to go about settling its disputes with the appellant through arbitration.

The Oromiya Supreme Court's holding was that the contractual clause only stipulates that either party can either proceed in the 'court of law' or through arbitration (*behig weiym beshimglina*). The Court, thus, concluded that their agreement does not require the parties to settle their disputes solely through arbitration. Hence the Court had failed to distinguish between 'adjudication' and 'litigation'.

The point is, however, whether the afore-mentioned dispute settlement clause is bereft of any irregularities and tamper-proof as claimed by the Federal Supreme Court. In other words, does the wording of Art.24 engender the need for interpretation? The author believes there are, at least, some simple but key issues that should have necessitated the intervention of the Federal Supreme Court's Cassation Division for the proper determination of the parties' rights and obligations under the contract:

a) Does the clause imperatively impose the duty to arbitrate on the parties?

b) Would the Illubabor Zonal Department of Education be compelled to arbitrate, article 315(2) notwithstanding?

c) Does it settle, once and for all, the hitherto controversial issue of whether administrative contract disputes are arbitrable or non-arbitrable, taking into account the fact that the decision was rendered by the Cassation Division of the Federal Supreme Court which is 'binding' on all Federal and State Courts? [59]

Primarily, from the wording of the second paragraph of the afore-mentioned ADR clause, one can easily understand the fact that adjudication is not used by the parties to mean litigation as they are deliberately choosing and deploying the terms as follows: *...either party may require that the dispute be re-*

[59] Art.2(1) of the Federal Courts Proclamation Re-amendment Proclamation No.454/2005, *Federal Negarit Gazeta*, Year 11, No.42, June 2005.

ferred to a 3rd Party for adjudication or arbitration… [Emphasis added]. This is to say that the parties were cognizant of the fact that be it "adjudication" or "arbitration", it is to be referred to a 3rd party. At least, one can safely expect that the parties, assisted by construction experts, would not commit such a clumsy bungle to refer the sovereign-appointed judges as "a 3rd party".

Secondly, a careful reading will enable us to note the stark contrast in choosing and deploying the words by the parties in the first and second paragraphs of the clause. Arguably, the parties might have intended that negotiation, as a dispute settlement method, should of necessity be resorted to by carefully choosing and deploying the imperative phrase 'shall be'! In contradistinction, the parties have been selective of their terminologies when using the word "may" (in the second para.).

Hence, it could mean that the parties stipulated an optional clause whereby the parties could either continue further negotiating on the dispute or, failing that, either party has the possibility of resorting to adjudication or arbitration, without making it imperative on the parties. In other words, it may be concluded that the parties left the door open for adjudication and/ or arbitration without entirely overruling litigation. This enables the parties to make an informed choice of the most cost-effective dispute resolution scheme in the event of a dispute.[60]

Thirdly, the parties made it abundantly clear that the submission of their disputes, be it to adjudication or arbitration, is to be made *in accordance with the Ethiopian Law***.**[Emphasis supplied]**.** The Ethiopian Law, which the parties laid down as governing, manifestly prohibits the submission of administrative contracts disputes (construction contracts for public works for that matter) to arbitration proceedings; thereby making the submission by the parties null and void. The Federal Supreme Court, in its cassation decision, streamlined the foregoing assertion by holding that, "*subject to what the law prohibits or limits, parties can enter into agreements and be bound by it as per Art.1731 of the Civil Code".* [Author's translation]

The crux of the matter is whether the Federal Supreme Court was "oblivious" of the obvious "prohibitive clause" of the arbitrability of Administrative Contracts disputes under Art.315(2) of the Civil Procedure Code? Or

[60] Such modalities are not uncommon in the construction industry. In fact, even the United States Courts tolerate "Unilateral" or "Discretionary" ADR and Arbitral clauses that effectively give only one party the right to choose between arbitrating or litigating certain disputes. For more discussion on the issue, see Adam Nahmias, The Enforceability of contract clauses giving one party the Unilateral Right to choose between Arbitration and Litigation, *The Construction Lawyer*, Vol. 21, (2001), pp.36-38.

could it be that the parties' agreement to refer to a 3rd party for arbitration was permitted by law?

The far-reaching consequence of the Federal Supreme Court Cassation Division's decision in the case is that the Court, advertently or inadvertently, either nullifies or contradicts itself with the much-talked-about Art.315(2) that has been evoking heated discussions as to whether disputes arising from administrative contracts are arbitrable or non-arbitrable. It may be argued that the non-arbitrability of any subject matter should be raised by the party against whom the arbitration agreement is invoked. This conveys the message that the Court, *sua motu*, will not raise the issue of non-arbitrability. Indeed, reading from the dossier on the case, there is nothing that indicates the invocation of Art.315(2) of the Civil Procedure Code by the Zonal Bureau of Education. Nevertheless, this belief is simply erroneous in that the arbitrability and non-arbitrability of any dispute is a public policy issue and must be maintained at any cost.

The critical question here is whether we can take the above ruling of the Federal Supreme Court's Cassation Division at its face value? The decision does not seem to settle the issue once and for all because of the following reasons. Firstly, each State has the legislative power not only to form and organize its own governmental structure but also to determine the responsibilities and duties of each of its organs according to its Constitution. Corollary to it, each State determines the substantive and procedural rules that each of its administrative bodies should adhere to. The conclusion, therefore, is that each State has retained the power to legislate specific enactments on 'Administrative Contracts Laws' if it chooses to continue to apply it, or even to reject altogether the Civil Contracts/Administrative Contracts dichotomy. Second, it is understood that the determination or allocation of the jurisdiction of each of the State courts that it establishes is left to its own discretion. No doubt, therefore, that the States determine the procedural rules employed by the respective courts of each State.

Thus, States also retain the power to enact the Civil Procedure Code for their respective courts. It should, thus, be quickly added to it that the existing Civil Procedure Code of 1965 couldn't be considered to have been a Federal one so as to bind both Federal and State courts. Indeed, it is incorporated *de jure* under Article 11 of the Federal Courts Establishment Proclamation No. 25/96 [61] to have the force of law in the Federal courts. It is, however, not clear whether it has been *de jure* incorporated similarly in each of the States or *de facto* applied. [62] It is clear, though, that it is being applied in all the

[61] Federal Courts Establishment Proclamation No. 25/96, *Federal Negarit Gazeta*, 2nd Year, No.13, A.A, Feb.15, 1996.

States because of the blessing that State Councils granted to the law in their respective territory.

Furthermore, States have the legislative power to invest the determination of administrative contract disputes solely in their respective courts and prohibit the submission of same to arbitration. The Civil Procedure Code of Ethiopia, having the force of law *de jure* or *de facto* in all the States, hitherto affords deference to Article 315(2); thereby maintaining the prohibitive clause. The multitude of contractual clauses qualifying government contracts as administrative contracts, especially in construction contracts for public works in the states, are vivid testimonies of continued warm treatment being accorded to administrative contracts law.

Another issue that captures our attention is whether the Federal Supreme Court's Cassation decision nullifies the hitherto prohibitive clause in the States' Civil Procedure Codes because of the fact that Cassation decisions of the Federal Supreme Court are binding upon both the federal and state courts? This would not have engendered much of a problem if the proclamation is attempting to introduce the concept of *judicial precedence* and/ or doctrine of *stare decisis* to the Ethiopian legal system for the Federal courts. It would not be that easier, though, when and if the Federal Government is trying to levy federal laws over the states for which the Federal Government does not at all have the legislative power to do so. It would only be appropriate, therefore, if both the States and the Federal Government work within the ambit of their legislative power without stepping on the toes of each other.[63]

After all, can the Federal Supreme Court exercise power of cassation over clearly defined state matters? Well, it is difficult to find a ready-made answer. We may approach it from the point of view of the pervasive practical problems in most of the States. For this purpose, it worked, perhaps, well to operate on Article 87 of the FDRE Constitution. [64] The scope of the article does not allow us dwell on the argument. It is, however, proper to mention that empowering the Federal Supreme Court's Cassation Division to revise State matters and apply them uniformly based on judicial precedence and/ or

[62] For example, Art. 108 of the Proclamation to Pronounce the Coming into effect of the Revised Constitution of the Regional State of Tigray, *Negarit Gazeta Tigray*, 10th year, No. 2, Hidar 6, 1994, grants the *carte blanche* for the applicability of all laws, regulations, and directives previously in force insofar as they are not inconsistent with the Revised Constitution.

[63] For an in-depth discussion on the issue, see Tecle Hagos Bahta, *Federal and State legislative Powers in civil and commercial matters in Ethiopia: Striking the balance and maintaining it!,* Federalism and the Protection of Human Right in Ethiopia, Eva Brems and Christophe Van der Beken (eds), (Lit Verlag Gmbh & Co. KG Wien: Zurich, 2008), pp. 70-85.

stare decisis is not only unacceptable but also a dangerous undertaking that can effectively but destructively be used to usurp in piecemeal on the legislative powers of the States**.** It should, thus, only be taken to mean that cassation decisions by the Federal Supreme Court will be binding on both the Federal and State Courts on cases or disputes arising from the federal laws on the basis of judicial precedence and/ or *stare decisis*. This, indeed, is an ingenious device to guarantee uniform interpretation of the federal laws to avoid differential treatment of citizens in the same case situations wherever the case is being seized. This furthers and guarantees certainty and predictability in the federal legal system; hence ensuring equality of citizens in judicial proceedings. However, the argument that the decision of the Federal Supreme Court's Cassation Division is also binding on state matters doesn't seem to be a strong argument because the Constitution maintains diversity depending on each State's policy considerations. It would, thus, be an unwelcome exercise for the Federal Supreme Court to claim to decide on the States' policy considerations.[65]

One cannot be certain as to what has been the impact of the decision of the Federal Supreme Court's Cassation Chilot in *re Zemzem PLC v Illubabor Bureau of Education* in the Self-Governing Federal Capital City of Addis Ababa and the Federal Enclave City of Diredawa where the Federal Courts sit and apply the Federal Civil Procedure Code.

The lesson we, arbitrators and academicians alike, draw from the decision is, however, clear. *One*: cutting the *circulus inextricablis*!: that the Federal

[64] The FDRE Constitution, *Federal Negarit Gazeta*, Year 1, No.1, A.A, 21st August, 1995; in this regard, resorting to historical interpretation of our Constitution may allow us, though still contentious, to read into Art.80 (3) the power of the Federal Supreme Court's Cassation Power over both Federal and State matters as presented, albeit vaguely, in the Minutes of the Ethiopian Constitutional Assembly, Vol.5, Hidar 21-24, 1987 E.C, A.A. However, it should be mentioned, in this connection, that historical interpretation has not been favoured by the EU European Court of Justice (ECJ) in Luxembourg; instead contextual and teleological interpretation methods have been frequently put in use. For an in-depth discussion on the issue, see Sionaidh Douglas-Scot, Constitutional Law of the European Union, (Harlow: Pearson Education, 2002), pp.199-224. In our case, lack of detailed, well-explained and consolidated documents of the *travaux preparatoires* of the Ethiopian Federal Constitution, one may argue, may militate against the use of historical interpretation and in favour of the contextual and teleological interpretation methods in the Ethiopian Constitutional interpretation processes, too.

[65] See also Muradu Abdo, *Review of State Courts over State Matters by the Federal Supreme Court*, Mizan Law Review, Vol. I, No.1, 2007, pp.60-74, arguing *de lege ferenda* against the practice of the Federal Supreme Court's Power of Cassation over any state matter.

Supreme Court through the Cassation Decision has stripped Art. 315(2) of the Civil Procedure Code of 1965 of its luster and hammered the last nail in its coffin and that henceforth any arbitral clause or submission in an administrative contract is enforceable. *Two:* the cure is worse than the disease: The Federal Supreme Court erred in holding the decision that is unequivocally against a clear policy consideration of the non-arbitrability of the administrative contracts disputes enshrined under article 315(2) of the Civil Procedure Code of Ethiopia of 1965.

Cutting the Gordian Knots: Conclusion

From the foregoing discussion, we can see that construction contracts for public works are part of the administrative contracts legal regime in Ethiopia and that administrative contracts, with all the privileges bestowed upon them, do exist in Ethiopia. It should also be underlined that more often than not administrative bodies do qualify their contracts as an administrative contract.

It should also be borne in mind that Art.315(2) does prohibit the arbitrability of disputes arising from administrative contracts. A sacrosanct policy consideration is manifestly expressed under Art.315(2) that invests any litigation on disputes arising from administrative contracts exclusively in the sovereign -appointed judges and expressly deprives party-appointed arbitrators of same!

The concern of the sovereign might have been, *inter alia*, the fact that states are deeply concerned in defending and tipping the scales in favor of public interest issues *vis-à-vis* the private interest. In France, for example, the administrative contracts law has been endeared [66] as ever mainly for four basic principles advancing the *services publics*:[67] the principles of continuity, equality, adjustment (adaptability), and priority. The arbitrators may not be sufficiently close to such national concerns and, it can be safely said, especially in international commercial arbitration, that they have a weaker allegiance to national laws; they are notoriously open to the application of international usages and rules of the trade.[68] This is exactly what happened in the case *re High Way Authority* v *Solel Boneh Ltd*. The case was followed by the embodiment of the much-talked-about Art.315(2) in the Civil Procedure Code that was promulgated just few months after the said Court ruling.[69]

[66] John Bell and *et al*, Principles of French Law, (Oxford University Press: New York, 1998), citing Braibant to have written: 'Whatever the new solutions and changes in the future, French administrative law must not lose its soul: the public service", at 167.

[67] Brice Dickson, Introduction to French Law, (Longman Group Ltd: London, 1994), p.70.

John Sykes has also an equally valid concern: [70] "litigation before the court is essentially a public expression of the need of society to let justice be seen to be done" as opposed to the confidential proceedings in arbitration.

At times, the arbitrator may not be the ideal person to rely upon for some critical disputatious issues. Let us consider the following hypothetical example:

> A certain government department head found out that the construction contract recently concluded with a certain Sky-Limit General Construction (G.I) PLC to construct the 101 kms asphalt road (worth Birr 400 Million) from a city of *Delina* to another city of *Lelina* was an artificially created demand by a certain Road Engineering Section Head within the department. The department alleges that it was intended to specifically procure financial benefits to the contractor and a certain Space Consulting Engineers and Architects (G.I) PLC, which was also awarded for the engineering and architectural services of the project. The department now wishes to invalidate the contract invoking *absence of cause* or *illicit cause* pursuant, respectively, to Article 3170 or 3171 of the Civil Code. Assuming that the contract allows the submission of disputes to arbitration, the department would, it is submitted, submit its request for invalidating the contract to arbitration. Now, would the arbitrator, in his function of determining the validity of the contract, probe into the allegations that the department artificially created the demand and intentionally rigged the procurement procedures to award the multi-million-construction contract to the bidders who connived with the Section Head? Can the arbitrator determine on the existence of procurement corruption (corrupt, collusive, fraudulent, and coercive practices) so as to declare the

[68] The developments and trends in the philosophical perspectives and the rules of engagement in international commercial arbitration involving states and state agencies and a foreign contracting party, including international construction contracts disputes, have been so controversial and detaching itself from the national public policy issues of the arbitrability of disputes. The analysis of those developments and trends was not intended to be within the scope of this short article.

[69] The case of *Ministry of Defense of the Republic of Egypt* v *Chromalloy Aeroservicies Inc.(USA)* is also, in this connection, a case in point wherein the arbitrators applied Egyptian civil law while the alleged contractual choice of law was the Egyptian administrative contracts law. Despite the arbitral award having been vacated (set aside) by the Cairo Court of Appeals, Chromalloy (the award-creditor) has succeeded in having it recognized and enforced both in France and the US. For further discussion on the case, See ICCA Yearbook, Commercial Arbitration, Vol. XXIV(a)-1999 (Kluwer Law International, 1999),pp.265-268. See also a brief discussion by Tecle Hagos Bahta, *Anomalies in the Labor Dispute Resolution Methods under the Ethiopian Labor Proclamation*, Jimma University Journal of Law, Vol. I, No. 1 (2007), pp. 111-132, in *Re Addis Ababa Water and Sewerage Authority* v *Salini Costrutori SpA.*

[70] John Sykes, *supra* note 7, p.214.

> contract null and void? Can the arbitrator probe into the public procurement irregularities, such as bribing, bid rigging, abuse of confidentiality, bids rejection on frivolous grounds, specification-tailoring to fit a particular bidder, bid splitting, bid bundling, etc?

For the French, the concern is even more than that. The judges of the administrative courts are distinct by their recruitment and training from the civil and criminal judges in that "the administrative judge has a distinctive formation in administration and personal experience of how it works".[71] This is why the French administrative law system has at its epicenter the *tribunaux administratifs*, the *cours administratives d'appel,* and the *Counseil d'Etat.*[72] Unfortunately, the Ethiopian administrative law does not enjoy similar treatment as that of its progenitor.[73] This has left, as indicated earlier on, the Ethiopian administrative contracts law as the most marginalized and stagnated area of law.

Let us now pose the query: whether the parties [and the legal system] would be better off by submitting their disputes to arbitrators who, they believe, are experts on the area, given that there are no administrative courts to deal with them? To be sure, specialist rules require specialist judges!!

International construction contractors and funding agencies are pressurizing, in its strict sense of the word, the opening up of the restriction on the arbitrability of international construction contracts. For example, France, Belgium, and Egypt have opened up international construction contracts to arbitration.[74] So has Ethiopia partially but falteringly.

Currently, disputes arising out of public works construction contracts in Ethiopia are being arbitrated, domestically and internationally, because of any of the following three grounds:

a) The use of the funding agencies' standard bidding documents when and if they are approved by the legislature as concomitant conditions of grants and loans for projects;
b) The judges' passivity in raising, *sua motu*, the defense of non-arbitrability of disputes arising from the public works construction contracts; and,
c) The various legislative enactments (otherwise known as 'enabling

[71] John Bell and *et al*., *supra* note 65, 176-177.

[72] Brice Dickson, *supra* note 66, pp.70-72.

[73] It is hinted by Prof. René David that both the High Court and the Supreme Court in Addis Ababa used to contain a division that deals with Government cases; cited at René David, *Administrative Contracts in the Ethiopian Civil Code*, *Journal of Ethiopian Law*, Vol. IV, No.1 (1965), p.144.

[74] Jeremy Winter, *supra* note 51, pp.178-183; it is indicated *supra* note 67 that the dictates are not analogous.

clauses') entitling the administrative bodies to settle their disputes out of court.

Yet, the 'enabling clauses' must be carefully trodden upon. Some of them are still dubious whether they allow for arbitration or not. Let us see two of them.[75]

i) the general manager may, with the specific permission of the Board, *settle disputes out of court;*

ii) the general manager shall *settle civil disputes out of court* in accordance with the directives issues by the Board. [Emphasis supplied].

It may well be argued that, insofar as arbitration of administrative contracts disputes are concerned, a prior express 'prohibitive clause' [Art. 315(2)] entails a posterior express 'permissive clause' to go against the former.[76] Thus, these provisions might have been intended to serve the purpose of partly freeing the general manager to engage in ADR methods (exclusive of arbitration) and reach at a compromise agreement.

This is because the administrative bodies are bound by the public procurement rules requirements that it may not be left to their own devices with a *carte blanche* to engage in compromise negotiations that involve the use of public money once the tender award is made.[77] At times, however, post-contractual renegotiations may enhance efficiency by allowing both parties to react to unanticipated contingencies; such contingencies being particularly rampant in construction contracts. Hence we cannot rule out the possibility that the new 'Enabling Clauses' might have been devised to offer a bit of a breathing space for the managers to engage in ADR and not in arbitration.

[75] Art.10 (3) of Ethiopian Roads Authority Re-establishment Proc. No.80/97, *Federal Negarit Gazeta*, 3rd year, No.43, A.A, 5th June 1997, and Art. 8(2)(f) of the Proclamation for the Re-establishment and modernization of Customs Authority, No.60/1997 respectively.

[76] See, for example, The Petroleum Proclamation No.295/1986 and the Mining Proclamation No.52/1993, wherein it is established that arbitration shall be used for settling any dispute, controversy or claims arising under the petroleum operations agreement and mining operations agreement, under Art.25 and 51 of the Proclamations respectively.

[77] For a discussion on whether the use of ADR in government contracts reduce the transparency of and accountability for the resulting settlements owing to the public's diminished access to and scrutiny of the negotiated settlements, see Steven Schooner, *supra* note 9, pp. 627-651. See also Robert Gomez, Mediating Government Contract Claims: How it is different*, Public Contracts Law Journal*, Vol. 32, (2002-03), pp. 63-98.

Be that as it may, however, the administrative contracts legal regime lacks in one basic ingredient that its counterparts have greatly benefited from, i.e., the administrative courts. The basic infrastructure that, we believe, made the administrative contracts non-arbitrable is missing here. Thus, it is high time that the Federal and States legislatures realize this gap and unfalteringly take either of the following two mutually exclusive stricter measures.

The first option is to establish an administrative court with professionals and specialists on the area as it is, for instance, in France, Germany, Italy, Belgium, and Egypt. As observed by Mauro Cappelletti and Bryant Garth, the administrative courts in France, Germany, and Italy, not only are sufficiently specialized in the subject matter but also "…truly independent and impartial bodies, endowed with the prestige of judicial courts, and maintaining fundamental standards of procedural fairness." [78]

The second option can be to unequivocally [79] repeal Art.315 (2) of the Civil Procedure Code. This can possibly enable the legal system, in general, and the Government Contracts legal regime, in particular, avail themselves of the expertise of the specialist arbitrators!!

[78] *Supra* note 52, at 21

[79] In this connection, mention should be made here of Art.47 of the Amhara State Public Procurement Procedure Determination Proclamation No.135/2006, *ZIKRE HIG*, 11th Year, No.20, June 15, 2006, Bahir Dar. Art.47 provides thus:

> "*Where a disagreement arises between the procuring entity and the supplier, such issue shall firstly be dealt with by arbitrators to be chosen by the two parties."*
>
> However, the legal provision still lacks in clarity: essentially, the use of the term "gilgil", as a title of the provision for 'arbitration' and 'gelagayoch' for the 'arbitrators' in stead of 'yegilgil dagnnet' or 'yeshimglina dagnnet' and 'yegilgil dagnoch' or 'yeshimglina dagnoch" respectively in the Amharic version renders the provision susceptible to some ambiguity. By the deployment of such terms in the Amharic version, the legislature may mean to refer to 'conciliation proceedings' rather than arbitration proceedings. The misuse of the word 'arbitration' to actually refer to conciliation proceedings is so pervasive in Ethiopia. For more discussion on this, see Tecle Hagos Bahta, *supra* note 68, at 120 (particularly ft notes 24-25). Furthermore, if it is meant to refer to arbitration proceedings *stricto sensu*, the role of arbitration only as a first instance dispute settlement method, as is clear from a reading of the provision, rejects the idea of *waiver* of appeal pursuant to art. 350 of the Civil Procedure Code. This is not, at least, in keeping with the trend in international commercial arbitrations demanding for the 'finality' of arbitral awards save by way of the 'set aside' recourse.

These measures can indeed serve the purpose of effectively applying and achieving the 'sacrosanct public interest issues' as it should have been advanced under the Government (Administrative) Contracts legal regime. And, perhaps equally important, they can enhance certainty and predictability in the legal system.

SUB-NATIONAL CONSTITUTONS IN ETHIOPA:
TOWARDS ENTRENCHING CONSTITUTIONALISM AT STATE LEVEL*

*Tsegaye Regassa***

Introduction

Ethiopia's federalism is often studied from the perspective of the "centre".[1] The result of this focus on the centre to start off our inquiries has rendered the state constitutions [2] invisible both in academic and non-academic circles.[3] This article offers a fresh look at the Ethiopian federal experiment from the perspective of the states. In a sense, therefore, this study is an attempt at studying federalism "from below".[4] Thus this paper offers an overview of state constitutions in Ethiopia with a view to highlighting their significance in the public life of Ethiopians. It also provides an analysis of how we can deepen and entrench constitutionalism in the states of Ethiopia through the instrumentality of state constitutions. Given the fact that state constitutions

*A shorter and earlier version of this article entitled "Regulating Local State Behavior: Towards Entrenching Constitutionalism at the Sub-national Level in Ethiopia" had been presented at the 3rd Annual Research Conference of the Ethiopian Civil Service College in June 2008 and has benefitted from the colloquy thereof. I am grateful to those who, in the conference, commented on the earlier draft. I am also grateful to the LL.M Students of the Addis Ababa University (classes of 2005and 2006) on whom I first tried some of the thoughts reflected in this piece. I remain grateful to them for their interest and enthusiasm for the subject, and for making me, at times, look at the states with a different 'lens'.

** Tsegaye Regassa (LL.B, LL.M, PhD Candidate [Amsterdam]) teaches at the Institute of Federalism and Legal Studies, Ethiopian Civil Service College, and in the Graduate Program of the Law Faculty of Addis Ababa University, Addis Ababa. E-mail: tsegayer@gmail.com.

[1] A number of studies have been made since the adoption of the federal constitution in 1995. Some of the recent studies include, Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study*. Nijmegen: Wolf Publishers, 2005/6. Solomon Negus, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*. Nijmegen: Wolf Publishers, 2006), David Turton (ed), *Ethnic Federalism: The Ethiopian Experience in a Comparative Perspective*. Addis Ababa/Oxford/Athens OH: AAU Press/James Currey/Ohio University Press, 2006. Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*. Asmara: Red Sea Press, 1997. Merera Gudina, *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy*. Addis Ababa: Shaker Publishers (Netherlands), 2002. While these studies have examined the phenomenon of federalism in Ethiopia—and have enriched the scholarship in the field-- none of these studies make a sustained, direct inquiry into state constitutions. When they refer to state constitutions, it is often tangential and indirect.

are the primary tools with which to guide and regulate state behaviour in states, this article contends that it is important that state constitutions foster the efforts to keep government accountable and transparent at the local level. This in turn ensures the deepening of not only constitutionalism but also of the principles of good governance.[5]

In this study, a quick survey of the constitutions of the nine states [6] of Ethiopia is made to provide an overview of what state constitutions look like,

[2] Various terms are used to refer to state constitutions. Depending on the nomenclature used to refer to the constituent units of the federation (i.e., States, Provinces, Cantons, Communes, Regions, etc), they might be 'state constitutions', or 'provincial constitutions', or 'Statuti (as in Italy), or '*Estatutos de Autonomia*' (as in Spain). The term 'sub-national constitutions', a broader term to include the constitutions of all forms of sub-federal units, is used mainly to distinguish them from the 'national' constitution which is applicable country-wide. As such, it is a handy tool to be used in the discussion on sub-federal constitutions. In this piece, because the constituent units in Ethiopia are known as 'states' or 'regional states' or, more recently, 'national regional states', 'state constitutions' and 'sub-national constitutions' are used interchangeably.

[3] The only piece of writing on state constitutions so far is this author's "State Constitutions in Federal Ethiopia: A Preliminary Observation" [2004] (electronically published at: http://www.camden-rutgers.edu/pdf). There are a few Master's Theses written by LL.M students at Addis Ababa University. Getachew Kenfeshe's *"The Role of Council of Nationalities of the SNNPRS in the Accommodation of Diversity and Conflict Resolution: Challenges and Prospects"* (Unpublished LL.M Thesis: Faculty of Law, Addis Ababa University, 2008) and Lemmesa Berber's "*Division of Powers in the State Constitutions- The Case of Benishangul-Gumuz Regional State*" (Unpublished LL.M Thesis: Faculty of Law, Addis Ababa University, 2008) are two of the very few theses written on the subject recently. "State Constitutions and Local Government" is the only course offered in the study of Constitutional Law in Ethiopia, and even this only at a graduate level. In the world of constitutional practice, the first time the issue of state constitutions is publicly discussed is in a recent annual consultative meeting among states in June 21-22, 2008. One of the papers in this year's consultative meeting, held in Harar, was entitled, "Constitutionalism in the States: The Role and Status of State Constitutions in the Ethiopian Federal Experiment" (Amharic), presented by this author.

[4] See Tsegaye Regassa (2007), "Imagining Federalism from Below: Sub-national Constitutions in the Ethiopian Federation" (an unpublished manuscript, available with the author; forthcoming in 2009.)

[5] While it is helpful to note the distinction between *constitutionalism* and *constitutionism* (like Walter Murphy does in one of his lectures entitled *"Constitutional Interpretation as Constitutional Creation"* given at UC, Irvine on November 1, 2000) in order for us to distance ourselves from a mere legalistic adherence to texts of constitutions, in this study, owing to the focus of the study, the term constitutionalism is broadly used to refer to what is signified by *constitutionism*, too.

their purposes, functions, features, and operations, the institutions they constitute and regulate, the rights they guarantee, the limits they impose on state and local governments, and the manner of their making, interpretation and amendment. Having made an analysis of the texts of the constitutions of the states and of the federal constitution and other relevant sources of state constitutional law, and aided further by the theoretical and comparative literature in the field, an attempt is made to assess the state of sub-national constitutionalism [7] in contemporary federal Ethiopia. An attempt is thus made to identify some of the challenges and problems that attend state constitutional law both at the level of design and of implementation. Finally recommendations in favour of better entrenchment of sub-national constitutionalism are submitted.

Some of the questions that this study wrestles with include the following: (1) what are the purposes, functions, features, and significance of state constitutions in a federal system such as Ethiopia's? (2) What are the principles, structures, and distinctive features of the state constitutions of Ethiopia? (3) What does the making, interpretation, and amendment of state constitutions look like? (4) What protections do the constitutions afford to fundamental rights and freedoms in the states? (5) What roles do the state constitutions play in institutionalizing self-rule and sub-national constitutionalism? (6) What are the problems and challenges encountered in the process of entrenching constitutionalism and deepening good governance at the sub-national level? [8]

[6] The nine states that constitute the Ethiopian federation are: Afar, Amhara, Benishangul-Gumuz, Gambella, Harari, Oromia, Southern Nations, Nationalities, and Peoples' Regional State (SNNPRS), Somali, and Tigray. All these states have their own state constitutions adopted in 1995 and revised in 2001 and since. The self-governing (autonomous) cities of Addis Ababa and Dire Dawa have their own charters in accordance with which they are administered. Both cities are accountable to the Federal Government, Addis Ababa because it is the federal capital and Dire Dawa because of the demographic heterogeneity of its residents which is not amenable to accountability to one regional state. This study is focused on the constitutions of the nine states, not the charters of the two city administrations.

[7] The term 'sub-national constitutionalism' refers to constitutionalism at the state level. It is often used in preference to the term 'state constitutionalism' because it refers to the levels of constitutional practice at levels below the federal one (which includes the state, the zone, Woreda, Kebele, and the Municipality level) governments. While the term is broader in its scope than the 'State Constitutionalism', in this study, as indicated in *supra* note 2, we use the two terms interchangeably.

[8] It is important to note that these questions are ones often used in the study of sub-national constitutions, a field that can be viewed as internal comparative constitutional law or comparative constitutional law from within.

This article is presented in six sections. Following this introduction, section two gives an overview of state constitutions in federal polities. Section three describes state constitutions in Ethiopia. In section four, we analyze the extent to which state constitutions are utilized to regulate state behaviour at the sub-national (i.e., State and sub-state) levels in Ethiopia. In section five of this study, we try to identify some of the major challenges of constitutionalism at the state level. The study closes with some concluding remarks. The study, being a normative one, does not delve into the empirical study of the practice.[9] Consequently, the reference to the practice is merely tangential and is intended for purposes of exemplification.

1. Of State Constitutions in General

State constitutions are usual phenomena in federal polities. States in classic federations such as that of USA, Australia, Switzerland, had their own (state) constitutions from the beginning.[10] In some jurisdictions such as India,[11] South Africa,[12] and Canada,[13] however, the existence of state constitutions is an exception than a norm. Their existence in a federal system is quite an ac-

[9] While it is granted that it is vitally important to study the practice using tools of empirical data gathering, the focus of this study is limited to the analysis of the texts of the constitutions. One can envisage a disparity between the law and practice in this area (as in other areas of Ethiopian law). But the more comprehensive study of both the laws and the practice merits a bigger research than this.

[10] The original 13 colonies that established the first 13 states of the USA had their own constitutions. The states that came to join the USA subsequently also had their own constitutions the substance of which however was impacted by the federal constitution and the "conditions" set for them by the Federal Congress for their admission into the union. See K. B. Smith, A. Greenblatt, and J. Buntin, *Governing States and Localities*. Washington, DC: CQ Press, 2005. Pp. 60-92; G. A. Tarr, *Understanding State Constitutions*. Princeton and Oxford: Princeton University Press, 1998. PP.6-9; R. Williams and G. Alan Tarr, "Subnational Constitutional Space: A View from the States, Provinces, Länder, and Cantons" in G.A. Tarr, R. Williams, and J. Marko (eds), *Federalism, Subnational Constitutions, and Minority Rights.* Westport, CN/London: Praeger, 2004. PP. 3-24. Austrian and German Länders, and Swiss Cantons, Australian States have their own state constitutions as do the states and provinces of Argentina, Brazil, Mexico, and Malaysia, from among others. See James A. Gardner, "In Search of Sub-national Constitutionalism," (Paper presented on the VIIth World Congress of the International Association of Constitutional Law, Athens, Greece, June 11-15, 2007, now available at http://www.camden-rutgers.edu/pdf), p.1.

[11]. In India, state governments are regulated through the instrumentality of the Constitution of India. As a result, states are not allowed to have their own constitutions. Kashmir is the exception in this regard. See A. Khan, "Federalism and Non-territorial Minorities in India" in G.A. Tarr, R.F Williams, and J. Marko, *supra* note , at pp. 199-213

ceptable phenomenon.[14] In most of these systems, state constitutions *aim* at regulating the behaviour of states at the sub-national (i.e., at the state and sub -state) levels. In order to effectively do the regulation of state behaviour, they first establish the basic organs of state, namely the legislature, the executive, and the judiciary.[15] They also state the powers and responsibilities of each organ thereby laying down the rules that govern the relationship among these organs of state.[16] Thus they allocate authority among the three organs of state in the sub-national polities. In addition, state constitutions establish the rules governing the relationship between state governments on the one hand and local governments (e.g. Zone, or Woreda, or Kebele level governments in the case of Ethiopia) on the other. Further, they regulate the relationship between state governmental bodies and citizens by providing for a constitutional guarantee for fundamental rights and freedoms of state citizens.[17] By so doing, state constitutions aspire to limit the powers of state governmental authorities. In a federal polity, because there is dual constitutionalism[18] (often reinforced by the existence of at least two constitutional texts), the state constitutions are also used to reaffirm, explain, and elaborate on state powers that are "granted" or "left" to the states by the Federal constitution.[19] At a more symbolic level,[20] state constitutions serve as the embodiments of the goals and

[12] In South Africa--a decentralized unitary system with a federal character that has avoided the use of the term 'Federal'--the provinces can have their own constitutions as long as the texts of the constitutions can be certified by the constitutional court for conformity to the 34 principles that guided the new South African constitutional dispensation. See K. Henrard, "Equality Considerations and Their relation to Minority Protections, State Constitutional Law, and Federalism" in Tarr, Williams, and Marko, *supra* note 10, at pp. 25-41. Note also the fact that in South Africa, only one province has such a constitution. James A. Gardner, *supra* note 10.

[13] In Canada, only British Columbia has its own provincial constitution. See James Gardner, Ibid, p.7.

[14] State constitutions exist in Australia, Austria, Germany and the USA. In Spain, states have "Autonomy Statutes" and in Italy, they have their "Statuti". Note however that in Canada, states do not have constitutions—with the exception of British Columbia-- because there cannot be such constitutions "independent of the federal constitution" Tarr, Williams, and Marko, *supra* note 10, at pp. 4-5. In Russia, "republics" can have constitutions, but *oblasts* can only have a charter. (Ibid.)

[15] The distinction among the three organs of state, alias known as the *trias politika*, is of course merely conventional and "intellectual abstractions". See W. Murphy, "Constitutional Interpretation as Constitutional Creation" (1999-2000 Eckstein Lecture presented at The Center for the Study of Democracy, UC, Irvine. Published electronically at http://repositories.cdlib.org/csd/00-05 as visited in June 2008.

[16] In this, state constitutions imitate other (i.e., "National" or "Federal") constitutions and to this extent, there is nothing unique or distinctive about them.

aspirations of the peoples of the states. They are also expressions of state sovereignty and the principle of self-rule that constitutes an aspect of federal governance.[21]

As has been hinted at above, the primary *task* of state constitutions is the creation (or constituting) of state governments and regulation of their day to day activities. They thus establish the primary organs of state and circumscribe the ambit of their powers so that they can be put within proper limits.[22] They determine the powers and responsibilities of major governmental insti-

[17] By far the most important justification for the existence of state constitutions is the protection of the rights and freedoms of state citizens from encroachment by the federal government while also granting the state governments the implicit power to interpose between the federal government and state citizens to block some intrusions from the federal government (by, for example, pre-empting the acts of the latter on areas of power overlap). See James A Gardner, *supra* note 13 at pp. 14-17; "The most important justification by far for subnational constitutionalism is the benefit it confers in the protection of human rights. Instead of a single regime of rights protection implemented at the national level, subnational constitutionalism allows for the creation of a second, and to some degree competing, regime of rights protection at the subnational level." P. 26.

[18] See D. T. Beasely, "Federalism and the Protection of Individual Rights: The American State Constitutional Perspective" in E. Katz and G. A. Tarr (eds), *Federalism and Rights*. Lanham/London: Rowman & Littlefield Publishers Inc., 1996, at pp. 104-105 and 117-118. See also, K.B. Smith, A. Greenblatt, and J. Buntin, *Governing States and Localities*, at 65.

[19] It is important to note that in federal systems such as Ethiopia's, exclusively Federal and Concurrent powers are listed while exclusively state powers are "left" to the states as "residual" or "reserved" powers. These powers are also known as "plenary" powers in federations that are created through aggregation or integration. See Arts 51 and 52 of the Federal Democratic Republic of Ethiopia (FDRE) constitution for a list of powers listed, respectively, as Federal and State powers.

[20] It is important to note the symbolic significance of constitutions as constitutional texts are also adopted, among other things, for the purpose of masking imperfections as much as of expressing aspirations and ideals. See W. Murphy, "Constitutions, Constitutionalism, and Democracy" in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World.* New York: Oxford University Press, 1993) at pp. 7-12.

[21] See T. Marks and J. Cooper, *State Constitutional Law in a Nutshell*. St Paul, Minn: West Publishing Co, 1988, at pp. 1 -7 for a discussion of the functions of state constitutions. See also A. Heywood, *Politics* (2nd ed), New York: Palgrave, 2003 at pp. 297-300 on purposes of constitutions in general. He states that constitutions have the principal functions of empowering states, establishing values and goals, providing government stability, protecting freedom, and legitimizing regimes. *Mutatis mutandis*, these functions can also be viewed as functions of state constitutions.

tutions. Often, they also determine the manner of their organization and the rules of procedure for their operation. State constitutions also serve as devices through which constitutional (political) disputes are resolved without a resort to violence. Moreover, they guarantee protection to fundamental rights and freedoms of state citizens. In addition to serving as frameworks of government, often, state constitutions serve as "manuals of government" that carry details of government policies at the state level.[23]

The *features* of state constitutional texts can be understood better when we compare and/or contrast them with the federal constitutions under the supreme authority of which they operate. When contrasted with federal constitutions, the texts of most state constitutions tend to be *lengthier*, *easier to amend and thus more flexible, less durable, and more varied*.[24] In their contents, they tend to be more detailed than federal constitutional texts. They also tend to prioritize direct democracy as opposed to representative democracy.[25] This is often because of the generally homogenous nature and smaller size of the states' demographic make-up as a consequence of which most decisions are submitted to direct popular approval (or disapproval) such as through referendum. State constitutions are also said to have a penchant for a *majoritarian* democracy that goes without *minoritarian* checks.[26]

Although state constitutions provide for a list of *rights of citizens*, they tend to ignore or neglect the rights of minorities. In principle, states are expected to provide for a better protection of rights by adhering to and expanding the federal "minimum standard" for rights.[27] States are free to provide better protection. As such, they are not even bound by the interpretations of the federal institutions that offer a narrower constitutional space for rights as they demonstrate that they, within their respective jurisdictions, are doing

[22] Note that limiting governmental powers is one of the core ideas embodied in the principle of constitutionalism.

[23] K.B. Smith, A. Greenblatt, and J. Buntin, *Governing States and Localities*. Washington, DC: CQ Press, 2005 at p 67 where it is argued that in contrast to the Federal constitution, the American state constitutions "often set forth procedures and address policies.... While the federal constitution creates a framework for government, state constitutions often get into policy details."

[24] *Ibid*, p. 68-69.

[25] *Ibid*

[26] More often than not, state legislatures are unicameral and so there is hardly a way to countervail the majoritarian trend in the legislature. In systems such as that of the USA, the state supreme courts use their interpretive clout to check the excesses of majoritarian decision making in the legislatures. But in systems such as Ethiopia's, where courts' power vis-a-vis the legislatures is weak both in law and in practice, the potential for an unlimited form of majoritarianism to be unleashed is patent.

[27] See T. D'Alemberte, "Rights and Federalism: An Agenda to Advance the Vision of Justice Brennan" in Katz and Tarr, *supra* note 18, at pp 123-138.

better.[28] Nevertheless, there is a possibility that states turn "reactionary" with regard to rights of oppressed groups, minorities, and liberal individual rights in the guise of state rights and autonomy that is sanctified by federalism.[29]

The *making* of state constitutions vary not only from state to state but also from a federal system to another. In federations that are formed through *aggregation* (which are also known as *coming-together federations*),[30] state constitutions, often coming into effect way before the federal constitution was adopted, show a clear variation from the federal constitution. They also tend to be free not to emulate the federal constitutional text as their model. On the other hand, in federations formed through devolution (or those known as *putting-together* or *holding-together* federations),[31] state constitutions tend to be made following the federal model. In these latter cases, the federal constitutions seem to set the directions the state constitutions need to take. Sometimes, the federal constitutions tend to dictate the form and the content of the state constitutions. [32]

In the *constitution making process*, states may choose to have it adopted by a state legislature.[33] States may also have a constitutional assembly for the express purpose of adopting a constitution. Or alternatively, they might submit the draft constitutional text to popular referenda.[34] It is interesting, though, that in contrast to federal constitutions, state constitutions have an 'easier' procedure for their making.

Similar 'ease' is noted with regard to the *amendment* of state constitutions. Often, state constitutions can be amended through the legislatures, a

[28] There is a solid body of jurisprudence that advances this kind of argument as compiled in R.F Williams, *State Constitutional Law: Cases and Materials*. Washington, DC: US Advisory Commission on Intergovernmental Relations, 1990. There are also sceptics as to the power of states to elevate rights more than the federal government. Lawrence Tribe's "Unravelling *National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services," *Harvard Law Review*, 90 (April 1977): 1065, is only an example.

[29] This is the sentiment that is also reflected in Tribe's scepticism. See Tribe, *supra* note 28, at p.1065.

[30] Alfred Stepan, "Federalism and Democracy: Beyond the US Model", *Journal of Democracy* (1999). Vol 10 No.4,

[31] *Ibid*

[32] See art. 52 (2) a-b of the FDRE constitution which stipulates that states are bound to "establish a state administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution;" and "to enact and execute the state constitution and other laws". One can gather from these provisions that the state constitutions cannot hope to establish a system that has a deficit of self-government, democracy, or rule of law, or one that does not defer to the Federal constitution. These provisos set the outer limits of the freedom to adopt one's own constitution at the state level.

[33] This is the case, for example, in Ethiopia.

constitutional revision commission, or a constitutional assembly. At times, amendments and/or revisions can be made to be ratified by popular referenda. This is perhaps because of the homogeneity of interests at the state level. The ease with which states effect a formal amendment, has rendered most state constitutions more flexible than the rather entrenched federal constitutions. [35] But on the other hand, this same ease and the consequent flexibility have made state constitutional texts less antiquated than the federal constitution which, often because of its relative "antiquity", commands a degree of awe, reverence, and mythic status. Apart from the 'easy' formal amendment procedure, state constitutions can also be amended informally by various legal and political actors as they go about discharging their day-to-day activities such as law-making, or interpreting, or executing a government policy. They can also effect amendment by sheer neglect of some provisions which eventually will be 'repealed' by disuse.[36]

For their *interpretation*, state constitutions often depend on the state courts. This is the case, for instance, in the states of the USA.[37] But in systems where ordinary courts are not granted the power to interpret constitutions, such as in Ethiopia, a specific body such as the Constitutional Interpretation Commission, or as in the time preceding 2001 in Ethiopia, state legislatures interpret the state constitutions.[38]

[34] Adoption through a constitutional assembly or referendum tends to create a unique 'constitutional moment' for the public and, to that extent, allows the constitution obtain a broader 'original' legitimacy. See Joseph H. Weiller, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*. Cambridge: Cambridge University Press, 1999, pp.3-9 for an extended and splendidly lucid discussion on the meaning and implications of 'constitutional moments' and how they are helpful in galvanizing popular sentiment that goes into the legitimacy of the constitution. Herman Schwartz asserts the need for resolving the question as to which way of adopting a constitution is better, and suggests that "[a] special constitutional assembly representing as many elements in society as possible is preferable, even though it is more cumbersome and expensive." H. Schwartz, "Building Blocks for a Constitution" in *Issues of Democracy* Vol. 9, No.1 (2004), p.13. A more or less similar argument is presented in, Vivien Hart, "Democratic Constitution Making". Washington, D.C.,: United States Institute of Peace (*Special Report* 107, July 2003) emphasizing the need for popular participation as an important component of modern constitution-making, available online at www.usip.org (accessed in December 2008).

[35] See Tarr, *supra* note 10, at p. 6, generally on the intensity of constitutional change at the state level.

[36] See K. B. Smith, A. Greenblatt, and J. Buntin, *supra* note 24, at pp.62-65.

[37] See James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Functions in a Federal System*. Chicago: University of Chicago Press, 2005, for the predominant mode of constitutional interpretation, especially in the USA.

Implementation of state constitutions depend on various factors such as their legitimacy, a state's historical circumstances, political culture, the notions of governance that predominate a state, and the strength, independence, impartiality, neutrality, and effectiveness of state and constitutional institutions.[39] It is important to note at this juncture that all the features of state constitutions that we discussed here also recur as the features of state constitutions in federal Ethiopia.

2. Sub-national Constitutions in Ethiopia: Towards a Preliminary Survey

In any federation, the federal and the state constitutions have an interlocked set of relations.[40] Often, one tends to be the extension of the other. One begins at the point where the other ends, or within the bounds of the other. As a result, discussions regarding sub-national constitutions will naturally begin with the discussion of the constitution that governs the federal polity. In the following sections, an attempt is made to first outline the nature of the constitution of the federal polity that encompasses the sub-national (constituent) units.

2.1- The Ethiopian Federation and its Constituent Units in General

Ethiopia has become, and is, a federal polity since 1995. The move to federalism was only a culmination of earlier efforts at decentralization that started in 1991 on the aftermath of the collapse of the Derg regime.[41] Marking a complete break from a unitary and centralist past, Ethiopia dared to experiment with a multi-ethnic/ multi-national federation. 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) [42] manifested a number of unique features. (The recognition

[38] In most states of Ethiopia, a constitutional interpretation commission, assisted by the state constitutional inquiry council, interprets the constitution. In the SNNPRS, the Council of Nationalities (CON) interprets the constitution. In the years before 2001, the year at which most of the state constitutions (at least those of the four central highland constitutions, i.e., of Amhara, Tigray, Oromo, and SNNPRS) underwent a massive revision, the state legislatures were the ones that were in charge of constitutional interpretation at the state level. Political interpretation seems to take a swing. In this connection, it is also interesting to note that according to the constitution of the People's Democratic Republic of Ethiopia (PDRE) of 1987, a political body, i.e., the State Council, was the ultimate interpreter of the constitution. (See Art 82(1) a-b).

[39] K.B. Smith, A. Greenblatt, and J. Buntin, *supra* note 36, at pp. 90-97.

of the right of secession,[43] the use of ethno-linguistic criteria as a basis of state formation,[44] the unconventional constitutional interpretation through the upper house of the federal legislature,[45] the fact that states are not directly

[40] Depending on the origin of the federation, i.e., on whether it is a coming-together or holding-together type, one of the constitutions start off where the other stops. If it is of the former type, the federal constitution, often coming into existence after the state constitutions, starts where the latter stop—despite its supremacy all over the country. In contrast, if it is the latter type, the state constitutions start of at the juncture where the federal constitutions stop. Often the federal constitution prescribes the most fundamental and core values undergirding the state constitutions. On the other hand, depending on the nature of division of powers between the federal and state governments, the relationship between the two types of constitutions might present to us a similar but complex picture. Thus, if federal powers are enumerated and state powers are reserved or "residual", then the state constitutions (mostly in coming-together federations) start off where the federal constitution stops. If, in contrast, state powers are enumerated and federal powers are reserved, then the state constitutions (mostly in holding-together federations), one of two things occur: either the state constitutions *begin and end* , at a time, within the boundaries set for them by the federal constitution, or they complete and perfect what has been started by the federal constitution; or they force the federal constitutions to, incrementally, start--and incrementally proceed from--where they stop, often to fill the gaps left unfilled by them or to pre-emptively preclude a potential free sphere of action. Hence, the interlocked relations.

[41] The ethno-nationalist liberation fronts that seized power in May 1991 hastened to negotiate a transitional charter that made ethno-national groups' right to self-determination sacrosanct. Subsequent legislation, Proclamation no. 7/1992, remade Ethiopia into a highly decentralized state where groups, as part of the package of their right to self-determination, had the right to administer themselves, use, promote, and develop their languages; enjoy, promote, and develop their cultures; write, preserve, and develop their history, and assert their particular identities.

[42] 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 Tadesses's, *The Generation: The History of Ethiopian People's Revolutionary Party Parts 1 and 2)*. Trenton: Red Sea Press, 1993 and Lanham: University Press of America, 1998; Edmond Keller's "Ethiopia: Revolution, Class and the National Question" 80 *African Affairs* No 321, 1981; Merera Gudina's *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960-2002*. (PhD Thesis). The Hague: Institute of Social Studies, 2002; Assefa Jalata's *Oromia and Ethiopia: State Formation and Ethno-National Conflict*. Boulder, CO/and London: Lynne Reinner Publisher, 1993; Andargatchew Tiruneh's *The Ethiopian Revolution, 1974-1987: A Transformation from an Aristocratic to a Totalitarian*

represented in the upper house,[46] the fact that the upper house has little, if any, legislative role,[47] etc, can be mentioned as evidence of its unique features).

The Ethiopian federation is composed of nine constituent units carved on the basis of "settlement patterns, language, identity, and consent of the people

Autocracy. Cambridge: Cambridge University Press, 1993, 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.

[43] Art 39(1) recognizes the "unconditional right to self-determination, including the right to secession" of every nation, nationality and people.

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

[45] 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 and 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).

[46] 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)).

[47] 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.

concerned."[48] These nine states, officially called variously as "National Regional States", "Regional States," "Regions", or simply "States,"[49] are: Afar, Amhara, Benishnagul-Gumuz, Gambella, Harari, Oromiya, Southern Nations, Nationalities, and Peoples (SNNPRS), Somalia, and Tigray.[50] Most of these states are ethnically heterogeneous although in most of them there are dominant ethnic groups after whom the states are often named.[51]

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".[52] While the constitution reserves the "plenary" 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 gov-

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

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

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

[51] 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. 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.)

[52] Art 52(1) of the FDRE Constitution.

ernment, to levy and collect state taxes on their own revenue sources, to establish and administer their own police force, etc.[53] Obviously one can have a fuller picture of the 'residual' powers only after considering the list of federal powers in the preceding provision [54] 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.[55] Thus, states have "equal rights and powers."[56] State legislatures command the supreme political power and are accountable to the people(s) of the states.[57] 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.[58]

The state legislatures' powers "to draft, enact, and amend" the state constitutions is also recognized in the federal constitution.[59] 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.[60] Although

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

[54] Art 51 of the FDRE Constitution

[55] I readily concede the point that in multinational 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).

[56] Art 47(4) of the FDRE Constitution.

[57] Art 50(3) of the FDRE Constitution.

[58] Art 50(4) of the FDRE Constitution.

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

the constitution does not explicitly stipulate the existence of the *principle of federal supremacy* [61] in the Ethiopian federation, it holds, in consonance with the *principle of federal comity*, that "The states shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States."[62] 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 [63] 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.

But before delving into the discussion on the state constitutions of federal Ethiopia, it stands to reason if we pinpoint some significant features of the federal constitution under the umbrella of which the state constitutions and, indeed the federation in its entirety, operate. 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.[64]

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.[65]

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

[61] 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.

[62] Art 50 (8) of the FDRE Constitution.

[63] Art 39 of the FDRE Constitution.

[64] Paragraphs 3-5 of the preamble of the FDRE Constitution.

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

In its chapter three,[66] 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) encroachment through making the amendment procedure rather rigid.[67] Nevertheless, the absence of an *application* clause (that indicates whether they have *direct*[68] or *indirect* [69] application), *interpretation*[70] clause (that clearly indicates the principles, methods, and steps to be used in the construction of human rights clauses), *limitation* [71] clause (that regulates the manner in which limitations are imposed when necessary), and the ambiguity with regard to the role of

[66] 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.

[67] 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).

[68] *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.

[69] 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.

[70] 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 how constitutions deal with interpretation of human rights provisions.

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.[72]

The constitution establishes a parliamentary system of government with a formally (weak) bicameral legislature at the federal level.[73] The lower house is the supreme legislator and the supreme political organ.[74] The upper house has little legislative role; instead it has interpretive and adjudicatory powers.[75] It is a house in which nations, nationalities and peoples (and, indirectly, states) are represented in proportion to their numbers.[76] The Constitution also establishes an executive made of the Prime Minister, the Council of Ministers and the Ministries.[77] It also provides for a ceremonial executive headed by a President who serves as the non-partisan, non-political Head of State. [78] Furthermore, it provides for a three-tiered, parallel, court system of federal and state judiciary.[79]

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.[80] 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.[81] With these points regarding the federal constitution in the background, we now turn to the discussion of the state constitutions of federal Ethiopia.

[71] 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 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.

[72] 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 international human rights instruments, but says no more. Art 13(1) is thus about the *reach* of the Human Rights Chapter.

[73] Art 53 of the FDRE.

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

[75] Art 62 of the FDRE Constitution

[76] 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.

[77] Art 72 of the FDRE Constitution

[78] Art 69-71 of the FDRE Constitution

[79] Arts 78-79 of the FDRE Constitution.

[80] Arts 82-84 of the FDRE Constitution.

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

2.2- The State Constitutions: A Closer Look

Since 1995, immediately upon the coming into force of the federal constitution, states have come to adopt their own constitutions and to utilize them to manage state politics in accordance with them.[82] For their making, all of them depended on the state legislatures. The fact that they were made by the state legislatures in an ordinary session made the constitutions look like any other law "enacted and adopted" by the legislatures. It also precluded the opportunity for people to relish in the deliberation and festive mood that comes along the "constitutional moment" that often comes with the adoption of a constitution. Nevertheless, the constitutions were made and put in place by the states. One might wonder as to how the constitution that constitutes the state governments and their organs can be made by the same legislatures that the constitution brought into existence. The answer is to point to arts 46-47, 50 (2-3), 52(2), etc of the Federal Constitution which provide for the power of the state legislatures to adopt a constitution. Partly, one can safely say, the mandate to make the constitution is rooted in the provisions of the federal constitution that antedate the state constitutions.

One might also wonder as to how the constitutions can assert a significance that is stronger than the one that is asserted by other (ordinary) laws of the states. The formal response to that query is that the constitutions, in their supremacy clauses, invariably claim to be the "supreme law"s in the states. [83] But the more substantive and important answer would be that their superior significance can be progressively exerted as, through time and effective implementation,[84] they gain broader popular legitimacy and the awe and reverence that comes along.

[82] Oromia had its own state constitution since 1993. But in its 1995 constitution, there is—rather strangely—no reference to the old constitution. Tigray's constitution of 1995 came into effect slightly earlier than the coming into effect of the federal constitution. See Tsegaye Regassa, "The Constitution of Oromia: A Brief Account" in : Tsegaye Regassa, *State Constitutions and Local Government: A Reader* (Vol II: Texts, Cases, and Thoughts).(Unpublished teaching material prepared for LL.M students at ECSC, Addis Ababa).

[83] See arts 9 of the Afar, Harari, SNNPRS, Oromiya, Amhara, and Tigray constitutions and art 10 of the Benishangul-Gumuz and Somali state constitutions for their supremacy clauses. These clauses assert that under the authority of the Federal constitution, state constitutions serve as the supreme law of the states.

[84] Elsewhere I argued that this kind of *earned legitimacy* that endows the constitutions with a late-coming wider popular legitimacy is a *derivative legitimacy* (*derivative* as opposed to *original*) that can further be strengthened by a 'redemptive constitutional practice'. See, Tsegaye Regassa, "Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of the Ethiopian Constitution" (An unpublished paper presented at a Conference on Constitutionalism and Human Security in the Horn, Addis Ababa, August 7, 2008)

The major *material or substantive source* of the norms of the state constitutions is apparently the federal constitution. A cursory glance at the provisions of the state constitutions confirms this observation. There is a striking similarity in the area of fundamental principles (chapter two of both the federal and all the nine state constitutions), human rights chapter (chapter three) [although there are some interesting differences as well], and in the statement of policy objectives and directive principles (assigned to chapter 10 of the federal constitution and to various chapters of the state constitutions).[85] The parliamentary model of government that they entrenched up to the Kebele level (especially since 2001),[86] the non-judicial constitutional interpretation method they opted for, the salience of the principle of the right to self-determination as accorded to all nations, nationalities, and peoples, etc are only some of the norms that are substantively drawn from the federal constitution.

In addition to the Federal constitution, the texts of the state constitutions seem to have drawn some provisions from the Transitional Charter (e.g. on the conditions attached to the exercise of the right to secession),[87] Proclama-

[85] Most of the states share the economic, political, social, cultural, and environmental policy objectives but drop the defence and foreign policy objectives as these are unnecessary at the state level. See, for example, chs 10 of the Afar, Benishangul-Gumuz, Somali, and Tigray constitutions, or chs 11 of the Oromia, SNNPRS, and Amhara constitutions. The Harari constitution differs from all the others in that, in its article 77, it stipulates that the implementation of all laws (including the federal and Harari constitution) and policies shall be guided by the policy objectives and directive principles of the FDRE Constitution that are enshrined in its chapter 10 (arts 85-92).

[86] This, is because the state legislatures, in the traditions of typical parliamentary system, are made the supreme political organs in the states. Moreover, in all of the states, the executive is drawn from, dependent on, and accountable to the legislatures. One quickly notes, however, that the Chief Administrators are both the heads of Governments and of State, at a time, in the states. However, as will be argued later, this and the fact that they are also called 'presidents' (especially before 2001, in law, and after 2001, only in practice) should not give the impression that the states have presidential forms of government.

[87] The state constitutions (re)introduced conditions since 2001. The conditions in the texts of the state constitutions are not exactly the same with those in the charter. But the thrust and the orientations are the same. The charter says that secession is exercised when a group is denied self rule, democracy is on the wane, and there is a violation of human and democratic rights—and these problems cannot be solved within the Ethiopian union. The constitutions say that secession is exercised if a group is "convinced that the rights under art 39(1-3) have been violated, suspended, or encroached upon and when such cannot be remedied under the auspices of a union with other peoples." (This is from art 39(4) of the Revised Oromia Constitution, and is referred to here only an example of a general pattern in all the states.)

tion No 7/1992 (on the organization of the sub-state units within them), traditions of the ethnic groups that live in the States (e.g. the recognition of customary and religious laws through their courts; the recognition of the role of advisory elders in Afar,[88] Somalia,[89] and other states), and religion (manifested often in the clauses that extend recognition to religious laws).

Apart from the state legislatures that are formally declared to be their makers, the *formal sources* of the state constitutions are unclear. The question as to who drafted them, and based on what preeminent principles, and who deliberated upon them before they were presented to the legislatures are not clearly known. In some states, it is the House Standing Committees that drafted the constitution. In others, it is a committee whose members are appointed by the chief executives that are responsible for the drafting of the texts. What is clear is that not many people, not many stakeholders (be it political parties or otherwise), are made part of the *drafting, deliberation and adoption* process. This indicates that most of them might have probably been drafted and adopted under the supervision of one dominant political party of the States. [90]

Like in all other federal polities, (and perhaps like all other constitutions), the purposes of state constitutions are to govern state behaviour in the states by regulating the relationship between the various organs and "levels" of state government, guaranteeing human rights of citizens, and determining the powers and responsibilities of the state organs. In Ethiopia, the state constitutions can also be viewed to have been made in order to consolidate and solidify the victories of the nations, nationalities, and peoples of the states; ensure self-rule; embody and express the collective goals and aspirations of state citizens;[91] reaffirm the sovereignty of nations, nationalities, and peoples residing in states; reaffirm the state powers that are stipulated as "reserved" for states in the federal constitutions; establish sub-state level of governance and

[88] Art 63 of the Afar Constitution allows the state legislature to "establish Councils of Elders at various hierarchies as may be necessary."

[89] Art 56 of the Somali constitution mandates the state legislature to establish "Elders' and Clan Leaders' Council".

[90] For the distinction between 'formal' and 'material' sources of laws, see George white-Cross Paton, *A Text book of Jurisprudence* (3rd ed), Clarendon: Oxford University Press, 1970(?).

[91] The Ethiopian state constitutions, like all other constitutions, aspire to embody the aspirations of the state citizens thereby hoping to portray a projected identity of the states. The 'We, the People of ..." phrase always tries to depict more a project than a reality. (See R. Rorty's "Moral Universalism and the Economic Triage" [November 2003] at http://www.unesco.org/phiweb/uk/2rpu/rort/rort.html as accessed in December 2006.) But this is acutely pronounced in the case of the SNNPRS, which lacks any 'anthropological' personality even more than the other states.

regulate the relations between these levels of government and the state governments; and to reaffirm constitutional guarantees granted to fundamental rights and freedoms of state citizens. In 2001, when the state constitutions were revised, some of the reasons that prompted the revision were the need to ensure a better form of governance through a constitutional separation of powers among organs of state (especially between the legislature and the Executive). The concern for entrenching good governance and efficient and effective governance that helps promote sustainable development in the states also forms part of the *raison détre* of the revision.[92]

In terms of length, until 2001, rather uniquely, Ethiopia's state constitutions were shorter than the federal constitutions. On average, most of the state constitutions had 98-102 articles, Harari, having a strikingly shorter text.[93] Since the revision in 2001, most of the state constitutions have become lengthier than the federal constitution. Thus, by far the longest, the SNNPRS Constitution came to have 128 articles. Tigray and Somali stopped at 110 while Afar, Oromia, Amhara, and Benishangul-Gumuz stopped at 111, 113, 120, and 121 respectively. Even the Harari constitution has grown in length from 63 to 80. The growth in size is perhaps attributable to the degree of details that began to go into the texts in order to determine the powers of all the three organs of the sub-state level governments, the newly created institutions such as the Council of Nationalities of the SNNPRS, the Constitutional Interpretation Commissions of the other States, and the Nationality Administration Council (executive and judiciary) of the Amhara state. While *prima facie*, the growing length of the texts might be taken to suggest that they are progressively becoming manuals of government (as opposed to framework of government) at the local level, in actual fact, because the length is primarily attributable to the creation of new structures, it is yet premature for us to say that they have become manuals of government, thick with policy details. But it is interesting that the states have begun to take a fuller account of their specific (demographic, geographic, socio-economic and cultural) contexts as they go about revising their constitutional texts.

The *principles* based on which the state constitutional texts sought to anchor the state constitutional orders are similar to those of the federal constitution. Thus, as we can gather from their chapter twos, the principles of sovereignty of nations, nationalities, and peoples, constitutional supremacy and constitutionalism, sanctity of human rights, secularism, and of transparency and accountability of government constitute the jural postulates of the sys-

[92] See the preambles of any of the revised state constitutions for these preoccupations with separation of powers, good governance, and sustainable development.

[93] The 1995 Constitution of Harari had only 63 articles.

tems at the state level. From their *preambles*, we can gather principles such as that of *self-determination, equality, rule of law, democracy,* the importance of strengthening one's *identity, language, and culture, separation of powers,* etc. [94]

Human rights are gratuitously granted a constitutional guarantee in the state constitutions. In almost [95] all of the constitutional texts, the provisions of chapter three of the federal constitution are "restated" at times even *ad verbatim*. Thus all rights—individual as well as of groups—are recognized. Deference to the federal constitution is patent in all the state texts. In the revised constitutions, some rights are granted better protection. The right to be recognized as a human person is, for example, a right which had not had recognition in the federal constitution but which found such recognition in the state constitutions of Amhara, Benishangul-Gumuz, Harari, Oromia, Tigray, etc). In most of these states, the list of non-derogable rights in times of emergency has grown longer.[96] In this regard, it can be said, states have begun to demonstrate they can extend the horizon of rights protection to frontiers that the federal constitution hasn't taken them yet.

But on the other hand, the states tended to limit the collective right to self-determination when they introduced a condition [97] to be fulfilled for a group to exercise the right to secession. Thus the constitutions of Tigray (art 39/4), Oromia (39/4), Benishangul-Gumuz (39/4), Harari (39/4), Amhara (39/4), Afar (37/4), etc declare as follows: [the peoples of... shall have the right to:

> Exercise its rights of self-determination, including the right to secession in accordance with [art 39] the constitution of the FDRE where it believes that the rights specified in sub-articles 1 to 3 are suspended, denied and not fully implemented and such violations could not have been rectified within [sic] unity.[98]

This shows that the state constitutions are attaching conditions to the right to secession, a right that is unconditional as per the words of the federal consti-

[94] These principles are stated in the preambles almost invariably.

[95] The 1995 Harari Constitution had only a reference to the federal constitution for some rights. But in the revised constitution of 2005, this has been changed to directly enshrine the rights in the text.

[96] The federal list recognizes only arts 18, 25, and 39(1-2). The state list goes to include (in addition to the ones rendered federally non-derogable) the right to life, physical integrity (or bodily security), rights of detained and convicted persons in places of detention and prisons, the right to be recognized as a human person, and freedom of thought, conscience, and belief.

[97] It is better to say that they re-introduced the conditions for the exercise of the right to secession by bringing in the provisions of the Transitional Charter which said that secession can be exercised only if massive violation or denial of the rights to language, culture, history, autonomy, self-rule, and democracy and this cannot be corrected within the union.

tution. To this extent, then, one can say that the state constitutions, by providing less protection to the right of secession, have made an inroad on the collective right to secession. Of course, to the extent that this clause contradicts the federal constitution, it is of no effect (as per art 9(2) of the FDRE Constitution). It is interesting to note that state constitutional texts should not even talk about secession from Ethiopia (unless they want merely to reaffirm their rights guaranteed to them by the federal constitution); rather, they would be entitled to talk about the right to form one's own separate state by seceding from the states.[99] In short, what one can say is that the state texts tell a mixed story of both better and less protection when it comes to rights: better for individual rights and less for collective rights. [100]

Up until 2001, the states had a semi-presidential, semi-parliamentary system of government with a unitary structure of government. Thus the Presidents of the states were chief executives, heads of the regional states, chairs of the state legislatures, etc. On the surface, the pre-eminence of the Presidents gave the impression that the sates had a presidential form of government. But when one observes that the state legislatures were the supreme political organs who determine the state budget, elect the president, control and oversee the performance of the executive, etc, one realizes that the system has also traits of a parliamentary system. There was a fusion of powers. The legislatures were unicameral. The legislatures were the interpreters of the constitutions. Since 2001,[101] however, primarily owing to the revisions, in some of the states, parliamentarism became very clearly established. Separation of the powers of the legislature and the executive became more visible. The presidents (alias Chief Administrators) are elected by the legislatures.

[98] The additions in the braces are from the Amharic version of the text—which is the authoritative version.

[99] Even this is taken care of by article 47 of the constitution anyway.

[100] Note the fact that traditionally states are said to be strong on collective rights while the federal government is strong on individual rights. Ironically, in Ethiopia, at least theoretically, the situation is otherwise.

[101] In some circles, it is said that the constitutions had to be revised in order to reduce the powers of the state presidents to dictate the states. Apparently, this makes the states more difficult to be mobilized in favour of one or another politician in office at the Federal level. This happened because a real possibility that a dissident group who wants to gain the support of the states can easily do so by merely speaking to the president (without the need to seek approval from the state legislatures) when the splinter group that left the TPLF sought the support of the state leaders in 2001 on the aftermath of the crisis in the TPLF. This information has been granted to me by an official who sought to remain anonymous and our discussion strictly confidential. Given the fact that this needs further corroboration, what *actually* necessitated the revision of state constitutions remains dubious until future inquiries help us find out the background causes of the revision.

The legislatures are now chaired by their own Speakers and Deputy Speakers who themselves are elected by the legislatures. Some states (e.g. the SNNPRS and Harari) moved towards bicameralism, although this is more of an appearance than of substance.[102] There is a striking omission [103] in the state constitutions — save in the Constitution of SNNPRS [104] — regarding the dissolution of the state legislatures. Consequently, there is hardly any guide as to what happens when the legislatures are so divided into party lines that a coalition government cannot be established or a reigning coalition government collapses owing to various reasons.

Moreover, save in the SNNPRS, constitutional interpretations began to be envisaged as tasks of an independent Constitutional Interpretation Commissions. Division of powers between the state and sub-state levels of government became more expansive. Separation of powers among the organs of the sub-state governments (i.e., Zones/or Nationality Administrations, Special Woredas, Woredas, Kebeles, and even Municipalities) was taken more seriously (than they used to be in the pre-2001 times). Although none of the states could concoct a "federation within a federation",[105] intra-state decentralization seemed to be intensified.[106]

[102] The upper houses have little, if any, legislative competence. At best, (as in the case of the SNNPRS), they serve as representative institutions with the power to interpret the constitution and resolve inter-group disputes at the state level.

[103] There is a similar omission regarding *emergency powers* in, for example, the Benishangul-Gumuz constitution. In the Harari State Constitution, there is a mere reference to the provisions of the federal constitution on *policy objectives* by specifically mentioning arts 85-92 of chapter 10.

[104] The SNNPRS Constitution provides for dissolution of the Council in its art 57 more or less in a manner similar to its federal equivalent. But because the chief executive is also the Head of State, it makes it difficult to imagine a scenario, for example, where, given the collapse of government in the legislative council, the Chief executive will invite the "previous ruling party or parties" to continue to serve as a caretaker government. Isn't the Chief Executive himself part of the "previous" government? If so, what is the point of the whole exercise of dissolution of the legislature except to give the old governing executive to dominate the legislative council?

[105] The SNNPRS seems to pose as a "federation with in a federation" because of the accent on ethnic self-determination and the consequent local self-rule. But even there, substantive decision making (including law-making) power seems to be the power of the state not of the self-governing Zonal or Special Woreda or Woreda entities.

[106] It is probably because students of decentralization in Ethiopia say 2001 marks the beginning of phase II of decentralization in Ethiopia. See for example the papers in Taye Assefa and Tegegn Gebre-Egziabher (eds), *Decentralization in Ethiopia*. Addis Ababa: Forum for Social Studies, 2007.

Although elaborate provisions are included in the revised constitutions regarding constitutional interpretations, the general thrust that was put in place in 1995 remains the same. Thus state constitutions are still interpreted by a non-judicial body. In all, save the SNNPRS, state constitutions are interpreted by Commissions set up for this purpose. These commissions are composed of representatives of Woredas of the states in more homogeneous states such as Somalia, Afar, Oromia, Amhara, Tigray, etc. In others (Benishangul-Gumuz, Gambella, etc), the diverse ethnic groups are represented in these commissions.[107]

In all these states, a Constitutional Inquiry Council that assists the commissions (or the Council of Nationalities in the case of the SNNPRS) was envisaged to be set up. In some states [108] (e.g. Oromia [109] and the SNNPRS),[110] such Councils have also been legally established. In most, however, it is not yet established. Where it is established, it has not become operational. It is also not an unwarranted pessimism to expect that where it begins to be operational, it will be beset by constraints such as lack of skilled manpower (especially constitutional law experts), lack of clear procedure (for accepting complaints and/or petitions, investigating disputes, conducting hearings, gathering evidence or hearing witnesses, writing judgement-looking recommendations [which could be taken as arbitral awards], sending out orders, etc), lack of financial and infrastructural resources, etc [111]. The sad consequence of this is that states will be lacking in strong constitutional institutions that: a) manage sub-national constitutional disputes (of which we have no lack); and b) serve as reliable custodians of the constitutions and the constitutionalism that emerges therefrom.

[107] See article 71 of the Benishangul-Gumuz constitution, for example, which holds that the commission is composed of 20 members drawn from all four "indigenous" nationalities (five from each).

[108] The councils have not been operational so far, although there are efforts towards that in most states.

[109] In Oromia draft law on the modes of operation of the State, CCI was prepared and discussed among officials but it was never adopted and promulgated by the *Caffee*. To date, the members of the CCI are not appointed. Consequently, the state CCI is not yet operational.

[110] A similar effort was undertaken in the SNNPRS (in 2004/2005) where the Speaker of the Council of Nationalities (CON), with the help of the then President of the State Supreme Court, had started to draft a specific law on the mode of operation of the SNNPRS CCI. (Discussion with Tekle Didu, the Speaker of the CON, December 2008).

[111] The federal Constitutional Inquiry Council has had its time of these problems for a long time and it doesn't seem to have fully come out of it yet.

While diversity is taken seriously in all the states, no state dares to expressly deal with *minority rights* in its constitution. Following the tack of the federal constitution, all the states view ethno-national groups sovereign.[112] They also readily grant that these entities are entitled to the right to self-determination.[113] But what they tend to ignore is the (new) minorities that emerged in the (new) ethnic sovereignties that arrived on the scene immediately after the adoption of federalism as an organizing principle that re-made up Ethiopia. These minorities are of four types: (a) groups that are children of northern settlers (the ruling elite) who were dispersed in the far-flung territories of the wider south of Ethiopia;[114] (b) groups that, owing to the (re) settlement and villagization programs of the government of the 1980s, were forced to migrate and settle in the South Western states;[115] (c) groups living

[112] Indeed the equivalent of the principle of ethnic sovereignty in art 8 of the FDRE Constitution is enshrined in all the state constitutions, often in their arts 8 or 9.

[113] The equivalent of art 39 of the FDRE Constitution is enshrined in all the constitutions albeit in most cases with a condition attached to the exercise of the right to secession.

[114] These folks are mostly people of Amhara, Tigryan, or other northern descent who moved into the "south" as state functionaries of the past and have made a home out of their places of residence. Cut-off from their northern kins, they are left to their own devices. Because they cannot qualify as "nations, nationalities, and peoples" under the definition of "nations, nationalities and peoples" under article 39 (5)—mainly because they do not have a contiguous territory—they cannot claim sovereignty rights (art 8) or rights of self-determination (art 39). As groups, they tend to be ignored, and often even discriminated against.

[115] Such is the case of those who, under the spell of famine and fragile ecology affected by drought, had to be (re)settled mainly in what are now the states of Gambella and Benishangul-Gumuz. These people have preserved their distinct cultural, religious, and linguistic identities although they have also, to a varying degree, adapted themselves to the local cultures and languages of the host societies. Nevertheless, they still associate themselves with their kins in their place of origin and often emphatically distinguish themselves from the local population. The local population also consider them as "settlers" who came from other places and view them as "other" than the original inhabitants of the States. Because they are made to (re) settle in a contiguous territory, they seek a veritable recognition as a distinct nation, nationality, and people. The local folks invariably resent this. Because they are numerous, they have swayed the demographic configuration of these states, especially that of Benishangul-Gumuz. As a result, the "settlers" as a group seem to be the single most important category of people that constitute a relative majority in the states. There is a consequent tension (albeit mostly latent so far) in these states between the local inhabitants and the "settlers". Diffusion of these tensions and channelling them towards broader recognition, accommodation, tolerance, and peace requires a stronger system of minority rights protection and a vibrant sub-national democratic practice.

dispersed all over the country by virtue of the exercise of their freedom of movement;[116] and (c) caste groups [117] that live oppressed under the predominance of an ethnic group.[118] It is important to stress that the states need to take account of these groups in their constitutional texts in the years to come—unless they want to develop in to "islands of illiberalism".[119]

Moreover, while states are relatively serious about local self-rule by distinct ethnic groups (and thus they grant self-rule, autonomy, etc, to these kinds of sub-state entities)—often in spite of the profuse rhetoric in favour of

.[116] See art 32 of the FDRE Constitution on freedom of movement and residence of "every Ethiopian national". See also the equivalent provisions of all the nine state constitutions on this.

[117] Groups such as the Menja (SNNPRS), the Donga (SNNPRS), the Fuga (SNNPRS), the Negede Woito (Amhara), and nowadays to a lesser extent the Hadicho exemplify the plight of caste groups who, as minorities within new sovereignties, suffer from discrimination, marginalization, and exclusion. It is interesting to observe that since the "restoration" of sovereignty to ethnic groups in 1991, the old traditional social stratification in various groups has been resuscitated. Studies on the Dawro of SNNPRS suggests that the differentiation among the Mana (alias Dawro), the artisans, and the Manja, etc which was abolished during the time of the military regime has come back to matter ironically in the times of ethnocultural justice. See Data Dea, *Rural Livelihoods and Social Stratification among the Dawro, Southwestern Ethiopia*. Addis Ababa: Social Anthropology Dissertation Series of AAU, 2006). See generally also, Lovise Aalen, *Institutionalizing the Politics of Ethnicity: Actors, Power, and Mobilization in Southern Ethiopia under Ethnic Federalism*. Oslo: University of Oslo, 2008 on the most recent dynamics of inter-ethnic and intra-ethnic relations in the SNNPRS.

[118] One can add "indigenous" groups to this list as a yet other category of minorities but the use of the term in Ethiopia evokes a bad memory of the Italian rule which divided the people into "Romans" and the "indigino". Also, it is often argued that beyond the traditional colonial boundaries, the term cannot be used palatably. The sensitivity aside, there is a reason for considering these groups as a separate category which could not benefit from the new federal and ethnic sovereignty dispensation. In a way, the fact that this dispensation could not help substantively equalize or 'emancipate' the many 'indigenous' peoples of the South, especially those in the South Western flank, and others in other states is either a paradox, or at least a manifestation of the practical limits of this (modernist) dispensation which could not penetrate into societies languishing under pre-modern situations.

[119] This is a term used by Will Kymlicka to refer to groups that tend to be internally oppressive while arguing for a wider collective right to freedom, autonomy, and accommodation in the encompassing polity. See his *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press, 1995.

[120] The autonomy we are referring to at this juncture is of course implementational autonomy (obviously along with autonomy to issue directives or produce a negotiated/deliberated set of decisions) for executive to act upon.

decentralization of power and resources--they tend to grant only executive autonomy [120] to Woreda and Kebele levels of government. This is because such entities are not granted with the substantive power to make (legislative and policy) decisions. At best, they can only develop regulations or directives (forms of subsidiary laws) to implement the laws and policies made and formulated by the state level government.

As has been indicated in earlier sections, state constitutions are flexible, i.e., amenable to change with procedures that allow easy *amendment*. That was also generally true in the case of Ethiopia's state constitutions until 2001. Since 2001, the state constitutions became relatively more entrenched. This is particularly the case with regard to the chapters on the fundamental principles and human rights of the constitutions (namely chapters two and three of the

[121] The state constitutions often refer to art 105(1) of the Federal constitution as the provision that guides the amendment of chs 2 and 3 of the state constitutions. To wit: Art 110 (1) of the **Afar** Constitution reads: "The provisions of Chapter Two and Three of this constitution may be amended in accordance with art 105 of the Federal onstitution." Art 112(1) of the **Oromia** Constitution hold that "Provisions of chapters two and three of this constitution *cannot be amended outside the conditions specified under art 105 of the Federal Constitution*." Art 107(1) of the **Tigray** Constitution says that "Provisions of chapters two and three this constitution shall be amended in accordance with art 105 of the Federal Constitution." (Translation mine.) Art 79 (1) of the **Harari** Constitution says that (the provisions of chapter three of this constitution shall not be amended in a manner other than that which is provided for under art 105 of the Federal Constitution"(Translation mine.) *Note that the Harari constitution, appropriately, does not subject its principles' chapter to a similar procedure of amendment* .A slightly different wording of amendment provisions are those of Gambella, Benishangul-Gumuz, Somali and the SNNPRS. Art 122 of the **Gambella** Constitution says that "The provisions of chapters two and three of this constitution shall be amended only when chapters two and three of the federal constitutions are amended."(translation mine.) *Note that, in effect, Gambella cannot change these chapters of the constitution before, or apart from, a change in the equivalent chapters of the federal constitution. The dynamics is frozen to that extent.* Art 119 (1) of the **Benishangul-Gumuz** Constitution holds that "the provisions of Chapter Two and Three of this Constitution may be amended if the provisions of chapters Two and Three of the Constitution of the [FDRE] are amended." In a similar vein, Art 109 of the **Somali** Constitution says: "The Provisions of Chapter Two and Three of this Constitution may not be amended except in accordance with the provisions of Article 105 of the Federal Constitution". Art 125(2) of the **SNNPRS** constitution, on its part, says: "Provisions of chapter Two and Three of this constitution are amended only if provisions of Chapter Two and Three of the Federal Constitution are amended." Evidently, thus, even a casual reading of these provisions shows that all of the state constitutions tend to be even more rigid than the federal constitution. This stands in stark contrast to the usually more flexible feature of state constitutions in other federal

texts). Accordingly, the provisions of these chapters were made to be amended in accordance with Article 105(1) of the Federal constitution [121] which requires that: all the state legislatures approve the proposed amendment with a majority vote; and that both federal houses (HPR and HoF) support the proposed amendment with a 2/3rd majority vote. In addition to converting the state texts into frigid constitutions, this arrangement seemed to imply that state sovereignty/autonomy is undermined by being exposed to the scrutiny of neighbouring states and of the federal government.[122]

3. Regulating State Behaviour at the Local Level

In addition to serving as frameworks of government at the sub-national level, state constitutions are also expected to serve as tools of regulating local government behaviour. In Ethiopia, the state constitutions have, especially since 2001, tried to establish sub-state level governments and determine the scope and limits of their powers. The powers and responsibilities of the Zone (or Nationality Administration in Amhara State), Special Woreda, Woreda, and Kebele level legislative, executive, and judicial institutions are clearly established in the state constitutions. Thus Zone/Nationality Administration Council,[123] the Zone Executive, or Administrative Council, the Zone High Courts are all constitutionally recognized. The Woreda Council, the Woreda Executive/Administrative Council, and the Woreda Courts are granted constitutional recognition.[124] Likewise, the Kebele administration council, the Kebele

polities. For a more directed and detailed discussion of the issues of state constitutional amendment, see my "Between Dynamism and Entrenchment: Amendment of State Constitutions in Ethiopia—An Exploration"(Unpublished paper prepared for the 7th International Congress of the International Association of Constitutional Law, Athens, Greece, June 2007.)

[122] It is important to note, in fairness, the advantage this has in terms of entrenching the text, especially the provisions pertaining to human rights, in the states. But it is also important to note that adding a new protective provision is also made difficult now. Also, it is interesting to note that the Woredas are now granted more opportunity to involve in constitutional amendment (as they are in constitutional interpretation). It is important to further note that, in practice, no amendment is effected by following this procedure so far.

[123] 'Nationality Administration Council' is a term used in the Amhara Constitution. The Agaw (of Awi and Himra) and the Oromo in the Region have their own National Administration, equivalent to Zones in the SNNPRS where the term 'Zone' is used to refer to a similar category of sub-state entities. A varaint of the same term "Administration of Nationalities" is used in the Constitutions of Benishangul-Gumuz and Gambella to refer to similar entities.

[124] See the chapters of the state constitutions on the Woredas, e.g. chapter eight of the Afar and Somali, chapter nine of the Benishangul-Gumuz, and chapter 10 of the Gambella constitutions.

Executive ("Leadership") Council, and the Kebele Social Courts are recognized.[125] Their powers are enumerated, their accountability chains are specified, and their financial sources are indicated. To this extent, the distinct identity and powers of local government institutions are rendered indestructible by virtue of recognition in the state constitutions.

However, it is still unclear as to what states will do when there arises an inter-organ (horizontal) or inter-level (vertical) dispute in the states. It is not clear, for example, as to what to do when the State Chief Executive (or Administrator), alias President, appoints a Woreda Administrator who is rejected by the Woreda Council [126] What happens when there is a friction be-

[125] See the chapters of the Constitutions on the Kebeles. e.g. chapter 10 of the Benishangul-Gumuz, 11 of the Gambella, 8 of the Harari, 9 of the Tigray, Somali and Afar Constitutions. Note also that in Tigrigna, the term used to refer to the kebele is the word 'Tabia'. Note further that the Harari Constitution devotes only an article to the matter and relegates the details to a law envisaged to be enacted by the state. (See art 75 (3)). Striking about the Harari constitution is that it does not have a chapter dealing with Woredas at all. In Harari state, there are only two tiers of government: state and kebele, although establishment of another tier of government is envisaged as may be appropriate and necessary (art 45). Harari's experiment is quite a material that excites a comparativist of state constitutions because it presents a number of unique ways of doing things.

[126] A case that happened in Benishangul-Gumuz elucidates this. In one such case, a person by the name *Andualem Negash Bemgaku* was appointed to work as an Appointee [*shum* in Amharic] of the Provisional Municpality Administration of the town of *Manbuk*, the capital of the *Dangur Woreda Administration* in the *Metekel Zone* of *Benishangul-Gumuz* State. Apparently, he was so appointed by the State level Executive (perhaps by the Chief Administrator himself]. After working in the position for some years, the Woreda Administration (alias, the *Dangur District Chariman* named *Terenta Mara Encha*) banned him from work and wrote a letter (dated May 28, 1999 EC) to the State Executive to appoint them another Appointee in his place. The reasons for banning him included inefficiency at work, embezzlement of public money, abuse of power, lack of transparency, accountability, and efficiency on the part of his administration, lack of ethical integrity (chewing *chat* at home in regular working hours, etc), and others. In deed, his case was also referred to the District/Woreda Police and was under investigation (letter to the police dated, 2 April 1999 EC). In response to the request of the Woreda District Chairman, the Chief Administrator of the State (in a letter dated 28 June 1999 EC) rejected the ban, hinted at the fact that such an Appointee can be removed only by the authority that appointed him in the first place, alleged that the allegations of the Woreda/district chair is not yet proved to be correct, and suggested that he be reinstated to his position. From this one can easily notice that there is a possibility of an inter-level tension within a state. I am indebted to Lemmessa Berber for the information (the letters and exchanges) regarding this case. See his "*Division of Powers in the State Constitutions—The Case of the Benishangul-Gumuz State*" (Unpublished LL.M Thesis: Faculty of Law, Addis Ababa University, 2008).

tween state level government and a Zone that has sought separate statehood as a result of which the relationships have grown sour and coarse is not very clear.[127] A similar omission seems to attend to the tension that emerges after a Woreda begins to seek a separate Zone Status.[128] If a group seeks a Special Woreda status and the dominant group in the Woreda resents it, frictions are naturally bound to arise.[129] What to do in such circumstances is not clear. Apparently, the constitutions did not envisage the possibility of such conflicts. Also, it is not clear as to what we can do when the Woreda Council seeks to oversee the work of the Woreda judiciary who it thinks is accountable to it (especially given the fact that the former allocates budget to the Woreda judicial organ).[130] Consequently, it looks like that while the state constitutions

[127] The situation that came about after the Sidama Zone sought statehood separate from the SNNPRS and after the Gamo's request for the same bears this out. The Sidama have since withdrawn their demand for statehood and apparently the friction has given way to peace and mutual understanding and cooperation between the Zone and the State level governments. But before this "pacific" settlement of the friction, the request for separate statehood has been presented to the Legislative Council of the SNNPRS (letter dated 08/11/1997 EC also copied to the SNNPRS Executive and the CON). The request was preceded by a unanimous decision of the Zonal Council (on its 9th Regular meeting on 06/11/97 EC). At a technical level the request was for a popular referendum to decide on statehood. The legislative Council sent the case to the CON (in a letter dated 02/01/98 EC). The CON, on its part, resisted to make a decision on this by arguing that decision on the request for statehood is to be made by the Legislative Council, and that this doesn't fall under art 59 of the Constitution which enumerates the powers and functions of the CON. So, it rejected to decide on the case on procedural grounds (i.e. absence of jurisdiction).

Gamo's request is similar. But the request was addressed to a diverse array of political and legal institutions: Central Committee of EPRDF, office of the FDRE President, Office of the Prime Minister, Ministry of Federal Affairs, Office of the Southern wing of the Coalition of the parties forming the EPRDF, the SNNPRS legislative Council, the CON, the Gamo Branch of the SNNPRS wing of EPRDF, Gamo Zone Legislative Council, and the office of the Gamo Zone Administration (i.e. the Executive). (See letter dated 10/10/97 EC.) I have not come across any evidence of the legal response to their request so far.

[128] The situation that came about after the Gofa sought a separate zone status is an example that bears this problem out. The Gofa, peoples who currently enjoy a Woreda status (Gofa Zuria Woreda) in the Gamo-Gofa Zone, presented their request for a separate Zone status (separate from the Gamo-Gofa Zone) in a letter dated 02/07/98 EC (ref no. 2/623/2/98) and addressed to the FDRE Prime Minister, House of Federation, Office of the EPRDF, the SNNPRS Legislative Council, the Chief Administrator of SNNPRS, CON, and the SNNPRS wing of EPRDF. It is interesting to note (from the addressees of the request) that importance is given to the political institutions, perhaps even more than the legal institutions (in this case the legislative Council and/or the CON).

have effectively laid down the 'framework of government' at the state level, they have yet a long way to go to serve as effective tools of regulating state behaviour at the sub-national level. To this extent then, constitutionalism at the sub-national level is not yet fully ensconced. We now turn to the discussion of some of the challenges posed to constitutionalism [131] in the states.

4. Challenges to State Constitutionalism in Ethiopia

It has been stressed throughout that state constitutions play a stupendous role in entrenching constitutionalism at the sub-national level. It has also been noted that, in Ethiopia, state constitutions have been adopted and have be-

[129] The case of the Tambaro versus the Kambata is an example of such a conflict. The Tambaro form part of the Kambata Zone. They seek a special Woreda status (equivalent to a zone in its effect) (See letter dated 04/06/98 EC). Apparently, their woreda is known as "Omo Sheleko". They also seek that it be called "Tambaro (Special) Woreda". They seek this Special Woreda status because they think their identity is watered down (because of the neglect of their identity markers and the promotion of the Kamabata identity alone often at their expense) they are oppressed administratively by the dominant group in the Zone, development is wanting, equality is denied to them, and their constitutional rights are denied or neglected, etc. The request was addressed to the SNNPRS Legislative Council, the Chief Administrator, and the CON. So far, I know of no evidence to the effect that their request is dealt with either legally or politically.

[130] The conflict between the Oromia State Supreme Court and the Woreda administrators in Oromia show these kind of conflicts. The Supreme Courts says only the Judicial Administration Commission can look into the work and character of all (including Woreda) judges, not the Woreda administration. But the latter hold the contrary view.

[131] It is obvious that constitutionalism is a broad concept that relates to the constraint imposed on the exercise of state power by, among other things, guaranteeing fundamental rights and freedoms, empowering the people so that they can make officials responsive and responsible, and putting a limit to what government can (procedurally and substantively) do even in a democracy. There is a veritable literature on constitutionalism. See for example, Andras Sajo, *Limiting Government: An Introduction to Constitutionalism*. Budapest: Central European University, 1999; Carlo Fusaro, "Constitutionalism in Africa and Constitutional Trends: Brief Notes from a European Perspective", available at www.carlofusaro.it ; A. E. Dick Howard, "Toward Constitutional Democracy Around the World: An American Perspective" *Issues of Democracy*, Vol. 9 No.1. (March 2004), Pp.18- 24; Louis Henkin et al (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*. New York: Columbia, 1990; Daniel N. Hoffman, *Our Elusive Constitution: Silences, paradoxes, Priorities*. Albany: State University of New York, 1997; Cass R. Sunstein, *Designing Democracy: What Constitutions Do*. New York: Oxford University Press, 2001; etc. In this piece, the term constitutionalism is used in the sense of constraining governmental exercise of power by regulating the behaviour of state and sub-state level governments.

come operational since 1995. In their 14 years of existence, these state constitutional texts have been amended substantively only once.[132] That could go for stability in the constitution. But it also could go for lack of challenges that test the constitutions as such. The question is: how far have the state constitutions in Ethiopia become tools of regulating state behaviour at the sub-national level? How far have they fostered states' efforts to become "laboratories of democracy"[133] and arenas of experimentation and innovation? What are the challenges that they encounter as they try to regulate state behaviour and entrench the ideals of constitutionalism at the sub-national level? We now turn (briefly) to addressing these questions.

As has been suggested at various junctures throughout this paper, while states set up the framework of government at the state levels, they hardly have become robust tools of regulating state behaviour. While states have tried to demonstrate some willingness to offer a more expansive space for individual rights and freedoms (and to that extent they have shown a degree of innovation), they haven't yet become "laboratories of democracy". This might be attributed to various factors such as lack of political party pluralism, states' strong dependence on the federal government, lack of skilled manpower and developed infrastructure at the state level.[134]

Apart from these, it is incontrovertible that--perhaps more than it is the case in other federal polities--the state constitutions in Ethiopia suffer from invisibility.[135] The consequence of this invisibility is that they failed to con-

[132] The Oromia constitution has been amended a couple more times when it was deciding on the (political) capital of the state Government, once in 2003 and again in 2005. The 2003 amendment moved the capital from Addis Ababa (alias Finfinne) to Adama, and the 2005 amendment moved it back to Addis Ababa again. There are some minor amendments to other constitutions often regarding the nomenclature of the states (to make them all "National Regional States"). The 2001 amendment is so massive that it can be understood more as a revision than an amendment.

[133] Justice Louis Brandies of the US Supreme Court used this term first in the 1930s and it has become a famous phrase since.

[134] Lovise Aalen alerts us to the first two factors in her "*Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000"*. Bergen: Christian Michelson Institute, 2002. Added to that is the poverty that looms large in the background of all the problems in the states and the problem of instability that recurs in some of the states (such as Gambella and Somalia).

[135] Granted, not all the constitutions suffer from a similar magnitude of invisibility. Obviously, the SNNPRS and the Benishangul-Gumuz constitutions—owing to their being tested through relatively difficult cases--have experienced a degree of attention and visibility among state political actors and even some portions of the electorate. But on the whole, there is no gainsaying that all the state constitutions suffer from a relative invisibility, especially when compared to the federal constitution.

stitute part of the "civil religion" of the states so that they can be instruments with which to discipline power and assert one's rights. What then are the challenges faced as states try to entrench constitutionalism? A number of factors may be mentioned.[136] The following is only a suggestive list:

a) The fact that most of the constitutions are not known among state citizens, which might have to do with the lack of a constitutional moment that engaged the state electorate as participants in the making process

b) The fact that there is a limited popular legitimacy that accompanies the texts of the state constitutions;

c) The fact that, as has been hinted at earlier on, the institutions that are envisaged to interpret and enforce the constitutions are not legally established (e.g. the Constitutional Interpretation Commissions and the state CCIs), and where they are established, the fact that they have not become operational; and the fact that they lack effectiveness in their operation is also part of the challenge.

d) The patent lack of principles of constitutional interpretation, the weakness of interpretive authorities to render neutral, impartial, and independent interpretative decisions;[137]

e) The challenge of giving a prompt and effective constitutional solution to constitutional disputes that emerge in the states;[138] and

f) The challenge of guaranteeing effective protection to minorities in the sub-national and sub-state entities.

Conclusions

Throughout this article, an attempt is made to explore the state constitutions with a view to circumscribing their significance in regulating state behaviour at the sub-national level. It has been noted that although state constitutions suffer from the problem of invisibility, they can be important tools via which we not only govern sub-national state behaviour but also entrench constitu-

[136] One quickly notes that these set of challenges are at times shared by the state of constitutionalism at the federal level, too.

[137] The problem the Council of Nationalities has faced in this regard can be evidence of this challenge.

[138] This challenge has been faced when there was a conflict between the Anywaa and the Nuer in Gambella in 2003/2004; when the electoral dispute that raged between the "Highlanders" and the locals in 2001 and since; when the quest for statehood (Sidama, Gamo), zone status (Gofa), Special Woreda status (Tambaro), for reassigned into another Zone (the 8 villages of Dale Woreda into Sidama, Menja into Kulo Konta), etc in the SNNPRS have not been effectively responded to.

tionalism by protecting human rights and limiting the power of sub-national governments. We have also noted that Ethiopia is one of the federal polities in which states are free to adopt their own state constitutions. We noted that these constitutions have been promulgated and rendered operational since 1995. All of them were amended (or, better, revised) in 2001 and since.

These constitutions, we noted, were made by the state legislatures. The result is that not many people had the opportunity to seize the "constitutional moments" during which they would be part of the process of constitutional deliberation. Nevertheless, they established states, formed organs of government, guaranteed fundamental rights and freedoms, set up sub-state level governments, and circumscribed the scope of their powers. These constitutions also provided for institutions of constitutional interpretation and procedures for formal constitutional amendments. However, throughout this article, we noted that the constitutions suffer from some omissions that pose a challenge to the work of entrenching constitutionalism in the states. We also noted that a more robust implementation is lacking thereby making constitutional practice weak and, to that extent, undermining the possibility for states to become "laboratories of democracy", or centres of experimentation and innovation in the Ethiopian federation. A number of challenges are identified. In order to suggest effective responses to the challenges thus identified, it is incumbent on us to suggest the following set of recommendations.

First, it is important for state governments to engage in "norm communication", a task that calls for duplication and dissemination of the constitutional texts in sufficient copies, translation of the texts into local vernaculars,[139] teaching (formally and informally) of the contents of these texts, and thereby "massifying" knowledge of the constitutions. This is so because (of the assumption that) the more people know about the state constitutions, the more readily they will utilize them both to put power in check and to assert their rights. This also helps curb the problem of invisibility that state constitutional texts perennially suffer from. Secondly, state governments need to engage in "norm implementation". This relates to putting the principles, rules, and standards set by the constitutions into practice. Effecting the values embodied in constitutional texts requires that political actors make way to the

[139] Often, they are published in the working language of the states, in Amharic (if the working language is other than Amharic), and English. The only exception is the Harari state constitution which is published in Amharic alone although the working languages of the state are Harari and Oromiffa (Art. 6). Strangely, when there is a conflict between the Harari and Oromiffa versions of the Constitution (which are not published yet), the Amharic version is taken as authoritative (because it is a tie breaker).

[140] H.L.A. Hart, *The Concept of Law*. Oxford: Clarendon Press, 1961.

demands of the constitution even when so doing might lead to temporary political losses. When officials obey the rules of constitutions (as Hart says regarding the secondary rules of recognition),[140] then a constitutional system continues to gain strength and vibrancy.

Apart from these, it is important that state institutions, especially those that are designed to serve as custodians of the constitutions, are strengthened, empowered, and allowed to operate competently, impartially, and independently.(For this, constitutional re-engineering may be necessary in order for them to curb some flaws of design.) More specifically, it is essential that the state constitutional texts specify the human rights chapter add a clear set of clauses on their application, interpretation, limitation, and remedies (when and if they are violated). It is essential that the texts extend explicit guarantee for the protection of minority rights within the states. (This would have the additional effect of redeeming the deficiencies of the Federal constitution in this regard.) The states also need to demonstrate valour in coming up with a stronger and more effective system of constitutional interpretation by rethinking the political interpretation of the constitutions in favour, for example, of their judicial interpretation. States also need to rethink the amendment procedure for injecting change into their chapter twos and threes; thus they need to resort to a scheme of formal amendment that : (a) disallows the involvement of the federal and other (neighbouring) state governments in the formal amendment processes; and (b)makes the constitution more flexible than the federal constitution. The need for flexibility resonates well with the need to be spots of experimentation in democracy and constitutionalism and with the (legal) fact that the states in Ethiopia are not indestructible entities as a result of which they invite frequent changes.

In the academia, it stands to reason that law schools and students of federalism teach, research, and study state constitutions more forcefully than they are so far doing.[141] This shift of academic focus to state constitutions (which should be done without losing our focus on the federal constitution and its institutions) would not only help to curb the problem of invisibility state con-

[141] Only the Graduate (LL.M) program of the Addis Ababa University Law Faculty offers a course on State Constitutions since 2005, and, even there, it is only one course offered in 3 credit hours per semester. The course is entitled, "State Constitutions and Local Government". In an interesting recent development, the LL.M Program at the ECSC is also beginning to offer a similar course. There is also a course entitled "State Constitutions and Good Governance" in the catalogue of courses to be offered to LL.M students of the Institute of Federalism and Legal Studies at the ECSC. It is remarkable that a number of students, both at the Graduate and undergraduate level, are annually encouraged to conduct (and are in fact conducting) researches on state constitutions in recent years.

stitutions are languishing under, it also makes our study of constitutional law and federalism more complete. Through studying state constitutions, we can have view of federalism from the perspective of states.[142] In this way, we can start to imagine federalism from below.

[142] I am indebted to Daniel Elazar for this phrase and much else. See Daniel Elazar, *American Federalism: A View from the States*. New York: Crowell, 1966, for this notion.

MAYHEM IN DARFUR:
THE ACCOUNTABILITY, PEACE AND IMMUNITY DEBATE

Awol Kassim Allo *

Introduction

Justice is a term with a wide 'penumbra of uncertainty.' Borrowing the words of Plato and others, Kirk captured the definition of Justice in just one phrase, *suum cuique*, which means *to each his own*.[1] Despite the recurring controversy over the meaning and normative content of the notion of justice, modern human rights enterprise posits the idea as articulating at least four obligations in the context of atrocity crimes, i.e., the duty to prosecute, disclosure of the truth, the right of victims to reparation and guarantees of non-repetition. [2]

There is, *inter alia*, the discourse regarding what objective we can achieve through prosecution and how effective it can ensure the contemporary conception of accountability. This article examines the utility of prosecutorial justice as a comprehensive tool for combating gross violations of human rights and serious breaches of humanitarian law without ignoring other interrelated imperatives of justice. It seeks to posit the debate between peace and justice and tries to make a critical analysis of whether the concern for justice truly jeopardizes the effort for peace in the particular context of Darfur.

The article further looks into the prospect of prosecution of those accused of perpetrating the most serious crimes of concern and examines the significance of ICC prosecution to the people of Darfur. By analyzing relevant international precedents and new developments in international criminal law, this article examines the state of the law relating to a sitting head of state immunity. It assesses whether the ICC indictment of President Omar Hassan Al-Bashir is politically motivated or a legally justified action against impunity.

* LL.B, LL.M, Lecturer, St. Mary's University College, Faculty of Law

[1] Russell Kirk, The Meaning of Justice, Heritage Lecture #457, March 4, 1993, available at <http://www.heritage.org/Research/PoliticalPhilosophy/HL457.cfm>, accessed 2 November, 2007. In the legal discipline, while the concept of criminal justice is predominant, restorative or transitional justice is evolving as an alternative and/or complementary to criminal justice. Criminal justice or retributive justice requires the investigation, prosecution and punishment of perpetrators while transitional justice seeks to redress human rights abuses on the basis of some principled compromises in transitional countries.

[2] See the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity; Econ. and Social Council, E/CN.4/2005/102/Add.1,8February2005, Principle 1-38.

1. Understanding the Debate between the Interest of Peace and Justice: Which Justice and for Whom?

The end of the atrocious conflict that claimed the life of more than a million people in Southern Sudan marked the intensification of another conflict on the western part of the Country, the Darfur state.[3] According to former UN Humanitarian Chief, the mayhem in Darfur has claimed the lives of over 200,000 persons and displaced over 2.5 million people from their livelihood since the end of 2005.[4] The Government of Sudan (hereinafter the GOS), holds that this figure is way too high.[5] Since then, Darfur has emerged into the international spotlight as an exceptionally dramatic scene of a humanitarian catastrophe.

Despite mounting pressures against the international community to attend to the agony and excruciating physical and psychological trauma sustained by the Darfuris, their effort is considered far below expectations.[6] The UN Commission of Inquiry on Darfur (hereinafter the UNCI) established pursuant to Security Council Resolution 1564 determined that war crimes and crimes against humanity have been committed in Darfur.[7] Following the report of the Commission, the Security Council (hereinafter the Council) has demonstrated its resolve to bring to justice all those responsible for the mayhem while the GOS have dismissed the ICC as a western political instrument. The debate over whether the ICC has a just mandate and jurisdictional competence over the situation in Darfur has remained a matter of greater controversy. However, the raging debate doesn't seem to change the vernaculars of

[3] North American Institute for Conflict Resolution, available at <http://www.crtraining.org/library/projects/sudan/>, accessed 15 December, 2008.

[4] United Nations High Commissioner for Refugees, As at March, 2006, there are 200,000 refugees in Chad and more than 1.7 million IDPs with in Darfur; See also Sudanese government estimate of death at 9,000, available at <http://en.wikipedia.org/wiki/Darfur_conflict>, accessed 15 December,2007.BBC News, available at http://news.bbc.co.uk/2/hi/africa/5347988.stm, last updated on 15 September 2006.

[5] MSNBC News, Death toll of 200,000 Disputed in Darfur, Former U.N. chief says his estimate in 2006 is too low, Sudan says too high, 28 March 2008, available at <http://www.msnbc.msn.com/id/23848444/>, accessed on 21st of December, 2008.

[6] *See* UNSC Resolution 1674, (28 April, 2006), UN DOC S/RES/1674. [It declares that the Council "*Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document that professes to recognize the responsibility of the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity". Attempts at unified effort against the Sudan have been aborted by the political cynicism around the Security Council.

international law that the Security Council is a political body with a unique set of powers legally authorized to refer situations to the ICC.

Basic questions capture our attention: what objective can we achieve through prosecution and how effective is it in ensuring contemporary conception of accountability? How can we assess the relative advantages of prosecutorial justice vis-à-vis transitional justice in light of the common good of the public? If punishment is seen as constituting the centerpiece of accountability, should it be seen as a backward looking exercise in retribution or an effort to restore peace and confidence in the rule of law? To what extent is responsibility for repression appropriate to the individual victims, as opposed to the state, the regime and the international community? To what extent should understandings of criminal responsibility be projected forward? Who should be held to account, and, for what offense and by whom? How do we allocate responsibility between responsible civilian leaders placed thousands of miles away from the crime scene and ordinary soldiers and militias who actually perpetrated the atrocities? Does prosecution guarantee reconciliation between the Darfuris stripped of all essence of life? The sections below address these issues without, however, claiming to offer conclusive answers.

1.1- Why Prosecute Perpetrators? Prosecution as a Matter of Principle

Under criminal law, prosecution is viewed as an instrument of maintaining law and order through repression. However, since the notion of individual criminal responsibility for atrocities such as Darfur presents a unique set of circumstances peculiar to international justice, the conventional understanding of prosecutorial justice is simply unsuited. The stakes are too high and the interests too enormous to be effectively rectified with ordinary criminal law machineries. And on the other hand, international prosecution is a recent phenomenon, and it mainly traces its roots to the two International Criminal Tribunals established by the Allied Powers following the downfall of the Axis Powers. While some regarded the Nuremberg Trials as fora of victors' justice, many believed that the trials ushered into a new era of international individual criminal accountability.[8]

[7] UNSC, Res 1564, (18 September,2004), UN DOC S/RES/1564 establishing the United Nations Commission of Inquiry on Darfur ; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004,Geneva, 25 January 2005, Executive Summary,p-5, available a <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf>, accessed 14 October, 2007[hereinafter UNCI].

For some scholars, prosecution is a matter of principle. They reflect on the dynamics of prosecution and its efficacy in establishing accountability to advance the general good of humanity. Professor Diane F. Orentlicher underscored the multifaceted purpose of prosecution. In her view, prosecution is an "effective insurance against future repression," [9] it deters perpetrators and can "inoculate the public against future temptations to be complicit" in those acts.[10] She maintains that prosecution strengthens the rule of law and advances transition into democracy.[11]

Orentlicher also reflects on the consequences of inaction by states for gross violations of human rights which she referred to as "atrocious crimes."[12] She contends that "a complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct."[13] Starkly putting the case for prosecution and accountability is Joseph Galloway, a military columnist for McClatchy newspaper who contended that: "Moderation in the Pursuit of Justice is No Virtue."[14] Writing on the questionable practices of the Bush Administration on their "global war on terror", Galloway emphatically argued that impunity to those responsible for crimes will be "a huge mistake that will come back to haunt them-and all the rest of us".[15]

Indeed, Orentlicher's and Galloway's arguments are logical, coherent, and at par with traditional norms of international law and general conceptions of

.[8] Judgment of Nuremburg Tribunal, Nuremberg (1946), 41Am.J.Int.L. 172(1974) in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, politics and Morals*,(2ed.)(Oxford University Press, 2000),p-115-121. The jurisprudence of these tribunals provided a momentum to the the normative content of crimes against humanity and war crimes. Also, the flourishing *ad hoc* international criminal tribunals and the emergence of the ICC elevated this acts to an unprecedented level; *See* Ian Brownlie, Principles of Public International Law, (4th ed.), p-562; Charter of the International Military Tribunal for the Far East, available at <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

[9] Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100Yale L. J, 2537, 2542.

[10] *Id.*

[11] *Id.*

[12] *Id*.

[13] *Id*.

[14] Nat Hentoff, Obama's First 100 Days: After Ending American Torture, Will We Prosecutes those who ordered other War Crimes? Capital Newspaper, Vol.11, No. 521, & December 7, 2008,p-2.

[15] *Id*. He wrote: "what signal does it send to Mr. Bush's gang of unindicted co-conspirators, who have unwrapped a pandora's boxful of other offenses-from perverting the administration of justice, to illegally eavesdropping on the phone conversation and emails of ordinary Americans…to lying under oath to congressional oversight committees? Etc . . . Unless the newly empowered Democrats

criminal law. However, others argue that these contentions have failed to sufficiently engage the practical realities of emerging democracies zealously awaiting peace and cannot afford to forgo opportunities for peace while pursuing complex and lengthy prosecutions.[16] While their arguments fully embrace the reality of certain societies, it falls short of conceiving underpinning mindsets and history of fragile post-conflict societies; societies under continuing conflict accompanied by brutality and constant state of fear—as in Darfur. They of course, dismiss these contentions as a "lesser evil" argument and strongly accentuate moral and ethical complications that ensue from their opponent's argument.[17]

1.2- Challenges to Prosecution: Is Prosecutorial Justice Adequate?

What is in the interest of justice? Ending a vicious cycle of violent crimes and preventing further loss of life or accountability? What if these ends are mutually exclusive phenomenon than being mutually reinforcing imperatives? That is the contention of this section.

Neither the experience of the Nuremburg Tribunal nor the recent *ad hoc* international tribunals resolve the impending questions of how transitional societies could come to terms with their horrifying past. The immediate good of the people in the conflict creates the urgency to first put an end to continuing atrocities without too much emphasis on accountability and reclaiming conventional morality. On the other hand, a comprehensive approach to the human rights problem demands a proper accounting of the past and the revitalization of conventional morality intolerant to impunity.

Those who resent prosecution in atrocity crimes argue for a "value-oriented approach to law; that recognizes the intersection of law and legal values" to strike an equilibrium between prosecution and other alternatives to prosecution, that taken together, serves the common good of the society.[18] They maintain that a 'social construction' approach to law, not a strict 'positivist approach', helps craft the "best route to a better future"[19] by collectively envisioning and determining "the people we want to be and the com-

in the White House and on Capitol Hill hang a few coyotes on some fences in Washington DC., they are making a huge mistake that will come back to haunt them-and all the rest of us, too".

[16] *See generally* Charles Villa-Vicencio, *infra* note 18.

[17] *Id* at 2544.

[18] John Dugard, in Charles Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' 49 Emory L. J 205,207(2000).

[19] *Id*.

munity we aim to have."[20] Others only partly agree with this assertion and call for deferral of prosecution only when existing political realities make prosecution unlikely; what Jose Zalaquett writing on the Chilean Truth Commission called: "Balancing Ethical Imperatives".[21]

Jose Zalaquett reveals two mutually exclusive but inextricably intertwined imperatives seen as defining characteristics of transitional societies — i.e., the protection of human rights in situations of armed conflict occasioned by violent crimes and the anxiety of elected governments in emerging democracies to prosecute past perpetrators.[22] Zalaquett distinguishes the 1945 model of prosecution that followed the Second World War [23] from the peculiarities of the Argentine situation where the democratically elected government has virtually failed to prosecute despite its genuine will to fight impunity of unspeakable atrocities committed in Argentina's Dirty War.[24] He, therefore, contends that "preventing the recurrence of such abuses and, to the extent possible, repairing the damage they have caused" should be the two overall goals of dealing with past human rights abuses.[25] For Jose Zalaquett, measures to redress past abuses should be pursued only to the extent compatible with the interest of peace and the continuity of incipient democracies.[26]

What is implied in his notion of "Ethical Imperatives" is the idea that if the threat of prosecuting powerful leaders and past perpetrators potentially jeopardizes the two crucial ends, transitional societies should be allowed to continue until the right moment arrives. However, he contends that perpetrators should be held to account when the time is right, quashing *de facto* impunity. Putting this account in its most stunning form, he said: "leaders should never forget that the lack of political pressure to put these issues on the agenda does not mean they are not boiling underground, waiting to erupt."[27]

In an attempt to propose a *modus operandi*, Charles Villa-Vicencio examines the purpose served by legal rules and the best approach towards that purpose. [28] However, protesting against the danger of advancing moral arguments under circumstances of brutal conflict, he questions whether the "duty to prosecute" is a legal absolute [29] and challenges the utility and practicality of this norm for mass atrocity crimes.[30] Since the "duty to prosecute" is an

[20] *Id.*

[21] Jose Zalaquett, Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations, 43Hastings L. J.1425.

[22] *Id* at 1427.

[23] *Id* at 1428.

[23] *Id* at 1428.

[24] *Id.*

[25] *Id*.

[26] *Id*.

[27] Jose Zalaquett; 'Why Deal with the Past?' in Alex Boraine et al, *Dealing With the Past* (eds.) (1997), 8, 15.

[28] Charles Villa-Vicencio, s*upra* note 18 at 206.

[29] *Id*.

unrealistic approach to the persistent and recurring sufferings of war-debilitated nations, Vicencio calls for the deconstruction of the "duty to prosecute" norm "to adjust to what is required in a particular situation to meet a given goal."[31]

Each conflict and transition is unique and demand unique responses. For example, Samuel P. Huntington distinguishes between three different categories of transitional societies, namely, transformation, replacement and transplacement;[32] each presenting unique set of problems in the search for justice.[33] According to him, most transitions in the 70's and 80's took the model of transplacement where the balance between spoilers and the government is such that the government, though unwilling to initiate real democratic transition, is nevertheless ready to be persuaded for negotiation.[34] He discusses the dilemma these democracies endure and brings into the light a choice of either to "prosecute and punish when circumstances allow or forgive and forget."[35] In conclusion, he blatantly advises societies under this form of transition "not to attempt to prosecute authoritarian officials"[36] for the cost is far greater than the "moral gains;" reducing the whole ideals of legitimacy and the rule of law into mere "moral gains."

1.3- Truth vis-à-vis Prosecution: Mutually Exclusive Objectives or Reciprocally Reinforcing Imperatives?

Neil J. Kritz and Naomi Roht-Arriaza reflected on a different dimension of the inadequacy of prosecution in addressing the enormity of the problem and the multitudes of competing interests that unfold in transitional societies. In their own words: "while meaningful accountability for past human rights abuses requires discovery of and reckoning with the truth, . . . proving their

[30] *Id* at 206-208.

[31] *Id.*

[32] Samuel P. Huntington, *infra* note 34, [emphasis added]. "[i]n transformation, those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system", "in replacement, reformers within the regime are weak or non existent. Democratization consequently results from the opposition gaining strength and the government loosing strength until it collapses or is overthrown". In transplacement, democratization is produced by the combined actions of government and opposition"

[33] Samuel P. Huntington, 'The Third Wave: Democratization in the Late Twentieth Century', in Neil J. Kirtz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, (ed.), V.I, United States Institute of Peace,1995, p-65-66.;*See* Ruti G. Teitel, *Transitional Justice*,(Oxford University Press),(2000) p-5, [where he debunks our conception of the term 'transition' itself].

[34] *Id.*

[35] *Id.*

[36] *Id.* [Emphasis added].

occurrence requires a level of cooperation from both perpetrators and traumatized victims that is rarely forthcoming."[37]

If prosecution is to serve as an effective tool for establishing accountability, it should be able to address what Kritz and Naomi called a "tradeoff" between a full disclosure of the truth and the duty to prosecute norm.[38] If we cannot illicit the truth underlying the atrocities with all the accompanying details, prosecution is not truly serving the end of justice. Patrick Burgess takes the issue a little further and argued that "punishment will not by itself heal the past wounds, which are so commonly the cause of renewed hostilities and the occurrence of new violations."[39] Something of an insurmountable significance goes to the essence of these arguments. One is that the classical conception of accountability for mass atrocity has changed and it is no more limited to the retributive conception of "punishing perpetrators" at any cost. The quest for truth to provide consolation for victims, public acknowledgement and apology by responsible individuals, establishing a sound basis for reconciliation and democratic transition are among the new imperatives that prominently figures into modern conception of accountability. Secondly, if the classical conception of prosecution is not capable of addressing the modern conception of accountability, then there is a need to deconstruct conventional accountability with the view to reinvigorate a mechanism that responds to all competing imperatives of justice.

Accountability for atrocity crimes is not merely about punishing the perpetrator; it is also about the truth of why the victims have been brutally annihilated. It is about "knowledge and acknowledgment" and making it part of the nation's history. Alluding to the practice of the South African Truth Commission as one success story, Vicencio argues that victims, survivors, and perpetrators need to play a crucial role in the national building process.[40]

---

[37] Neil J. Kritz and Naomi Roht-Arriaza, 'Taking Account of Accountability: Transitional Justice: How Emerging Democracies Reckon With Former Regimes, Impunity and Human Rights in International Law and Practice',(Book Review), 20-SPG Fletcher F. World Aff. 157 at 3; The rights of the victims to know the truth of what happened and why their loved ones are made to disappear. "There are questions to which the victim badly needs answers in the absence of which he will conjure up his won….they need to know why particularly his wife, father, daughter, to mention a few, were maimed or killed".

[38] *Id*.

[39] Patrick Burgess, 'A New Approach to Restorative Justice-East Timor's Community Reconciliation Process' in Naomi Roht-Arriaza &Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, (eds.), (Cambridge University Press), (2006), p-176. He called for what he termed as a dynamic workable solution" that advances reconciliation. Accountability, he argued, can be essential in 'healing the past' but is neither a response to justice nor reconciliation.

He argued that even if we assume that prosecution is the only instrument against impunity and is the best way to prove the supremacy of the law, the rule of law and the standard of proof makes it almost impossible to "obtain a guilty verdict" against powerful perpetrators.[41] Prosecution, therefore, not only squanders the limited resources of countries in transition, it also deviates from its intended purpose.[42]

While Vicencio asserts that countering "counterfeit and partisan version of history"[43] paves the way for a more "rational approaches to past conflicts," [44] he falls short of addressing the substantive problems encountered by his notion of "principled compromise". Other than contending that divulging the truth is an "antidote to such ideological perceptions of the past that undermine the mind's capacity for judgment and for learning;"[45] he did not offer compelling responses as to whether the disclosure of truth provides a sufficient basis for victims to come to terms with the perpetrators. Allowing perpetrators to go free in return for truth might intensify existing tensions by divulging the conspiracy and complicity of various institutions. Summarizing his argument of principled compromise, Vicencio offered a compelling argument when he said:

> [T]he inexactitudes of peaceful coexistence and national reconciliation are most likely to be born where legal, political and moral absolutes are decalcified under the spotlight of rigorous enquiry and a creative response to political realities. Principled compromise that ignores neither the realities of political context nor the wisdom of judicial insight captured in international human rights law can create a sustainable breakthrough toward achieving peace and reconciliation.[46]

In UNSCR 827 (1993) and 955 (1994) establishing the ICTY and ICTR, the Security Council indicated that prosecution of persons responsible for grave violations of human rights and humanitarian law will "contribute to ensuring that such violations are halted and effectively redressed."[47] The resolution proclaims that prosecution of the Rwandan genociders "would contribute to

[40] *Id* at 207.

[41] *Id* at 209.

[42] Bruce Ackerman, The Future of the Liberal revolution, cited in Villa Vicencio, *supra* note 18 at 206.

[43] *Id* at 212.; See also United States Institute of Peace, Info Advisory #18/T&R, CMSN Precedence, February 18,1999,available by request at usip_requests@usip.org.

[44] Charles Villa-Vicencio, *supra* note 18, at 211.

[45] *Id*.

[46] Charles Villa-Vicencio, s*upra* note 18 at 206-207.

[47] UNSC. Res. 827 (25 May 1993),UN. DOC S/Res/827, establishing the ICTY, Preamble; UNSC Res 955 (8 November 1994), UN DOC /Res/955 (1994) establishing the ICTR, See Preamble.

the process of national reconciliation and to the restoration and maintenance of peace".[48]

1.4- Between Principle and Pragmatism: Reconciling Interests

While advocates of prosecution strongly argue that retributive justice is the means towards combating impunity and ensuring peace and reconciliation, others question the practicality of their argument. As Jose Zalaquett, Villa Vicencio, and others argued; there are practical difficulties in applying the noble principles of conventional retributive justice to the dynamics of societies in transition—where the military has remained in large control of the army, rebel groups and repressive regimes preconditioned peace-talks to amnesty. These realities call for new approaches that reconcile different view points.

Martti Ahtisaari, Noble Prize winner and acclaimed Peace-Maker, recognizes the need to punish offenders for a society to make a clean break with its horrific past.[49] But, he argues that recording past injustice and crafting a platform for national reconciliation is not always best achieved through prosecution.[50] Ahtisaari correctly observed that trials are not always the best instruments for memory and healing and the point should, therefore, be made that instead of replacing prosecution with other schemes that engenders a persistent culture of impunity, they should be augmented by other imperatives of justice.

Writing on El Salvadorian Truth Commission, Douglass W. Cassel offered an ingenious approach to the dilemma of transitional democracies when he argued that: "[i]n transitional societies, the accumulation of past human rights violations may far exceed the capacity of even a competent and honest judicial system to prosecute. Moreover, an attempt to prosecute all past violators might well provoke security forces to overthrow the incipient democratic government."[51] Without ignoring the interest of "incipient democracies" and grounding his argument in international human rights, Cassel suggests an array of options that ranges from selective and exemplary prosecutions to future prosecutions or Security Council mandated prosecutions.[52] He ruled out *de jure* amnesty demonstrating the importance of timing; what

---

[48] *Id.*

[49] Martti Ahtisaari, 'Justice and Accountability: Local or International?' in Ramesh Thakur and Peter Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, (United Nations University Press,2004),p-xv.

[50] *Id*.

[51] Douglass W. Cassel, International Truth Commissions and Justice, in Niel J. Kritz, *supra* note 37 at 328.

[52] *Id*.

Rachel S. Taylor; writing on "Cambodia's Joint Tribunal", called "Better Late Than Never."[53]

In a nutshell, while no single approach can fully resolve this debate, it is beyond doubt that international law demands prosecution of gross violations of human rights and humanitarian law. While Zalaquett's "ethic of responsibility" provides an imaginative approach with respect to transitional societies, Diane's orientation of prosecutorial justice should always be the acid test in all cases: i.e., even if there is a competing interest of peace and transition into democracy, prosecution should be considered to the extent practicable. If prosecution is impossible or dangerous to the integrity of the nation, a cautious and comprehensive step-based approach suggested by Professor Douglass Cassel [54] must be adopted as minimum standard to avoid a moral degeneration.

2. Acts Repugnant to *Jus Cogens* Norms: The Duty to Prosecute

2.1- The Duty to Prosecute for Breach of *jus cogens* Norms

A norm of j*us cogens* is a preemptory norm of international law that cannot be set aside by agreement and "from which no derogation is permitted." [55] A violation of a norm of this nature requires states to investigate, prosecute and punish perpetrators.[56] Though the content of these norms and how this status can be attained is not clear, its distinctive nature and normative superiority is beyond dispute. Nevertheless, it is not totally clear how and when a norm of *jus cogens* generates *erga omnes* obligations despite certain writer's contention that obligations *erga omnes* "pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*". [57]

The concept of obligations *erga omnes* is expounded by the ICJ in the *Barcelona Traction Case* where the court decisively held that:

---

[53] *Id* at 329; Rachel S. Taylor, 'Better Later Than Never: Cambodia's Joint Tribunal', in Jane E. Stromeseth, *Accountability for Atrocities: National and International Responses*,(Transnational Publishers), (2003), p-237.

[54] See *supra* note 51.

[55] The Vienna Convention on the Law of Treaties, Adopted 23 May 1969,entered into force on 27 January 1980, 1155 UNTS,331,344,art.53; M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International law*, (Martinus Nijhoff Publishers, Dordrecht/ Boston/London,1995),p-51.

[56] *See* M. Cherif Bassiouni, *infra* note 58 at 50.

[57] M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligations Erga Omnes, 59 Law &Contemporary Problems,1996, p-1.

> [A]n essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes.*[58]

According to Cherif Bassiouni, when a prohibition of an act attains the status of *jus cogens* generating *erga omnes* obligation, it proscribes "the duty to prosecute or extradite, state liability, the inapplicability of statute of limitations, the inapplicability of any immunities including the head of state, the nullity of defenses of superior order, non-derogation under state of emergency and universal jurisdiction."[59] Though there is no consensus as to a complete list of rules of international law that attained the status of a norm of *jus cogens* generating *erga omnes* obligation, it is beyond dispute that piracy, the prohibition on genocide, war crime, crimes against humanity, slavery and aggression constitutes a preemptory norm from which derogation is impermissible.[60] It follows that the question of prosecuting, extraditing or cooperating in the prosecution of those accused of genocide, war crimes and crimes against humanity is not a matter of choice left to the discretion of individual states; rather, it is a duty of all states. The GOS is no exception to this rule.

2.1- Duty to Prosecute for Gross Violations of Human Rights and Humanitarian Law

Contemporary international human rights impose on the state the duty to investigate and prosecute for gross violations of human rights and humanitarian

[58] *Barcelona Traction, Light and Power Co. Ltd, (Belgium v. Spain)*,1970, ICJ 3, 32(Feb.5); Reservations to the Genocide Convention, (Advisory Opinion), 1951p-8, available at http://teaching.law.cornell.edu/faculty/drwcasebook/docs/genocide%20convention%20decision.pdf.

[59] M. Cherif Bassiouni, s*upra* note 57 at 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, ICJ reports(1996),595 at 616; For cases of state liability, *See Armed Activities on the Territory of the Congo (Democratic republic of the Congo V. Uganda*),ICJ 3, 19 December 2005,available at http://www.icj-cij.org/docket/files/116/10455.pdf; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted in 1968, entered into force 11 Nov 1970, art, 1; *See* also ICRC, *Customary International Humanitarian Law* (Cambridge University Press) (2005),p-603 recognizing universal jurisdiction for war crimes in non-international armed conflict; International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, 2Yearbook of International Law Commission,(1996), art.7.

[60] *See* M. Cherif Bassiouni, *supra* note 57 at 3-4.

law.[61] The American Convention on Human Rights provides for the "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal."[62] The most cited decision of the Inter-American Court of Human Rights in *Velasquez Rodriguez v. Honduras Case* made the duty to "prosecute norm" the central caveat of human rights obligation and hence significantly influenced thinking about the general obligations of states for human rights norms.[63]

Furthermore, the Inter-American Court had the occasion to opine on the language of "ensure respect" contained in Article 1(1) of the American Convention on Human Rights.[64] In its prominent judgment against Honduras, the Court has decisively declared that "[A]s a consequence of this obligation, the state must prevent, investigate and punish any violations of the rights recognized by the Convention."[65] Today, it is a settled principle in the jurisprudence of international human rights that human rights instruments in general involves the obligation to respect, prevent, fulfill, and protect violations of human rights. [66]

The African Charter to which the Sudan is a party recognizes the right of every person to have his cause heard by competent national organs against acts violating fundamental rights. [67] The African Commission on Human and Peoples' Rights correctly emphasized that the Charter as a human rights treaty, entails four layers of obligations, namely, the duty to respect, protect, promote, and fulfil these rights.[68] In interpreting the duty to protect, the Commission has noted that states have the duty to protect the right holders against intrusion upon their rights and provide remedy when they are violated. [69]

---

[61] *See Velasquez Rodriguez v. Honduras*, *infra* note 63; *Khashiyev and another v. Russia*, *infra* note 77; T*he Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria*, *infra* note 71.

[62] The American Convention on Human Rights, Adopted on 22 November 1969, entered into force on 18 July, 1978, art.8 (1), available at< http://www.hrcr.org/docs/American_Convention/oashr.wpd>, accessed 15 December, 2007.

[63] *Velasquez-Rodriguez v. Honduras*, Inter-American Court of Human Rights, 1988, Ser.C, No.4, 9, Human Rights Law Journal 212 (1988) in Steiner and Alston, *supra* note 8 at 213.

[64] *Id.*.

[65] *Id*.

[66] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, Comm. No. 155/96, African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report, 2001-2002, May 2002, Pretoria, South Africa, Para 44, p-6.

[67] African Charter on Human and Peoples' Rights, Adopted 27 June 1981,entered into force 21 October, 1986, art.7 (1)(a).

[68] See the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria, *supra* note 66.

[69] *Id* at para-46, P-7.

The European Court of Human Rights decisively pronounced state's duty to carryout a genuine investigation and prosecution of human rights violations.[70] In *Khashiyev and another v Russia*, the European Court of Human Rights has held that a mere attempt to investigate a human rights violation is not considered an efficient investigation and states must exercise due diligence necessary within the circumstances to investigate and punish offenders.[71]

The Updated Set of Principles on Impunity considers prosecution as a *conditio sina qua non* in the fight against impunity.[72] These Principles blame the prevalence of impunity on the failure of the state to investigate, prosecute and duly punish perpetrators of atrocity crimes.[73] Principle 19 articulates a state's duty to prosecute, try and duly punish those responsible for serious crimes under international law.[74] As a matter of classical international law, these Principles on Impunity do not constitute an independent, authoritative, and binding source of international law. However, those norms enunciated in the document and which pertains to the duty of the state to investigate, try, and punish, have already been crystallized into customary rules of international law.[75] This has been decisively affirmed for the first time by the pronouncements of the Inter-American Court of Human Rights in *Velasquez Rodriguez Case*.[76] This landmark judgment by the Court has been considered as the most authoritative exposition of the law of human rights and reflects a customary norm.[77] As a result, it was cited by major human rights bodies and

[70] Vasilev v Bulgaria (App no 48130/99), European Court of Human Rights, ECHR, 48130/99, 20March, 2007, Para-75; *Khashiyev and another v. Russia* (App Nos. 57942/00 and 57945/00), ECHR, 14 October 2004 and 27 January 2005,Para-157-158.

[71] *Khashiyev and another v. Russia* (App Nos.5794/00 and 57942/00), ECHR, 14 October 2004 and 27January 2005,Para--158.

[72] *See generall,* the Updated Set of Principles on Impunity, *supra* note 2, Principle I-V.

[73] *Id* at Principle I.

[74] *Id* at Principle 19.

[75] *See Velazquez Rodriguez v. Honduras*, s*upra* note 63; *Khashiyev and another v. Russia*, *supra* note 70*; The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria***,** s*upra* note 66; Diane F. Orentlicher, s*upra* note 9; M. Cherif Bassiouni and Edwards M. Wise, s*upra* note 55.

[76] See *Velazquez Rodriguez v. Honduras*, s*upra* note 63. The Court proclaimed that the obligation to 'ensure the free and full exercise of the rights recognized by the Convention' implies the "duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.

[77] See The African Commission on Human and Peoples' Rights in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria***,** s*upra* note 66; *See* Henry J Stei-

writings of 'the most highly qualified publicist of the various nations of the world'. [78]

2.2- Prosecuting the Darfur Atrocities: A Fight Against Impunity or An International Political Hypocrisy?

Before the indictment of Sudanese President, Omar Hassan Al-Bashir, one might think that prosecution of persons responsible for serious crimes will potentially serve the purpose of justice without compromising peace. After Al Bashir's indictment, though, international organizations and individual states have protested against the indictment and requested the Security Council to defer the situation in the interest of peace.[79] They argued, the prosecution of Al Bashir jeopardizes the hope for peace and perpetuates the suffering of civilians.[80] Others argue that instead of jeopardizing the progress towards peace and exacerbating the conflict, the indictment will induce the President and alleged co-perpetrators to aggressively pursue peace.[81] Although there is no empirical evidence to that effect, Al-Bashir's recent declaration of unconditional and unilateral cease-fire has been viewed as a confidence-building measure intended to soften the ICC, the Prosecutor and win the heart and minds of his African counterparts.[82]

Furthermore, when it is very apparent from the circumstances that the effort for justice is scuttling efforts for peace, the Security Council has the authority to defer the situation.[83] Since the ICC Statute stipulates for deferral of the entire "Situation", not specific cases, the Council should demand stronger measure evidencing commitment by the GOS and rebel forces to make pain-

. ner and Philip Alston, *supra* note 8 at 180 -184; James Nickel, How Human Rights Generate Duties to Protect and Provide, 15 Hum. Rts. Q.(1993), 77, P-80.

[78] *Velasquez Rodriguez v. Honduras*, *supra* note 63; *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria*, *supra* note 66; Diane F. Orentlicher, s*upra* note 9; M. Cherif Bassiouni and Edwards M. Wise, *supra* note 55. See the International Criminal Court, *infra* note 121.

[79] Sudan Tribune, Sudan confident China, Russia to block Al-Bashir indictment 4 August 2008 07:00, available at< http://www.sudantribune.com/spip.php?article28141>, accessed on 26 January, 2009.

[80] *Id.*

[81] Simon Montlake, The Christian Science Monitor, Sudan cease-fire call gets wary reception in Darfur, Many say the Sudanese president is trying to prevent a war-crimes indictment, 13 November, 2008, available at <http://www.csmonitor.com/2008/1113/p99s01-duts.html>, accessed on 14 December, 2008.

[82] *Id*

[83] The Rome Statute of the International criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998, entered into force on 1 July 2002, art.16.

ful concessions for peace before it defers the situation.[84] Deferral of the "Situation" entails all ICC cases in Darfur, not just the case against Al-Bashir.[85] However, in an increasingly chaotic region where neither the rebel groups nor the GOS are serious about peace, the persistence for justice does not, of itself, constitute an impediment to peace.

Any argument which involves *de facto* or *de jure* amnesty to perpetrators of atrocity crimes unleash a clash of high normative principles that entails the reexamination of the utility of the very norms that are inherent to all legal systems. However, the reexamination of the norms, if at all necessary, must anticipate possible peace for Darfuris and transition into a democracy that guarantees a sustained peace in which human rights and fundamental freedoms flourish. Even when transition and lasting peace are real possibilities, legal and ethical principles exact dispensation of justice in a way that accommodates the concerns of victims, the society, and the state.

Writing on the controversy between peace and justice, Louise Arbour correctly summarized the appropriate course of action for situations like Darfur when she said: "The abandonment—even the postponement—of the process of justice is an affront to those who obey the law and a betrayal of those who rely on the law for their protection; it is a call for the use of force in revenge and, therefore, a bankruptcy of peace." [86] This view is at par with the view of the Council that "justice and accountability are critical to achieving lasting peace and security in Darfur." [87] Consistent with this assertion, Nsongurua J. Udombana made an appealing case in the call for justice when he wrote:

> Prosecuting perpetrators of the Darfur mayhem and making reparations to victims are essential for victims to come to terms with their loss. Such an exercise could have a positive impact on peace and security in Sudan, unless peace is intended to be a brief interlude between conflicts. Prosecution also has a potential to deter vigilante justice, now or in the future, it will discourage those who would want to seek revenge and take justice in their own hands.[88]

If an all inclusive political process that recognizes difference and upholds ideal notions of pluralism and multiculturalism is not instituted, peace will

---

[84] *Id.*

[85] *Id.*

[86] Louise Arbor, UN High Commissioner for Human Rights, Address to the UN Commission of Human Rights in UN: No More Delay on Darfur, Human Rights Watch,March,18,2005,available at <http:/hrw.org/English/doc/2005/03/18/sudan10337.htm>. See also Nsongurua J. Udombana, *infra* note 98,at ,p-9.

[87] Security Council Resolution 1593/2005, 31 March, 2006.

[88] Nsongurua J. Udombana, Pay back Time in Sudan? Darfur in the International Criminal Court, 13 Tul. J. Comp. & Int'l L. (2005), 1, 9.

simply be a brief interlude between conflicts with various groups. It is imperative that the GOS works to restore confidence in the rule of law and repress future violations by using prosecution as both a forward and backward looking strategy. Until the parties realize the legal and moral obligation to honor the dignity and intrinsic worth of their people, they should not be allowed to continue perpetrating atrocities with impunity. [89]

3. Security Council Referral of the "Darfur Situation": A Tilted Scale?

3.1- The Security Council Referral: Implications in Darfur and Beyond

When the Security Council has made the first historic referral to the ICC amid political standoff, many in the human rights movement believed that the referral turned a new page in the history of the human rights movement. Indeed, Resolution 1553 set forth a profound precedent demonstrating that the world can come together to save humanity even in the face of a sharp political standoff. This being the clearer message, the indictment of a sitting head-of-state under this resolution has led some to describe the decision to arraign the President as "bad of international law, bad for the Sudanese people -and bad for America." [90] Daniel Hannan accuses the ICC of overturning centuries of settled rules of territorial jurisdiction to enforce a covenant against states without its expressed or implied consent.[91] Whether the referral of the situation with the implicit consent of those who openly opposed to the Court is a tilted scale against the powerless will be discussed later. Though profoundly political in nature, it may be said that the decision was the right-move in the right direction.

The alleged implication of top civilian leaders in the ICC crimes left a doubt in the ability of the Sudanese judicial process to genuinely try and punish suspected perpetrators. That doubt intensified the controversy between the ICC and the GOS on how to best handle questions of accountability. At any

[89] Robert K. Goldman, "Amnesty Laws and International Law: A Specific Case," in International Commission of Jurists, Justice Not Impunity 209(Geneva: ICJ, 1993), in Naomi Roht-Arriaza, Impunity and Human Rights in International Law and Practice (ed.)(Oxford University Press),(1995), p-57.

[90] Daniel Hannan, Americans can Now Be Tried By the International Criminal Court, 6 March 2009, available at <http://blogs.telegraph.co.uk/daniel_hannan/blog/2009/03/06/americans_can_now_be_tried_by_the_international_criminal_court>, accessed on 7 March, 2009.

[91] *Id.*

rate, neither peace nor justice will be realized unless the ICC, the Prosecutor, and the GOS design a *modus operandi*, which former UN Secretary General Koffi Annan, captured in the following terms:

> Justice, peace and democracy are not mutually exclusive objectives, but rather, mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.[92]

The Prosecutor is expected to craft a workable strategy: striking balance between competing interests of peace and justice, questions of legitimacy and pragmatism, maintaining his independence and securing the cooperation of the Sudanese government.

Beyond Darfur, the referral is a clear signal to states and individuals that horrific violations of norms protected under the Rome Statute is inescapable. For the three veto wielding states, China, Russia and U.S.A., their abstention constitutes a tacit recognition of the ICC and its significance in the international criminal justice system. [93]

3.2- The International Criminal Court: Whom and How to Prosecute

> Mass atrocity could not occur without the organized cooperation of many, often numbering in several thousands. These include both soldiers of various rank and sympathetic civilians in government and private sectors. Their cooperation takes innumerable forms, and a satisfactory method for ascribing particular harms to specific defendants is not always readily at hand. This is particularly true of those not physically present at the crime scene. [94]

In deciding on the question of whom to prosecute for the atrocities, at least two factors must be critically assessed. First, since the ultimate purpose of prosecution and punishment is averting mass atrocities *ex ante* and redressing

---

[92] Secretary General's Report to the Security Council on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, available at htttp://siteresources.worldbank.org/INTLAWJUSTINST/Resources/RuleofLawTransitional.pdf>, see summary, accessed on 22 October, 2007.

[93] Nsongurua Udombana, *supra* note 88, [emphasis added.]

[94] Mark Osiel, The Banality of Good: Aligning Incentives Against Mass Atrocity, (2005),105 Colum. L. Rev. 1751, 1751-1752.

it *ex post*, prosecution strategies must take due account of this purpose. Secondly, given the size of both the victims and the perpetrators, the prosecutor must thoroughly assess all the existing options before deciding how many of the perpetrators to prosecute.

The first decision to be made is whether to prosecute the "big fish" or the "small fry". Accordingly, the question one should ask is whether the gravity of atrocities perpetrated by the *small fry*, who actually committed the acts, leads us to the conclusion that endorses punishment of only the *big fish*. How can we make a distinction between the gravity of the acts of the "big fish" that have not actually killed but ordered, facilitated or approved those acts and those of *smaller fry* who actually committed the atrocities? On what basis may the acts of the subordinates be fairly ascribed to the most elevated superior, from whom they are so distant in space and time? Should the prosecutor follow the precedents of the ICTY prosecutors who have relied upon the doctrine of participation in a joint criminal enterprise? Should it invoke command responsibility? So far, the two current indictments against the President, the State Minister and the militia leader supports the view that the Prosecutor is going to pursue the *big fish* that bears the greatest responsibility for the atrocities.

3.3- ICC and the 'Special Criminal Courts on the Events in Darfur': The Challenges of Complementarity

The most decisive power of the ICC derives from the Principle of Complementarity enunciated in Article 17 of the Statute and underpins the entire functioning of the Court. Complementarity is a check on the absolute westphalian notion of sovereignty. The drafters of the Rome Statute were mindful of the many examples of sovereigns on the international arena and designed Article 17 to govern the conduct of those who let horrendous atrocities go unpunished. In addition to numerous other checks on the ICC's powers, the Complementarity regime allows "prosecutorial prerogatives of responsible states to use their forums to enforce international law[95] while at the same time providing for a back-up tribunal to step in and trump traditional sovereignty claims for failed or recalcitrant regimes." [96]

Sudan is not a State Party to the ICC. UNSCR 1593 (2005) provided ICC with jurisdiction. The Rome Statute bestows primary jurisdiction on the states to prosecute crimes that fall under the jurisdiction of the ICC. [97] While

[95] Larry Charles Dembowski, The International Criminal Court: Complementarity and Its Consequences, in Jane E. Stormseth, Accountability for Atrocities; National and International Responses, (Transnational Publishers, Ardsley, New York),(2003) at p-140.

[96] *Id*.

state jurisdiction is the rule, ICC jurisdiction is exercised in exceptional circumstances if the state's unwillingness or inability to genuinely exercise jurisdiction over the accused.[98] In the case of Darfur, the question will be whether the Sudanese Special Criminal Courts on the Events in Darfur (hereinafter the SCCED) [99] setup to replace the ICC can legally override ICC jurisdiction.

The preamble to the Rome Statute declares that "most serious crimes of concern to the international community must not go unpunished" [100] and it is the duty of every state to "exercise its criminal jurisdiction over those responsible for international crimes". [101] There is no doubt that Sudan has primary jurisdiction to redress the wrongs committed within its own territories. However, the GoS have expressed their opposition to the Security Council referral[102] and they have opined that the SCCED is "considered a substitute to the International Criminal Court".[103] Self-serving as those arguments appear to be and, of course they were, they cannot be automatically dismissed.

The ICC jurisdiction is contingent upon proof by the Prosecutor that the national system is either unwilling or unable to genuinely investigate and prosecute the perpetrators.[104] Indeed, it has been determined that the Sudanese legal system is either unwilling or unable to deal with the atrocities committed in Darfur. In the words of the UNCI:

> The Sudanese justice system is unable and unwilling to address the situation in Darfur. … Laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts.[105]

---

[97] The Rome Statute, *supra* note 83, article 17(1)(a) providing that the "Court shall determine that a case is inadmissible where it is being investigated or prosecuted by a state which has jurisdiction over it, unless the states is unwilling or unable genuinely to carryout investigations…" Emphasis added.

[98] The Rome Statute, *supra* note 83 at art.17.

[99] Human Rights Watch: Special Courts Not Prosecuting War Crimes, Nairobi, 8 June 2006, available at <http://www.irinnews.org/report.aspx?reportid=59255>, Accessed: 20 August 2008.

[100] The Rome Statute, *supra* note 83, Preamble Para-4.

[101] *Id* at Preamble,Para-6.

[102] Nairobi, 24 June 2005 (IRIN); Sudan's own judiciary was qualified and ready to try those accused of any violations in Darfur." The GOS declared its "total rejection" of UNSCR 1593, accusing the ICC of lacking justice and objectivity.

[103] *Id*.

[104] The Rome Statute, s*upra* note 83, art.17.

[105] UNCI, *supra* note 7 at 5.

However, since the finding of the UNCI predates the establishment of the SCCED, the Prosecutor must prove to the satisfaction of the Trial Chamber that his case is admissible and investigation by the SCCED falls short of the requirements of Article 17. The principle of complementarity limits the power of the ICC by creating a procedural hurdle to the admissibility of cases and in a way safeguards the rights of the state whose legal system is prepared to pursue alleged perpetrators. All that Sudan is expected to prove is that it is willing and able to genuinely prosecute the individuals on the list of the Prosecutor's indictment for the same conduct alleged by the Prosecutor.

The two Prosecutor's cases relate to the President of the Republic, Omar Hassan Al Bashir and Ahmed Harun (Former Minister of State for the Interior) and Ali Kushayb (Janjaweed militia leader) for "a systematic and organized initiative to attack civilian populations in Darfur".[106] In *the Prosecutor v. Thomas Lubango,* the Pre-Trial Chamber has enunciated the admissibility requirements of the Statute when it pronounced that: "it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court".[107] On its decision on the Prosecutor's application for an arrest warrant for Ahmed Harun and Ali Kusheyb, the Pre-Trial Chamber pronounced that the case is admissible and falls within the jurisdiction of the Court.[108]

In the case against Ahmed Harun and Ali Kusheyb, the Prosecution has shown that there is no national proceeding at all against Ahmed Harun in connection with Darfur for any of the alleged crimes.[109] In the case of Ali Kushayb, the SCCED has launched an investigation involving him and an-

[106] The International Criminal Court, Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593(2005) (hereinafter Fifth Report of Prosecutor to the UNSC or simply The Fifth Report), p -8, available at <http://www.icc-cpi.int/library/organs/otp/ OTP_ReportUNSC5-Darfur_English.pdf.>, accessed on 20 September 2008.

[107] *The Prosecutor v. Thomas Lubanga Dyilo*, Situation in the Democratic Republic of the Congo, Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest Pursuant to Article 58 of the Rome Statute Case No.ICC-01/04-01/06,10 February 2006, at p-20, available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf.>.

[108] *Prosecutor v. Ahmed Muhammad Harun ("Ahmed Harun") and Ali Muhammad Al-Abd-Al-Rahman("Ali Kushayb),* Situation in Sudan, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, No.ICC-02/05-01/0, The Fifth Report, *id* at 7-8.

[109] Fifth Report of the Prosecutor to the UN Security Council, s*upra* note 106.

[110] *See* Report of Human Rights Watch, available at http://hrw.org/backgrounder/ij/sudan0606/1.htm; The Fifth Report at p-7.

other 12 individuals against whom a *prima facie* evidence has been found. [110] However, those investigations are for a separate incident of a very marginal nature compared to the prosecution's case and they are not related to those investigated by the prosecutor.[111] In summarizing the matter in which the Pre -Trial Chamber has ruled in his favor, Prosecutor Luis Moreno-Ocampo said:

> There is no investigation in the Sudan into such a criminal conduct. The Sudanese investigations do not encompass the same persons and the same conduct which are the subject of the case before the Court. To the extent that the investigations do involve one of the individuals named in the prosecution, they do not relate to the same conduct which is the subject of the case before the Court. National proceedings are not in respect of the same incidents and address a significantly narrower range of conduct. [112]

While the individuals are suspected of committing war crimes and crimes against humanity, trying them for theft and slaughter of a herd of sheep appears as an insult to the victims and constitutes an audacious affront to international standards against impunity. This is indeed a typical manifestation of the inability and unwillingness of the system to prosecute perpetrators and one intended to shield them from international prosecution—making the ICC prosecutions all the more important. Thus, SCCED prosecutions do not meet the standards set forth in Article 17 of the ICC Statute to override ICC jurisdiction.

3.4- Cooperation with the ICC: A Legal Obligation or an International Political Expedience?

As early as 1973, the UN General Assembly adopted a historic resolution which required all states to cooperate in the punishment, detection, arrest and extradition of persons guilty of war crimes and crimes against humanity. [113] Both the Geneva Conventions and the Torture Convention contains explicit provisions dealing with prosecution or extradition of persons guilty of grave breaches and torture. [114] It is now an established norm of customary interna-

---

[111] Fifth Report of the Prosecutor to the UN Security Council, s*upra* note 106.

[112] The *Prosecutor v. Ahmed Muhammad Harun* ("Ahmed Harun")and Ali Muhammad Al-Abd-Al-Rahman("Ali Kushayb), *supra* note 108, p-9.

[113] GA Res. 3074(XXVIII), Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UN Doc. A/9034/Add1(1973).

[114] *See* The Four Geneva Conventions of 12 August 1949,Geneva I at art.49, Geneva II, at art.50, Geneva III, at art.129, Geneva IV, at art.146; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in force 26 June 1987, art.5(2), 8.

tional law that all states have obligation *aut dedere aut judicare*, to prosecute or extradite offenders of preemptory norms of international law. [115]

Mark Lattimer and Philippe Sands maintain that in most cases, international human rights impose an obligation on state to prosecute or to cooperate in their prosecution rather than licensing them to abuse human rights with impunity.[116] In its concluding observation on Sudan, the Human Rights Committee urged the GOS to respect its duty to prosecute perpetrators of human rights and cooperate with the ICC. [117] As stated by Juan Mendez, Former Special Advisor of the Secretary General on Genocide, "cooperation with the ICC is not a matter of choice for any state". [118] Moreover, UNSCR 1593, a Chapter VII resolution, required the Sudan to cooperate with the ICC. [119] Accusing the ICC for lack of "objectivity and justice", and contrary to its international obligation, the Sudan has totally rejected the ICC and UNSCR 1593.[120] In its decision issuing an arrest warrant for President Hassan Al-Bashir, the Pre-Trial Chamber reiterated the position of the GOS and their refusal to cooperate with the Court.[121]

4. The Case against Al Bashir: the Demise of a Sitting Head-of-State Immunity or Political Vendetta?

Omar Hassan Al-Bashir is the President of the Republic of Sudan since 1989. Ever since he assumed power in June of that year, he has engaged in a constant political and military battle with his adversaries from within and outside Khartoum.[122] In May of 2007, the judges of the ICC issued an arrest warrant

[115] *See* M. Cherif Bassiouni, *supra* note 57.

[116] M. Lattimer & P. Sands QC, *Justice for Crimes Against Humanity* (ed.),(Hart Publishing: 2003), p-4.

[117] The Human Rights Committee, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, CCPR/C/SDN/CO/3/CRP.1,26 July 2007,p-3, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=46e516f52>, accessed on 18 December 2007.

[118] *See* Juan Mendez, Former UN Secretary General's Special Advisor on Genocide, available at <http://www.irinnews.org/report.aspx?reportid=56662>, accessed on the 27 July 2008.

[119] UNSCR 1593, Preamble.

[120] IRIN, SUDAN: Judiciary Challenges ICC over Darfur Cases, *supra* note 102.

[121] The International Criminal Court, Decision on the Prosecution's Application for a Warrant of Arrest against Omer Hassan Ahmed Al-Bashir, Case No: ICC-02/05-01/09, Para-228, 229. The Chamber specifically referred to one incident in which it noted "that the embassy of the State of Sudan in The Hague, The Netherlands, refused on 2 May 2007 and 11 June 2007, to receive from an officer from the Court's Registry, the cooperation request for the arrest and surrender of Ahmad Harun and Ali Kushayb".

for Ahmed Haroun and Ali kusheyb.[123] On 14 May, 2008, Albashir publicly declared that he "will not hand-over Haroun or any Sudanese to the ICC."[124]

Having failed to secure the cooperation of Sudanese President, Hassan Al Bashir, in the apprehension and surrender of Ahmed Harun and Ali Kusheyb, Prosecutor Moreno-Ocampo turned to the Commander-in-Chief himself.[125] Accusing him for the most atrocious crimes imaginable: genocide, crimes against humanity and war crimes, the Prosecutor has made an unprecedented move in indicting a sitting Head-of-State.[126] Requesting an arrest warrant for the President, the Prosecutor made his toughest allegation claiming that "As Al Bashir decided and set out to destroy in part the Fur, Masalit and Zabghwa groups, on account of their ethnicity. His motives were largely political. His pretext was a "counterinsurgency". His intent was genocide."[127]

Despite his allegation, the decision of the OTP to indict Al Bashir has received a mixed reaction from around the world. While the African Union, the Arab League and many individual African leaders expressed disappointment and outrage at the decision of the Prosecutor, human rights activists have hailed the decision as a major breakthrough ushering in a new era in which those who are given the most power to do harm or good will be held to the "highest standards of international law, not the lowest." [128]

Sudanese neighbor, Ethiopia, has expressed its discontent with the indictment calling it a "single minded pursuit of justice."[129] The Ethiopian Premier linked his country's opposition to the indictment with the interest of peace,

[122] The ICC, Situation in Darfur, The Sudan, Summary of the Case, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassn Al Bahir, 14 July 2008, p-3.

[123] See *supra* note 108 at 11.

[124] Eighth Report of the ICC Prosecutor to the UNSC pursuant to UNSCR 1593 (2005), para-50.

[125] The ICC, Situation in Darfur, The Sdan, *supra* note 122 at page 3, English Report of the ICC Prosecutor to the UNSC, *id* at para-25, arguing that "Mr. Al Bashir as President and Commander in chief of the Armed Forces exercises both *de jure* and *de facto* authority. He provided directions to the operations against the civilians in Darfur. While he delegated authority to his subordinates, supreme authority was always his. He ensured the coordination of operations through the State administration and through Locality and State Security Committees reporting to him. He participated personally in the recruitment and direction of Militia/ Janjaweed incorporated into reserve forces. The events that occurred in Darfur, in particular their systematic and planned nature could not have occurred without his approval and will."

[126] UNSCR 1593, *supra* note 87.

[127] The ICC, The Situation in Darfur, The Sudan, Summary of the Case, *supra* note 122, p-3.

[128] Gilbert Sison, A King No More: The Impact of The Pinochet Decision on the Doctrine of Head of State Immunity, 78 Wash. U. L.Q. 1583, 1584.

which according to him should not be trumped by the concern for justice.[130] Expressing his country's stance on the indictment of Al Bashir, the Ethiopian Minister for Foreign Affairs, H.E. Seyoum Mesfin, condemned any crimes against civilians and declared the indictment as unfair and unbalanced.[131] Eritrea on its part dismissed the indictment calling it an "insult" and "harassment" by the Western powers.[132] On the other hand, the Former U.S. Special Envoy to Sudan, Andrew Natsios has expressed his frustration over the indictment holding that the indictment:

> . . . [m]ay well shut off the last remaining hope for a peaceful settlement for the country. Without a political settlement, Sudan may go the way of Somalia, pre-genocide Rwanda, or the Democratic Republic of Congo: a real potential for widespread atrocities and bloodshed as those in power seek to keep it at any cost.[133]

Furthermore, the African Union, a body with unequivocal power to use military force against Member States to prevent gross violations of human rights,[134] expressed concern that such a pursuit of justice targeting the President of the Nation would only scuttle the effort for peace.[135] The AU Peace and Security Council anticipated the situation earlier; warning that any effort aimed at "justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace in Sudan."[136] This Council has expressly condemned the move by the ICC prosecutor and called upon the Pre-Trial Chamber to refrain from issuing an arrest warrant against Hassan Al Bashir saying that "approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan."[137]

---

[129] Sudan Tribune, Ethiopia Voices Support to Sudan over ICC Charges Against Al Bashir, Monday, Tuesday 29 July 2008, available at < http://www.sudantribune.com/spip.php?>, accessed on 10 November, 2008.

[130] *Id*.

[131] *Id*.

[132] *Id*.

[133] Andrew Natsios, ICC Prosecution of Bashir May Destroy Sudan, in *Larouche* Political Action Committee, available at <http://www.larouchepac.com/news/2008/07/16/icc-prosecution-bashir-may-destroy-sudan-says-former-u-s-spe.html>, accessed on 12 December, 2008.

[134] Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, adopted at Lomé, Togo on the 11th of July, 2000, *entered into force* May 26, 2001, art.4 (h). Authorizing the 'Union to intervene in a Member State' pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".

[135] *Id*.

[136] African Union Peace and Security Council, 141st Meeting, 11July 2008, Addis Ababa, Ethiopia.

[137] The Peace and Security Council, the African Union, Addis Ababa, Ethiopia, 21 July 2008, Para-9.

According to African diplomatic sources familiar with Sudan and its political culture, "there are only two options for Sudan: progress toward a political settlement, or else chaos, war, and a failed state".[138] The AU and the Arab League have called upon the Security Council to defer the prosecution.[139] Within the Security Council itself, four members of the Council; Russia, China, Republic of South Africa and Libya have asked the Council to suspend the indictment for one year invoking the 'interest of peace' that empowers the Council to defer cases. [140]

For human rights groups, the indictment was considered a momentous victory for the global human rights enterprise. [141] For example, Africa Action, a Washington based human rights organization, dismissed the contention of the African Union, the Arab League and some regional leaders stating that "[T]he notion that, in this case, the pursuit of justice will scuttle a peace process for Darfur is misguided."[142] Human Rights Watch referred to Al Bashir's indictment as a "dramatic development" and called upon the African Union not to seek deferral, warning that such a move is tantamount to a denial of "redress to the victims of atrocities in Darfur." [143]

Despite the political earthquake that followed Al-Bashir's indictment, the Pre-Trial judges have found a reasonable ground to believe that two counts of "war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the

[138] *See* Larouche Political Action Committee, *supra* note 133.

[139] The Sudan Tribune, Islamic Countries Ask UN Defer ICC Move Against Sudan President, 5 August, 2008, available at <http://www.sudantribune.com/spip.php?article28159,>, accessed on 13 January 2009.

[140] Human Rights Watch, ICC Prosecutor Requests Arrest Warrant for Sudan's President, available at <http://www.hrw.org/en/news/2008/08/09/icc-prosecutor-requests-arrest-warrant-sudan-s-president>, accessed on 12 December, 2008.

[141] Charles Pierson, Pinochet And The End Of Immunity: England's House Of Lords Holds That A Former Head Of State Is Not Immune For Torture, 14 Temp. Int'l & Comp. L.J. 263, 263.

[142] Africa Action, "Al Bashir's Prosecution, Bold Step for Justice, Peace in Sudan",15 July 2008, available at <http://www.panapress.com/newslatf.asp?code=eng044728&dte=15/07/2008>, "The people of Darfur are strongly supportive of holding those responsible for genocide and crimes against humanity accountable, and the ICC is the only mechanism capable of fulfilling that role at this time," Gerald LeMelle, executive director of Africa Action, said in a statement.

[143] Human Rights Watch, "AU: Do Not Call for Suspending ICC's Investigation of President al-Bashir", A Letter Addressed to H.E. Mr. Kabinga Pande, Foreign Minister of Zambia, available at <http://www.hrw.org/en/news/2008/09/19/au-do-not-call-suspending-iccs-investigation-president-al-bashir>, accessed on the 12of December, 2008.

Statute" [144] and five counts of "crimes against humanity of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(l) (a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region, pursuant to the GoS policy to unlawfully attack were committed by GoS forces."[145] The Court has thrown out genocide charges by a two-one majority on the basis of insufficient evidence indicating Al-Bashir's direct or indirect intent to exterminate the alleged groups in whole or in part consistent with the rules of international law.[146] In finding Al Bashir's indirect responsibility for the two counts of war crimes and five counts of crimes against humanity, the Chamber found the GoS collectively responsible for designing and implementing a "common plan to carryout a counter-insurgency campaign" the core component of which constitutes the unlawful attack of civilian populations belonging to the Fur, Masalit and Zaghawa.[147] In establishing a legal nexus between the GoS and Al Bashir, the Chamber saw the President as the *de jure* and *de facto* head of the state of Sudan and found a "reasonable ground to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for those war crimes and crimes against humanity"[148] and issued an arrest warrant for his arrest and transfer to The Hague, The Netherlands.[149]

Although the indictment and even prosecution of a sitting Head of State for alleged violations of *jus cogens* norms is not unprecedented, Al Bashir's case is not uncontroversial. One of the controversies relates to the referral of the "Situation" to the ICC. Since the Sudan is not a party to the Rome Statute and bears no obligation towards the Court, the ICC can only intervene through Security Council authorization. Also, the referral of the "Situation" was done at least with the tacit consent of veto wielding political powers such as USA, China, and Russia-countries that denied jurisdiction to the ICC and in some cases gone to the extent of engaging in conduct contrary to the purpose and object of the Rome Statute.[150] As a result, some see the President's indictment as politically motivated.[151] After the Chamber's decision to issue the arrest warrant, many accused the Court as a new face of imperialism and

[144] The International Criminal Court, *supra* note 121 at Para-78.

[145] *Id* at Para-109.

[146] *Id* at Paras, 204-206. Dismissing the Prosecution's allegation, the Chamber held that "the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3".

[147] *Id* at Paras- 213-215.

[148] *Id* at Para-223.

[149] *Id* at Para-248.

asking whether President Bush and his aides or those who massacred children and women in the Gaza Strip will be equally subjected to this supra-national form of justice.[152] However, the history of prosecution of a head-of state has never been a politically neutral process and the debate is likely to continue.[153]

The Constitution of the ICC devised a prudent system that envisioned a world free of impunity for gruesome and violent crimes.[154] The Statute is premised on the principle that "there can be no impunity for perpetrators of genocide, crimes against humanity or war crimes."[155] To bring recalcitrant non-state-parties to the attention of the Court, the Statute authorized the Se-

[150] *See* Geert-Jan Alexander Knoops, The Prosecution and Defense of Peacekeepers under International Law, (Transnational Publishers, Ardsley: 2004), at 261; *See* also UNSC Res. 1422/2002 and Res. 1487/2003; When the entry into force of the ICC Statute approached, the United States asked the Security Council to grant immunity for peacekeepers in East Timor. The proposal was rejected and the United States warned the Council that it will consider withdrawing from present and future peacekeeping operations. When the Council was convened in 2002 to renew the mandate of the Peacekeeping operation in Bosnia, a NATO operation authorized by the Security Council, the US introduced a resolution that provided immunity for all military and civilian personnel and it was again rejected by the Council. As a result of the USA veto, the mandate of the Bosnia operation was extended three times for few days, days and finally after the adoption of the immunity resolution 1422, the mandate was renewed for six months.

[151] Sudan Tribune, Ethiopia Voices Support to Sudan over ICC Charges Against Al Bashir, *supra* note 129; Peter Clottey, African Union Demands Security Council Suspend ICC Indictment of Bashir, 22 July 2008, available at <http://www.voanews.com/english/archive/2008-07/2008-07-22-voa2.cfm?CFID=78687203&CFTOKEN=19309985>, accessed on the 10th of Dec., 2008.

[152] D'Escoto, President of the UN General Assembly: Bush Should Stand Trial, FARS News Agency, 07-03-2009, available at <http://english.farsnews.com/newstext.php?nn=8712171148>, accessed on 9 March 2009; Robert Parry, War Crimes and Double Standards, 8 March 2009, IN THESE TIMES, available at <http://inthesetimes.com/article/4289/war_crimes_and_double_standards/>, accessed on 9 March, 2009.

[153] The history of international prosecution of individuals has never been free of political alignments. The Nuremburg Tribunal is notorious for its politicization, and so was the trial of Slobodan Milosevic and Charles Taylor. This, however, does not mean that there are not good reasons to believe that those individuals were criminally responsible. The "Darfur Situation" is no exception.

[154] The referral by the Security Council is devised to deter unwilling states to refrain from engaging in egregious crimes offensive to common values and conscience of the global community. It is defining of state's determination to put an end to recurrent culture of impunity that plagued post conflict societies.

[155] See Statement by Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005) , 5 June 2008.

curity Council to refer atrocities in their territory to the Prosecutor.[156] However, this does not change the fundamentally undemocratic nature of the Security Council resulting in the politicization of an independent judicial institution meant to repress heinous atrocities against humanity.

Traditionally, international law has recognized both procedural and substantive immunity for a Head of State and diplomats.[157] Though the Head of State immunity is not explicitly delineated in the Vienna Convention on Diplomatic Relations, it originates from a customary understanding of sovereign immunity deemed inseparable and indivisible from the leader of the state.[158] Customarily, "the immunity granted to the Head of State was seen as an extension of the immunity granted to the state itself."[159] Although the concept survived to the recent date, its importance was significantly reduced with the shift in emphasis from the sacrosanct conception of sovereign equality to the recognition of the overarching role of human rights culminating into individual liberty and accountability.[160] Former Czech President, Václav Havel emphatically stated that: "[t]he enlightened efforts of generations of democrats, the terrible experience of two world wars--which contributed to the adoption of the Universal Declaration of Human Rights-- have finally brought humanity to the recognition that human beings are more important than the state".[161]

---

[156] *Id.*

[157] Joseph W. Dellapenna, Has the Time Come to Revise the Foreign Sovereign Immunities Act? 88 Am. Soc'y. Int'l. L. Prac. 509, 512 (1994) (as reported by Mark S. Zaid, Sovereign Immunity: A Comparative Perspective, 88 Am. Soc'y Int'l L. Proc. 509, 512 (1994)) in Gilbert Seson, *supra* note 128 at 1586. "The famous remark of King Louis XIV of France, "L'etat, c'est moi" (I am the state), best represents this notion of the state and the head of state being thought of as one and the same".

[158] *Tachiona v Mugabe*, 2001 US Dist. LEXIS 18712, 33-34 (US S.D. NY 2001), See judge Victor Marrero's holding that: "There is now growing recognition that the sovereign is solely the state and that the nation's ruler is a distinct entity".

[159] Joseph W. Dellapenna, *supra* note 157 at 1585; *Tachiona v Mugabe*, *id* at p- 148 at 33; Heidi Altman, The Future of Head of State Immunity: The Case against Ariel Sharon, April 2002, at p-4, available at <http://www.indictsharon.net/heidialtman-apr02.pdf>., accessed on 25 November, 2008.

[160] See U.N. Draft Code of Crimes against the Peace and Security of Mankind (1996) art. VII.; Draft Code on Crimes against the Peace and Security of Mankind, U.N.Doc. A/CN.4/L.532 (Jul. 8, 1996), reprinted in Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation, Annex VI 435-45 (1997); Cf. Nuremberg Charter, art. 7.

[161] Václav Havel, Kosovo and the End of the Nation-State, N.Y. Rev. of Books, June 10, 1999, at 4 (reprinting President Havel's address to the Canadian Senate and the House of Commons in Ottawa, Canada on April 29, 1999) in Charles Pierson, *supra* note 141 at 263

With this progressive evolution of international law, the place of the individual in the context of international human rights has continued to grow as the value placed on state sovereignty consistently declined.[162] This decline in sovereignty is marked by a decline in immunity for heads of states and diplomatic officials with respect to preemptory norms; norms that are considered by the international community as deep-seated and worthy of serious protection.

The end of the First World War marked the first time a head of state immunity came into question when the Treaty of Versailles signed between the belligerent parties called for a public arraignment of the then Emperor of Germany, William II of Hohenzollern.[163] In the aftermath of WWII, the London Charter declared official position of those accused of heinous crimes as irrelevant to a finding of criminal responsibility and punishment.[164] Although these trials were considered as victor's justice, the Nuremburg Principles have been crystallized into customary norms of international law. [165]

Moreover, the atrocities committed in the Former Yugoslavia and Rwanda has brought about a decisive blow to the concept of Head of State immunity. Article 7(2) of the Statute of the ICTY and Article 6(2) of the Statute of the ICTR declares that "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[166] Rejecting the argument by *amici* pleading a head of state immunity on behalf of the late Slobodan Milosevic, the Court emphatically pronounced that Article 7(2) is a restatement of customary rule of international law.[167] This holding of the ICTY marked the first time an international tribunal unequivocally rejected substantive immunity for sitting Head of State for crimes of genocide, crimes against humanity and war crimes.[168]

---

[162] Heidi Altman, *supra* note 159 at p-4.

[163] Treaty of Versailles, 22 June 1919, art. 227 in Heidi Altman, *supra* n. 159, p-8.

[164] Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement") (Aug. 8, 1945), 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279, reprinted in 39 Am. J. Int'l L. 258(Supp.1945). art. 7; William Schabas, Enforcing International Humanitarian Law: Catching the Accomplices, 83Int'l Rev. Red Cross 439,440(2001).

[165] General Assembly Resolution 95(I); See also Report by the International Law Commission on Principles of the Nuremburg Tribunal, Yearbook of the ILC, 1950, vol. II, p.195.

[166] The Statute of the ICTY, *supra* note 47 at art. 7(2); Statute of the ICTR, *supra* note 47 at art. 6(2).

[167] *See Prosecutor v Slobodan Milosevic*, Preliminary Motion, IT-99-37-PT (ICTY,2001), para-45.

[168] *Id.*

Monumental in this regard is the decision of the UK House of Lords in the *Pinochet* that represented a real change in the international law doctrine of the head of state immunity.[169] In the *Pinochet*, a five-member panel of the House of Lords pronounced that a former head of state is entitled to immunity from criminal process for official acts committed in the performance of official duties.[170] However, the majority decision, though a tiny majority, affirmed that egregious acts "condemned as criminal by international law cannot amount to acts performed in the exercise of the [official] functions of a head of state". [171] According to the majority reasoning, because torture and hostage taking are contrary to preemptory norms of international law, they cannot constitute "official functions" of a head of state for which immunity is available. [172]

Although the Pinochet ruling dealt with a much narrower aspect of immunity within the context of the English Extradition Statute,[173] the case sets a momentous precedent in its pronouncement that a former head of state cannot enjoy an absolute immunity for appalling crimes of the most serious concern to the world. Since "violent crimes of exceptionally serious gravity and consequence to the victims and the international community" cannot in anyway amount to "official functions" of the head of state, the majority in the case did not find a legal rationale to bestow immunity on Ugarte Pinochet for acts of torture.[174]

Despite its significance, the *Pinochet* decision is distinguishable from *Al Bashir* in two significant ways. Firstly, the *Pinochet* decision dealt with a former head of state and made a clear distinction between immunity for a former head of state and a sitting head of state.[175] A typical account of this assertion is the holding by five of the six Law Lords that a sitting head of state will

[169] Gilbert Sison, *supra* note 128 at 1584.

[170] *Regina v. Bartle*, 37 I.L.M. 1302, 1334 (Lord Nicholls), 1338 (Lord Steyn), 1339 (Lord Hoffman), 1998.

[171] *Id*.

[172] Id at 1334; *See* also the See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987 ; 6/34/L.23 (1979)). Convention Against the Taking of Hostages, 18 I.L.M. 1456, 1456 (1979) (reproduced from U.N. Doc. A/C.

[173] Curtis A. Bradley & Jack L. Goldsmith, Pinochet and International Human Rights Litigation, 97 Mich. L. Rev. 2129, 2133 (1999), at 2138; See also *Ex Parte* Pinochet, 38 I.L.M. at 588 (Lord Browne-Wilkinson), 613 (Lord Hope), 627 (Lord Hutton).

[174] *Regina v. Bartle*, *supra* note 170.

[174] *Regina v. Bartle*, *supra* note 170.

[175] Lords Hotton, Millett, Phillips, Saville and Browne-Wilkinson, in Sarah C. Rispin, Implications Of Democratic Republic of the *Congo v. Belgium* on the Pinochet Precedent: A Setback For International Human Rights Litigation?, 3 Chi. J. Int'l L. 527, p-530.

continue to enjoy absolute immunity under international law regardless of the gravity of the crimes he committed.[176] Secondly, while the Pinochet decision pertains to extradition decision to another state for prosecution, Al Bashir's prosecution is before an international tribunal, the ICC, pursuant to jurisdiction created by UNSC. Therefore, despite its importance in analyzing substantive issues relating to head of state immunity, the Pinochet decision does not provide an authoritative reference to the case.

In general, although both substantive and procedural immunity is available for a sitting head of state, general international law seems to be moving to the direction that abrogates immunity for violations of higher norms of international law such as genocide.[177] In the words of Arthur Watts; "It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes."[178] However, state practice is grossly inconsistent and the Head-of-State immunity seems to stand at a bizarre cross-current of history. Nevertheless, the unique circumstances created under the Rome Statute expressly abrogating all forms of official immunity places Al Bashir's case in a unique situation.

4.1- Al Bashir's Case in the Light of "*Case Concerning the Arrest Warrant of 11 April 2000*"

In the *Congo v. Belgium*, the International Court examined whether an incumbent Minister for Foreign Affairs, Abdoulaye Yerodia, can be tried before Belgian Courts for offenses of "crimes against humanity and war crimes" or protected by immunity from criminal jurisdiction abroad.[179] In assessing the extent of immunity enjoyed by the Minister for Foreign Affairs, the Court adopted a function-based-approach and equated the functions of Foreign Minister with that of the Head of State.[180] In its judgment, the Court enunciated its vision of the state of the law relating to the Head of State immunity and proclaimed that:

[176] *Id.*

[177] See Judge Victor Marrero's statement: ". . . since 1967, however, some conceptual fissures have separated the ancient notion that equated the head-of-state to the state itself. There is now growing recognition that the sovereign is solely the state and that the nation's ruler is a distinct entity".

[178] Arthur K. Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, III *Recueil Des Cours* 35, 84 in Heidi Altman, *supra* note 159.

[179] *See Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), 14 February 2002 General List No. 121, para. 54.

[180] *Id* at para-53.

[181] *Id* at para-53.

> [a] Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office.[181]

Ruling in favor of the DRC, the Court proclaimed that an incumbent Minister for Foreign Affairs "enjoys full immunity from criminal jurisdiction and inviolability" "throughout the duration of his or her office".[182] However, the Court has delineated four exceptions under which the Minister for Foreign Affairs can be denied "immunity from criminal jurisdictions and inviolability". In part, the judgment reads: "[a]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include . . . the International Criminal Court created by the 1998 Rome Convention."[183] Thus, the absolute personal immunity enjoyed by the Minister for Foreign Affairs and head of states does not exonerate the Minister or the President from the jurisdiction of the ICC. Thus, in the light of *Congo v. Belgium,* Al-Bashir's official capacity does not exclude his criminal responsibility, nor does it accord immunity from standing trial before the ICC.

4.2- Al Bashir's Head-of-State-Immunity in the Light of the Rome Statute

The Rome Statute unambiguously states that "official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence".[184]

Even though the immunity of a sitting head of state stands at a strange cross-road, the express reference of the ICJ to the Rome Statute as an exception to its assessment of the *Congo v Belgium* case, renders any plea of immunity from the Court's jurisdiction legally implausible. Article 27 of the Rome Statute is similar with Article 7(2) of the Statute of the ICTY. In *Prosecutor v. Slobodan Milosevic*, the ICTY declared Article 7(2) as a codification of customary international law.[185] Even if the state of the law under customary international law is a *lex lata*, the Rome Statute seems to prevail over all other contradictory laws as the *lex speciali* for the "Darfur Situation".

---

[182] *Id* at para-54.

[183] *Id* at para-61. Emphasis added.

[184] The Rome Statute, *supra* note 83 at art.27(1).

[185] *Prosecutor v Slobodan Milosevic*, Decision on Preliminary Motions, IT-99-37-PT (ICTY, 2001), Para-76.

Therefore, the head of state immunity does not exonerate Al Bashir from the competence of the ICC. The Pre-Trial Chamber reiterated this argument in its decision for arrest warrant against Al-Bashir.[186]

Conclusions

There are difficulties in striking a balance between the backward-looking aspects of justice and ensuring effective accountability mechanisms, and the forward looking concerns towards the pursuance and maintenance of peace. The most vexing problem in prosecutorial justice is the question of whether traditional prosecutions effectively address contemporary conception of accountability that embraces truth, reparation and guarantees of non-repetition.

The question of accountability for gross violations of human rights is no longer a mere question of investigating and punishing the perpetrator. Although punishment forms the centerpiece of accountability, equally compelling is the response to intuitive human desire to discover the truth and the detail of how and why, by whom and when the victims of human rights have suffered the atrocities. The incumbent duty of the state to provide a fair and just compensation for victims of human rights and its duty to guarantee that those atrocities will never happen again is equally compelling and at the heart of the obligation of states. As great as these understandings of accountability might appear, international justice does not have the sophistication and institutional capability to achieve all of these objectives without compromising the other.

Firstly, *habeas corpus* rights and procedural guarantees such as the standard of proof and guilt, the presumption of innocence and rules on the admissibility of evidence makes obtaining a guilty verdict against powerful perpetrators very difficult, if not impossible. This is even more precarious when the accused is a civilian President of the nation or former high ranking officials capable of mobilizing the state apparatus to suppress evidence.

Secondly, since punishing perpetrators is only one imperative of justice, the interest of peace, and the search for truth will not be possible without a certain level of cooperation forthcoming both from the victims and the perpetrators and these calls for some sort of compromise. When allegations of the victims are corroborated by the perpetrator; it provides a perfect basis for divided societies to come to terms with their brutal past. If the accused is not willing to disclose the truth; victims, either primary or secondary, the larger society who are indirect victims and subsequent regimes will be all left to guess the truth, which is essential for memory and healing.

[186] The International Criminal Court, *supra* note 121 at Paras-43 and 44.

Thirdly, there are stronger voices against the arrest warrant issued against Al Bashir arguing that the move will derail the effort for peace. It should be emphasized, however, that peace and justice are mutually reinforcing imperatives and not mutually exclusive phenomena. The principle of the head of state immunity does not exonerate President Al Bashir from ICC jurisdiction. The only way peace could be given a chance is through deferral under Article 16 of the Rome Statute. However, the deferral of prosecution in the interest of peace should anticipate a lasting peace. Even if the indictment is deferred in the interest of peace, it should not mean total impunity and responsible individuals should be held to account when circumstances so permit. The present arrest warrant against Al Bashir has nothing to do with the President's guilt or otherwise. It simply means that the Prosecution has established a *prima-facie* case so that the President has a case to answer before the Court.

In Darfur, alleged war crimes and crimes against humanity have been perpetrated. When the violation of norms of international law relates to *jus cogens* principles, establishing accountability is never a matter solely within the internal affairs of the state. Nevertheless, the Sudan has remained adamant about the transfer of Omar Al Bashir, Ahmed Harun and Ali Kushayb to the ICC invoking the principle of complementarity and dismissing the Court as political. Article 17 of the Rome Statute entitles a state to investigate and prosecute the perpetrators only when it is found willing and able to genuinely investigate and prosecute the atrocities. The Sudanese SCCED started investigation of cases that related to Ali Kushayb but not Ahmed Harun and Omar Al Bashir. However, while Ali Kushayb has been charged before the ICC for acts that constitutes war crimes and crimes against humanity, the SCCED has tried him for minor offenses that are of a marginal importance compared to the issues before the Court. In addition, the investigation is not related to the conduct which is the object of investigation before the Court. These two requirements are cumulative. Therefore, invoking the principle of complementarity stipulated under Article 17 of the ICC simply flies in the face of the Rome Statute.

Norms of international justice clearly require the GoS to investigate, prosecute and duly punish those responsible for the atrocities or transfer them to the ICC or states willing and able to do so. Since the ICC is going to undertake only a handful of exemplary prosecutions, the Sudan should prosecute the "small fry" before its own Special Courts consistently with its international obligations. On the other hand, the international community must reckon with the grim realities of millions of Darfuris languishing in unbearable life situations and place their aspirations before political-point-scoring and defer the indictment, if and when the GoS and the rebel groups provide sufficient guarantees to make painful concessions for a lasting peace. ■

UNDERLYING DISTINCTIONS BETWEEN ADR, *SHIMGLINA* AND ARBITRATION:

A CRITICAL ANALYSIS

*Fekadu Petros**

Introduction

Alternative Dispute Resolution (ADR) and arbitration are forms of out-of-court dispute resolution mechanisms. *Shimglina* on the other hand, is a term sometimes used as the Amharic equivalent for the term arbitration. In the strict sense, however, very little is known about their difference. Even when recognized, the difference between ADR and Arbitration is often simplified to a matter of degree of some commonly shared element such as the extent of intervention.[1] This article attempts to challenge this view and submits that the difference between ADR and Arbitration is indeed significant and relates to a difference attributable to their underlying institutional underpinnings. The article then contrasts them with *Shimglina*.

The analysis sets out with a discussion of the main institutions of dispute resolution in Section one. Sections 2 and 3 treat the institution of arbitration as a variant of the broader institution of adjudication. The sections also analyze the defining tenets of the institution of arbitration. In Sections 4 and 5 ADR is addressed in the broader institutional context of contract. Section 6 will be devoted to the analysis of problems in terminology in the Ethiopian context with regard to *Shimglina*. And finally conclusions have been forwarded.

* LL.B, LL.M; Arbitration Tribunal Manager, Ethiopia Commodity Exchange; and Part-time lecturer at Addis Ababa University Faculty of Law.

I would like to thank my colleagues Ato Getahun Seifu, and Ato Shimelis Habtewold for their comment on the initial manuscript. I also owe a special debt of gratitude to Ato Zerihun Desalegn, Judge in the Dire Dawa Federal First Instance Court for supplying me with relevant cases. Everything expressed in this article is my personal opinion, and should not be attributed to any other individual or institution. I will be happy to respond to any questions related to this article @ fekaduros@yahoo.com"

[1] Jack Effron, "Alternatives to Litigation: Factors in Choosing "(1989), 52 *The Modern Law Review*,482

1. Election, Contract and Adjudication: Underlying Models of Dispute Resolution Institutions

ADR and Arbitration represent two different institutions. In his groundbreaking theory of adjudication Lon Fuller identified election, contract and adjudication as the underlying institutions of dispute resolution. [2] While adjudication is popularly understood as mechanism of dispute resolution, contract is taken as a commercial instrument of making deals. Proper understanding of the essence of each form (of ADR and arbitration) is imperative for ease of understanding the modus operandi and nomenclatures (designations) of the various mechanisms of dispute resolution. In other words, understanding the essence of each model will help us know, what principles govern its operation, when is it being properly used, what are its uses, and when it is not being properly used.

There seems to be a confusion, and even misconception[3] in the relationship between arbitration and ADR, and so much of it is attributable to underestimating the connection between each form and its underlying institutional underpinnings. From the dimension of dispute resolution, what essentially makes each of these underlying institutions (i.e. adjudication, contract and election) different from one another is the particular way in which the disputing party participates in the process, that is, the particular way that the institution not only offers but also guarantees the party affected by the outcome of the process.[4] Thus, the institution of election offers voting as the mode of participation to the affected party, contract offers negotiation, and adjudication offers presentation of proofs and reasoned arguments.[5] While, this constitutes the crux of their difference, before an elaborate discussion is offered on their differences, let us look at what is common about these three institutions, or at least the dispute resolution dimension of each.

At a deeper level, these institutions are subtly interconnected by an individualistic ethic. The right to vote (in election), for example, derives from the recognition of man as an autonomous, rational being who is responsible for his own life, and who should therefore freely choose the people he authorizes to represent him, or the course of action he approves of.[6] Party participation by presentation of proofs and arguments is as much individualistic as participation through voting. It is premised on the assumption that to get a decision

[2] Lon L. Fuller, "Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review*, 363.

[3] One view holds the difference between ADR and Arbitration as a matter of degree of intrusiveness of the third party between the parties' affairs. See Supra n 1, p. 482

[4] *Supra* n 2

[5] *Ibid*

[6] http://www.aynrand.org.site/News2?page=NewsArticle&id=10385&news-iv-c+rl=1021

in his favor a person has to produce more convincing evidence and arguments compared to his adversary. Thus, each party has to do by himself without assistance from the public/state.

According to Owen M. Fiss private law adjudication's individualistic bias is embedded in four notions: (1) It has no place for public interest protection; (2) The pursuit of private ends; (3) The assumption that without adjudication there will not be harmony between individuals and the purpose of adjudication is to guarantee that harmony; and (4) Finally, the assumption that the adjudicator (judge) is separate (isolated) from the disputants.[7] Other scholars have also contended that private law adjudication precedes the emergence of the state, and can to some extent, be privatized even in the modern world.[8]

Coming to the institution of contract, negotiation is even more individualistic in this respect. Backed by the ideal of freedom of contract and the subjectivity of values it underscores the basic tenets of individual choice reflected in the promises for exchange of values.

The above being said about the interconnection among the three dispute resolution institutions, an elaboration of their difference is now in order. To do that, we should first identify two aspects of the models of institutions. These are the essential elements and the optimal requirements. The essential elements are those defining features of the institution without which the institution will lose its immanent (internal) order and identity.[9] The optimal requirements are, on the contrary, those conditions that raise the institution to an ideal (perfect) level of realization.[10]

From the above analysis, the essential conditions of *election* that define its nature are that the electorate be given the opportunity to vote, "that the votes be honestly counted, that the ballot box be not 'stuffed', that certain types of intimidation be absent, etc".[11] On the other hand, the optimum conditions which will raise the participation by voting to its perfect level of realization include: an "intelligent and fully informed electorate, an active interest by the electorate in the issues, candor in discussing those issues by those participating in the public debate – conditions it is needless to say, that are scarcely ever realized in practice." [12]

The truth is of course; in most elections most voters exercise their voting rights even without the necessary information, let alone with rational analysis

[7] Owen M. Fiss, "The Social and Political Foundations of Adjudication," (1982) *6 Law and Human Behavior*, 123-125

[8] See William M. Landes and Richard A.Posner, Adjudication as a Private Good, NBER Working Paper Series No.263, University of Chicago Law School, p.18

[9] *Supra* n 2, P. 363

[10] *Ibid*

[11] *Supra* n 2, P. 364

[12] *Ibid*

or scrupulous calculation of ends. In other words, the institution of election doesn't necessarily require the participant to be rational. Indeed, most voting choices are backed by irrational considerations such as racial, religious, or linguistic affiliations than rational analysis. It is not that these are unimportant in election. Indeed, if every voter in an election could make a rational analysis, election could have attained perfection and most disputes on the aftermath of elections could have been avoided.

The institution of *contract* likewise has its own optimum and essential conditions. The whole idea of contract rests on the idea of consensual exchange of values between two or more persons. Negotiation is the process through which this act of reciprocity (give and take) takes place. The essence of this process of *negotiation* is the freedom of choice underlying the exchange. This in other words, is what we call freedom of contract. Here, "underpinning the whole idea of contract is that the parties must act voluntarily. It is axiomatic that contractual liability stems from the parties' volition".[13] This, in most legal systems, is translated into expression of consent free from defects. So as far as a person expresses consent free from such defects as coercion, deceit, mistake, unconscionability, etc, he will be taken to have freely made his choice.

The optimum conditions in a contract may include such matters as fairness (equality) of the exchanged values, rationality of choices made by parties etc. Such are, however, not essential for the institution of contract to stand on its own feet. Since what essentially characterizes a contract is the exchange aspect, it suffices if the parties "freely" bargain and conclude their deals.

When we come to *adjudication*, like the other institutions it also has its essential as well as optimum conditions. It has already been set out that the distinguishing characteristics of adjudication lies in the fact that it confers on the disputing party a peculiar form of participation in the process; that of presenting proofs and reasoned arguments for a decision in his favor.[14] Thus, the essential conditions for an unimpaired or meaningful realization of this process mainly are that: the conferring of the opportunity to present one's evidence and arguments; attention to such proof and arguments from the bench or person to whom these presentations are made; and responsiveness of the decision (to the proof and arguments presented).

To put it differently, the pillar norms of participation of the affected party by presentation of proof and arguments mean that "(1) the adjudicator should attend to what the parties have to say; (2) the adjudicator should explain his

[13] *Ibid*

[14] Melvin A. Eisenbeg, Participation, Responsiveness, and the Consultative Process, (1992) 92Harvard Law Review, 411

decision in a manner that provides a substantive reply to what the parties have to say; and (**3**) The decision should be strongly responsive to the parties' "proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments."[15] The optimal conditions that will boost the institution of adjudication to its highest level of realization are such factors as the equality in all respects of the parties, such as the fact that both parties have representation by intelligent counsel, well – crafted and vigorous advocacy is made on both sides, etc.

It is now fairly clear that each of these three dispute resolution institutions (i.e., contract, election and adjudication) have differing integral demands that make them function in an orderly manner. The other (external) characteristics of the institutions emanate from each of these integral demands.

2. Arbitration as a variant of Adjudication

What really distinguishes the non judicial features of arbitration from adjudication is the fact that arbitrators are private appointees, and judges are state officials. Other aspects that are often employed to explain the difference such as the assumption that arbitration is a more flexible process, that it is less costly, that it is more prompt, that there is more party autonomy[16] in it, etc, are not essential to the distinction between Arbitration and adjudication. These assumptions are of course, either unchallenged ritualized thoughts or result from the mere private nature of the arbitrator's office. In this section, we shall examine arbitration against those distinguishing characteristics of adjudication namely, the test of attention, the test of explanation (rationality) and the test of responsiveness indicated above. We shall also analyze some practices in arbitration which I shall call diversions or abuses of the adjudicative model.

2.1. Arbitration and the requirement of attention

Arbitration as a variant of adjudication represents a form of dispute resolution that guarantees to the disputants the right to present proof and arguments. The test of attention which requires the adjudicator to be attentive to the presentations of the parties is one essential ingredient of the adjudicative process without which the mode of party participation by presenting proofs and arguments will be of no use.[17] In other words, the test of attention repre-

[15] *Id* p. 412

[16] The importance of party autonomy in making arbitration more attractive than state courts cannot however, be undermined. But, the concept is vague and relative. Thus even when there is little or no party autonomy a process may still carry the name of "arbitration."

[17] *Supra* n 14, P. 412

sents the due process requirement of hearing. The right guaranteed by the due process doctrine is qualified as fair hearing. It incorporates such rights as the right to present one's own version of the case, the right to produce evidence, to challenge opposing evidence and argument, etc. Fair hearing also demands that the opportunities given by the bench to each party be equal.

All the above and other due process requirements are implicitly assumed in an adjudicative process. And the requirement of attention is here concerned with the arbitrator's degree of focus to party presentations. Indeed, if the arbitrator doesn't pay attention to what the parties have been arguing, refuting, and criticizing in their presentations what is the use of the presentations?

In contrast, contract doesn't guarantee any right to presentation of proof and arguments. Even if, one makes such presentations, there is again no assurance that the other party will listen to his arguments and proof.[18] Negotiation of course involves presentations, but these presentations seldom constitute evidence and/or arguments. These are more of communications often intended to discovering the real needs and interests of each other for the purpose of exchanging the right values. Sometimes therefore, a party to a contractual bargain may make a "take it or leave it" offer without engaging in any form of explanation, and still the process will not lose its essence. But, any position asserted in an adjudicative proceeding has to be supported by arguments and proofs; a party cannot get away with a "take it or leave it" approach in an adjudicative proceeding.

2.2 Arbitration and the test of explanation

Arbitration –as adjudication- is always subject to the test of rationality. This means that the arbitrator should render a reasoned award. This strict demand for rationality emanates from the nature the mode of participation of the disputing parties takes. The idea is that "if, the only mode of participation consists in the opportunity to present proof and arguments, the purpose of this participation is frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretense whatever to rationality."[19]

As a matter of fact, rationality in adjudication presupposes an established principle on which the outcome will have to be based. Explanation (rationality) is that bond which connects the outcome with this principle. Presentations of proof and arguments are competing claims as to which of the established principles should underlie the outcome. Although rationality is not peculiar to adjudication, it is not a necessary requisite (intrinsic demand) in the other two forms (institutions) i.e. election and contract.

[18] *Supra* n 2, P. 366 | [19] *Id*, P. 367

In Lon Fuller's illustration:

> We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting…. In entering contracts men, are of course in some measure guided by rational considerations. The subsistence farmer who has a surfeit of potatoes and only a handful onions acts reasonably when he trades potatoes for onions. But there is no test of rationality that can be applied to the result of the trade considered in abstraction from the interests of the parties…the trade of potatoes for onions, which is a rational act by one trader, might be considered irrational if indulged in by his opposite number, who has a store house full of onions and only a bushel of potatoes.[20]

2.3 Arbitration and responsiveness

The other intrinsic element of the mode of participation of disputing parties by presentation of proof and arguments is responsiveness of the outcome of the proceeding to the presentations. The outcome is said to be responsive to the parties' proof and arguments if it proceeds from, and is congruent with their presentations.[21] This cannot however mean that perfect congruence must always be achieved. Yet marked digression of the final decision from the presentations made during the proceeding, will on the other hand, destroy the nature of adjudication. "[I]f the grounds for the decision fall completely outside the framework of the arguments [s] making all that was discussed or proved at the hearing irrelevant – then the adjudicative process has become a sham, for the parties participation in the decision has lost all meaning."[22]

There are many threats to this ideal in practice. One and most important is the attempt by the arbitrator to take into consideration inputs falling outside presentation of the parties in the name of public policy, public interest etc. Such would be not only an anomalous exercise, but also a dangerous one in the context of private law litigations. While, this doesn't mean that the arbiter should not base his decision on the right legal principles for parties' failure to invoke it, he should not lose the general framework of party presentation when doing so. In other words, since he controls the proceeding, the arbiter should direct the parties to make their most relevant presentations. Even when all the points on which the decision rests are touched on by the presentations, if the emphasis of the decision is on the points dealt in passing by the parties in such a way as to make them regret that had they foreseen it, they would have presented different arguments and proofs, the adjudicative proceeding will be a deception.

The discussion made thus far is fairly dispositive of the true nature of arbitration. Before we pass on to the abuses of the institution of arbitration, let us

[20] *Id*, P. 367 | [21] *Supra* n 14, P. 413 | [22] *Supra* n 2, P. 388

see the other variants of arbitration, if any. The only form that may occur to our mind is the *rent – a judge* model which is familiar in the USA. In this process, "the disputants in an attempt to avoid the use of a regular court select a retired judge to hear and decide a … case as an arbitrator would."[23] Unlike arbitration, however, his decision can be appealed for errors of law or on the ground that the judgment was against evidence, though such appeals are rare."[24] The other type that I feel compelled to caution not to be taken as a variant is the "*umpire model*." This is not an independent form from the arbitration model as such. The umpire is simply a person, not a process. It is an alternative to a presiding arbitrator in situations of plurality of arbitrators. An umpire is said to be "different from [the presiding] arbitrator in the sense that he or she is a person selected by the arbitrators to decide the matter in controversy where the arbitrators are unable to agree, whereas a presiding arbitrator is just an additional arbitrator who may only act together with the other arbitrators."[25] Both the *rent – a judge* model and *umpire process* do not substantially deviate from the pillar norms of the institution of adjudication. Thus, the participation by presentation of proofs and arguments and its entire derivative attributes that spring there from apply to them.

3. Abuses of the Arbitration model

Certain practices of an institution represent practices that destroy or threaten to destroy the true model. In the case of arbitration, practices that threaten it are those that render meaningless the parties' opportunities of participation in the proceeding by way of presenting proof and arguments. In this connection, three established practices can be identified.

3.1. The arbitrator acting as a settlement facilitator

The arbitrator acting as a *settlement facilitator* (or sometimes known as) the proactive arbitrator relates to an arbitration proceeding in which the arbitrator may initiate settlement at any stage during the proceeding.[26] In such cases, if the settlement succeeds, the agreement reached by the parties will be turned into an award – consent award; or if the attempted settlement is not reached, the arbitral proceeding will resume from where it stopped. But, the "participation of the arbitral tribunal during an ongoing arbitration in settlement negotiations would in reality be a mediation/conciliation process, re-

[23] Steven Vago, *Law and Society*,(Printice Hall,7th ed, 2003) 256

[24] *Ibid*

[25] Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia: A Synopsis," (2007) *1 Ethiopian Bar Review*, 134

[26] Hilmar Raeschte-Kessler, "The Arbitrator as Settlement Facilitator," *21Arbitration International*, 123

quiring caucusing to be effective. During such caucusing the parties could by definition divulge secrets they would not have disclosed during the normal course of the arbitration to the arbitrator turned mediator and to other parties." [27]

This seemingly innocuous practice may be attended by many dangers. First, it may open the way to a biased arbitrator to propose settlement when he finds out that the party he favors will be prejudiced if the arbitral proceeding goes any further. One may challenge this view on the contention that since the arbitral tribunal's proposal will have effect only when it is accepted by both parties such risk will not materialize. But, the impartial picture that the arbitrator displays can convince the victimized party to innocently agree to any such proposal. Yet, even when a party is suspicious of the tribunal's proposal, it will seem risky for such party, to reject the proposal for fear that he will plant bias in the tribunal's mind unless such party is dead sure about the tribunal's bias and believes to face no greater risk in rejecting the proposal.

Assume the settlement proposal is accepted, and ends in an agreement. How will such agreement be treated? In many cases it is endorsed by the tribunal as a consent award – an ward on agreed terms- which is enforceable as an ordinary award. In other words an outcome which should have been arrived at via the adjudicative process has been reached through the back door of proposal of settlement by the tribunal. The whole process of presentation of proof and arguments has been thrown away all along. This is a clear case of abuse or perversion of the institution of arbitration.

What will happen if the attempted settlement is not successful? Obviously, the arbitrator will resume the arbitral process. Here, there is even more danger to fear. The arbitrator might have already formed his own view of the matter in the settlement negotiation process, and may find it difficult to depart from.[28] Crucial evidence which may determine the outcome might have been obtained both by the unscrupulous adversary and the bench. If this is so, then the participation by presenting proof and arguments will be impaired.

Let alone make a settlement proposal, an arbitral tribunal should not even initiate the proceeding. The institutional norms of adjudication do not allow arbitration to be initiated by the arbitrator. The very act of interfering in private affair of the parties and initiating the arbitral proceeding not only appears to negate the impartial institutional stature, but it also in most cases carries with it some degree of commitment and often a theory of "what happened".[29] In general, the main reasons as to why arbitration cannot be initiated by the arbitrator can be reduced to two:

[27] *Id.* P. 525 | [28] *Id,* P. 530 | [29] *Supra* n 2, p. 386

> First, it is generally impossible to keep even the bare initiation of proceedings untainted by preconceptions about what happened and what its consequences should be. In this sense, initiation of the proceedings by the arbiter impairs the integrity of adjudication by reducing the effectiveness of the litigant's participation through proofs and arguments. Second, the great bulk of claims submitted to adjudication are founded directly or indirectly on relationships of reciprocity. In this case, unless the affected party is deceived or ignorant of his rights, the very foundations of the claim asserted dictate that the process of adjudication must be invoked by the claimant. [30]

3.2. Med-Arb/ Arb-Med

This is a procedure in "which the issues that were not solved by mediation are submitted to arbitration, with the same person /serving first as mediator, then as arbitrator."[31] This process is very similar to the case of arbitrator acting as settlement facilitator, (discussed above), and the problems discussed therein apply here as well.

3.3. Award without offering reasons

If rationality is an integral element of the institution of adjudication, it necessarily follows that the award be accompanied by reasons.[32] The test of responsiveness to parties' presentation is somewhat related to this issue. If reasons are not given for the decision, how would the parties know that the arbiter has taken their presentations as inputs, and has not decided on the basis of irrelevant consideration say on the throw of a dice? The outcome of an adjudicative process whether in state courts or in arbitration is often dispositive of the future conduct of the parties. If reasons are not given "the parties will almost inevitably guess at reasons and act accordingly.[33] Thus, reasoned outcomes are inseparably connected with the institutional norm of adjudication.

4. ADR as a variant of contract

Contract is one of the purest private law institutions along with and intrinsically fused into the institution of private property. Its basic and defining notion is that of freedom of will or of consent. Very roughly, the ideal of free-

[30] *Id.* P. 387; In Ethiopia Shimglina which is the Amharic translation of Arbitration can be initiated by the Shimagiles (the neutrals). Despite the approach in the Civil Code, "Shimglina is a practice that combines a hybrid of what a modern lawyer calls mediation, conciliation, compromise and arbitration proper", See *Supra* n 25,pp.117-118.

[31] *Supra* n 25, P. 357

[32] See for example, Teruo Doi, "International Commercial Arbitration in Japan", in Peiter Sanders,(edr.) International Arbitration Liber Amicorum for Martin Domke, (The Hague, 1967),72-73

[33] *Supra* n 2, p. 388

dom of contract goes like this: 'contracting parties are rational enough to best know their interest, and make the right choice of values in the course of bargaining with each other. So, contractual obligations are freely and willfully assumed by both sides in return for reciprocal exchange of values.' This coupled with the notion of subjectivity of values, stands as the foundation of the doctrine of freedom of contract.

This is not to say that society doesn't have any interest in private contracts. Yet, any private "contract serves society only insofar as society is interested in the individual enrichment made possible by a regime of reciprocity…. If two men discover that by an agreement each can profit by giving up something he values less than the thing he receives in exchange for it, the individuals are enriched by virtue of their own evaluations of the objects of the exchange."[34] This is the reason why the outcome of a contractual bargain cannot be objectively defended. If the deal is fine for the contracting party, then it is the right deal, though it may be judged as unacceptable for on lookers.[35]

When we look at contract as a dispute resolution institution, it is again this aspect (of freedom of will) what looms larger than the others and helps us sort it out from other rival institutions of adjudication and election. This freedom of consent exercised in the process of negotiation is what constitutes the essence of the dispute resolution dimension of the institution. So if contract is the essence of ADR, then it is this freedom of contract that defines the very nature of the mode of participation through the process of negotiation.

But what does the acronym ADR stand for, after all? Many people hold that it stands for "alternative dispute resolution". In this regard, "ICC has chosen to refer to ADR as 'amicable dispute resolution' rather than the more traditional 'alternative dispute resolution.'[36] Also, the set of processes that fall into the class of ADR can better be designated as "Amicable dispute resolution" mechanisms. The former usage was developed many years ago when the business community initially in the United States of America was searching for dispute resolution mechanisms other than litigation in national courts"[37] "Amicable dispute resolution' not only corresponds well with the spirit of assisting parties toward a negotiated settlement, it also clarifies the confusion with arbitration and avoids the question 'alternative to what?'[38] In this respect, ICC has in fact shown a determined stance by coming up with

[34] *Supra* n 2, pp. 386 -387

[35] Note that legal systems have tried hard to avoid or limit the obnoxious results of this view. One typical such attempt is found in the doctrine of unconsionability - see Article 1710 of the Ethiopian Civil Code

[36] ADR International Application – Special Supplement 2003, *ICC International Court of Arbitration Bulletin*, 110

[37] *Ibid*

[38] *Id*.p.12

unified rules for ADR in such a way as to allow parties to adapt it to the particular technique they choose-mediation, conciliation, neutral evaluation-etc; and failing agreement on the particular technique to be adopted the fallback seems to be mediation.[39]

Generally the set of forms that fall within the category of ADR include Conciliation, Mediation, [Early] Neutral Evaluation, Expert Determination, Mini-trial, Negotiation, Compromise, etc. Often the list differs from country to country.

At this juncture two questions present themselves:

a) If ADR is a contract then what does mandatory ADR mean?
b) If ADR is a contract, why should there always be a neutral third party?

4.1. Mandatory Submission to ADR

The duty to submit to ADR proceedings will come into picture mainly in two situations: (1) when the occasion envisaged in the underlying contract materializes, and (2) when courts sponsor ADR programs for some category of cases and compulsorily refer parties to such programs. In certain exceptional situations the law can prescribe ADR.

4.2. The Participation of a Neutral

The participation of neutrals almost invariably characterizes all forms of ADR except negotiation. If ADR is a contract, pure and simple, then how can such practice be vindicated? Non interested third party participation is not alien to the institution of contract, after all. Agents and brokers are typical examples in contracts. But what practical significance does neutral participation have in ADR? Is it indispensable to the institution of ADR, that its practical importance will be impaired if not its conceptual coherence? Viewed in institutional terms, the presence of neutrals serves two major types of functions. First, they may facilitate the negotiation process, by relieving the parties of the embarrassment involved in admitting fault or "by representing a disputant who has distaste or a disability for discussing face to face personally"[40] Caucusing in mediation and conciliation is exactly of such an aim. The difficulty makes the involvement of a neutral very important (indispensable). The second advantage of neutrals' involvement is bringing some element of objectivity into negotiation in order to soften individual positions.[41]

[39] ADR Rules in Force as from 1, July 2001; *International Chamber of Commerce Dispute Resolution Services-ADR.* www.iccadr.org

[40] Melvin Aron Eisenberg, "Private Ordering Through Negotiation: Dispute Settlement and Rulemaking"(1976) 89 *Harvard Law Review*, 660

The neutral is hence a person that doesn't control any part of the proceeding;[42] neither the process nor the outcome. The parties control the whole process and the outcome, and the neutral assists them all along.

4.3 Some Misconceptions about ADR

a) ADR and Due Process of Law

Due process of law is a legal tool which aims at protecting the rights of parties in an adjudicative proceeding. It has two components: procedural and substantive. Due process is not unique to adjudication, as it can also be involved in rule making proceedings more often at the administrative level than the legislative. The most important aspect of due process in the adjudicative context is procedural due process that demands that parties in dispute be given adequate notice and fair hearing. Fair hearing is multi pronged – it includes the right to be given equal opportunity with the opposing party in the over all proceeding, the right to present one's own version of the case, the right to get all the documents and evidences produced by the opposing party against one self, the right to challenge those evidences and arguments, the right to produce one's own witnesses, and challenge through cross – examination the opposing witnesses, the right to get good and equal attention from the bench for one's presentations, etc. All these are compulsorily required in arbitration (unless waived by the parties). [43]

In ADR, there is no hearing; generally no production of evidences and arguments, no presentation of witnesses, no cross examinations etc. This does not, on the other hand, mean that ADR proceedings do not involve any kind of discussions, presentations and explanations. ADR proceedings are of course required to be much more informative of the general personal emotional and material backdrop of the dispute – A matter which cannot be attained without open and candid discussions.

However, such discussions or presentations are not made in order to convince the neutral as in arbitral hearings. What ADR gives the parties is the opportunity to really explore what the other side is looking for, and to identify the focus upon the issues. In other words, the neutral is never going to turn around and say "yes, ok you have persuaded me," and there is little point in trying to convince him of a party's arguments because ultimately the neutral has no power to impose his own view upon the parties.[44] Put differently,

[41] *Id*, p. 662
[42] But see, *supra* n 1, p. 482
[43] Sometimes parties in arbitration waive the oral hearing component – not the documentary presentation though.

while the presentations in arbitration are made to the neutral, they are directed to the parties in ADR.

b) ADR and the degree of neutrality of the "neutral"

It is an established tenet that the neutral in arbitration be completely neutral – impartial and independent. And, based on this any related person (whether in blood, business or marriage is deemed not neutral and hence) is unworthy, to arbitrate the dispute. Can the same be said of the neutral in ADR proceedings? From all the foregoing analysis, the answer for this question will be "not exactly." Although the third party in ADR proceedings is generally required to be neutral, there is no strict application of it, and if the parties want they can waive their right to it. X and Y may present their dispute to Y's father as a mediator or conciliator. In as far as the conciliator/mediator cannot give a binding decision the damage, if any; arising out of his partiality can be cancelled at the end. There may even be no need to wait till the end. A party who suspects the neutral of bias can quit the proceeding at the earliest possible sign of such conduct. Thus, neutrality of the third party in ADR, though it cannot be dismissed as unimportant, is not so important as in arbitration.

c) ADR, and Rationality and Responsiveness

It has already been indicated in the preceding section on arbitration that rationality is one of the intrinsic demands of the institution of Arbitration. This is because the means of participation of the parties in arbitration is by presenting proof and arguments, and such participation, as a matter of necessity, calls for a rational analysis. This particular modality of participation by the parties in the process also gives rise to another quality to the arbitration proceeding- responsiveness of the outcome of the proceeding to party presentations.

Is same expected of the process and outcome of an ADR proceeding? Not necessarily. As for the requirement of rationality, although it would lift up the institution of ADR to its optimal level of utility, it is not mandatory for its proper operation. [45] ADR as a contract essentially involves exchanging values, and no objective and rational analysis can be made as to the propriety of a particular exchange made to resolve a dispute by the parties in as far as each party had gotten its choice.

Likewise, the requirement of responsiveness, though useful in ADR as well, is not guaranteed by the institution. The final settlement may be made

[44] Toby Randle, Alternatives to Adjudication 11th Adjudication Update Seminar, http://www.google.ca/search?hl=en&q=alternatives+to+a judication

[45] *Supra* n 2

without taking into consideration all the facts, figures and etc. made in the course of the discussions, and will still be valid. There is no mandatory requirement that it should proceed from and be congruent with the presentations made by the parties. The course that leads to the final outcome may be dictated by an unexpected event that took place at the last minute in the negotiation that falls outside the frame of party presentation.

5. Abuses in ADR

5.1. Mandatory ADR

ADR as a contract is therefore entirely dependent on the free will of the parties. Any attempt of imposing ADR on the parties counters this freedom of contract. Mandatory ADR arises in two contexts: (a) Court sponsored mandatory ADR; and (b) Court enforced ADR clause in private contracts. Legally imposed ADR doesn't exist in Ethiopia, and hence will not be discussed here.

a) Court annexed Mandatory ADR

Not all court sponsored (annexed) ADR is mandatory. But where it is compulsory it vitiates the parties' freedom of choice. Some of the reasons for courts to compel parties to attempt ADR may have to do with reducing court case load, help parties find a solution that will work better, or be timelier than determination of the court, or to offload some cases which are too complex for adjudication, etc. The first and third reasons have nothing to do with the interest of the parties. But the second reason seems to promote the interest of the parties to the dispute. It will still be paternalistic and counterproductive where it is an imposition.

There is also some empirical evidence that mandatory ADR is less attractive and effective than the voluntary one. In this regard, one scholar referring to the practice in the US has it that:

> Although no statistical data exists about the number of participants refusing to engage meaningfully in mediation, it seems that the horse led to water by the courts that mandate mediation still refuses to drink. Instead of learning and using mandatory mediation to negotiate, many participants treat mandatory mediation like another part of litigation. Parties and lawyers as ordered by the court often show up at the mediation table but do not participate in a meaningful way. In many mediations, groups of participants show the same adversarial behavior as they do in the courtroom. [46]

[46] Archie Zariski, Mandatory ADR or an ADR Mandate? Encouraging Effective Dispute Resolution http://www.google.ca/search?hl=en&q=mandatory+adr&btnG=Google+Search&meta=,

The results of compulsory ADR are not difficult to anticipate. No matter how benevolent its ends and its promotions, compelled ADR often thwarts the parties' independence and fails to provide those sorts of procedures capable of alleviating concerns about fairness. It should come as no surprise, then that disputants resent and try to avoid compelled ADR. ADR's legitimacy is eroded by its association with compulsion. It does not look or feel "safe" to those forced to use it. [47]

b) Court enforced ADR clause in a private agreement

At times, courts may compel parties to live by their ADR agreement although one of the parties may decline to do so. The scenario occurs when a party goes to court notwithstanding an earlier agreement to resolve the dispute by ADR. However, compelling either party to respect ADR clause will not be fruitful since "[Often] after the first discussion with the neutral… either party is free to terminate the ADR proceeding."[48] The justification for such anomalous procedure lies in the fact that the process presents the voluntary nature of ADR while allowing the parties to commit themselves to the agreed ADR procedure.[49]

In effect, this means that if a party opts to refuse the ADR proceedings, it should appear before a neutral and say so. In other words, mandatory submission doesn't compel an unwilling party to participate in ADR proceedings – it however requires him to express his refusal in a particular way – by appearing in front of a neutral. The attempt here is to guarantee the freedom of the parties at the same time maintaining meaningfulness of the ADR clause. In its proper institutional context, however, compelling parties to adhere to their agreed ADR procedure means forced performance of a contract which is always disallowed by the law if it vitiates the personal liberty of a party so compelled.[50] Obviously, forcing a person to personally appear for ADR discussion and participate in it affects the personal liberty of the party so compelled.

Be that as it may, mandatory submission is a typical instance of the "*moss"* that has developed around the institution of ADR- a practice that tends to blur the true nature of ADR by confusing it with other compulsory proceedings. Whether or not such a practice is one that should be weeded out is a matter of calculating the pros and cons of doing so. Not every "*moss"* is harmful, however, and where the company of an institution by a moss is advantageous, there is no reason to abandon such company in as far as the essence of the institution is not grossly inhibited.

[47] *Ibid*
[48] *Supra* n 46, p.12
[49] *Ibid*
[50] Article 1776 of the Civil Code of Ethiopia (1960)

5.2. ADR forms Yielding Final and Enforceable Outcomes

It has already been established so far that ADR is a contract and the process involved in it is negotiation. If the negotiation process is successful, then it will be wound up by a settlement agreement (often memorandum of settlement in mediation and conciliation). If the ADR proceeding doesn't end in settlement then there is no any agreement, as when a negotiation to conclude a contract of sale fails to succeed, there will be no agreement. If the ADR proceeding successfully ends in settlement what is the nature and effect of such settlement? Obviously such a settlement shall be binding as a contract. However, it is not final and readily enforceable in a court of law unlike an arbitration award which is directly executable. So if a party refuses to live unto the settlement that will be regarded as mere non performance of a contractual obligation.

It thus follows that, the remedies against such party are either forced (specific) performance or cancellation of the contract with or with out compensation depending on the existence of damage. So, ADR proceedings do not result in an outcome which the parties cannot refuse to live by. It is thus, perverting the institution of ADR to effect direct judicial execution of the outcome of an ADR proceeding. One of the typical practices in this line is the DAB (Dispute Adjudication Board) used in the construction sector. Under this rule, when a dispute ensues between a contractor and an employer it is referred to a dispute adjudication board or sometimes also called dispute adjudicator which has to decide the matter within 28 days. If any party is dissatisfied by the decision it has to notify his dissatisfaction to the other party and the neutral within 14 days as of the decision failing which the decision will be binding and non appealable at least provisionally.[51] Such a model diverts the notion of adjudication to the extent that it ascribes the effect of adjudication to a contractual model of dispute resolution.

It is now obvious that a clear distinction emerges between ADR and Arbitration from the foregoing analysis. This conceptual framework will also be significant as the issue of *shimgilna* is addressed below.

6. Variants of Shimglina

Shimglina, Giligil, Yezemed dangninet, and Irq: Terminology Differences or Conceptual?

These four Amharic terms are as confused in Ethiopia as ADR and arbitration. Our ultimate aim is placing each of these in their appropriate category –

[51] See, The Addis Ababa Chamber of Commerce and Sectoral Associations Adjudication Rules of 2007 Art 5(4)

ADR or arbitration. To this end, we shall first attempt to analyze their difference, if any, or explain their sameness.

In almost all the Amharic versions of legal texts in Ethiopia, the English term arbitration is translated as either Yezemed dangninet,[52] or Shimglina,[53] or Giligil[54] or less frequently, Irq.[55] There are also provisions where any two of these terms are combined or interchangeably used at the same time.[56] Though use of two or more terms for one concept in the same provision generally suggests interchangeability, that doesn't seem to be the case in Ethiopia. On top of the fact that there is no constantly used combination in the laws, each of these terms has its distinct meaning.

6.1 Shimglina

*Shimglina***,** which literally means elderliness, denotes dispute solution by elderly persons. It is the most rooted system in Ethiopian traditional dispute resolution scheme than the rest. Strikingly most Ethiopian nationalities have dispute resolution institutions which either literally i.e in names, composition and function correspond to Shimglina,[57] or at least in composition and function resemble it.[58] In all these cases either the name of the dispute resolution institution itself in the language of the community means dispute resolution by the elderly, or in actuality it is run by elderly persons. However, elderly

[52] See for example, the Civil Code Art. 941, 945,1765, 3325-3326, 3328-3346; the Commercial Code Art 267(2)

[53] See for example, the Civil Code Art; 973 (3),1275,(1)1472,1473, 2271, 3327; the Commercial Code Art 647(3); Revised Family Code Art.118-122; Proclamation No.550/2007,Art 6(7) & 28(1,2); Proclamation No.197/2000, Art 9(4); Proclamation No. 372/2003,Art 13(4)(c)

[54] See for example the headings of Civil Code Arts 941,945 and 1275; the Commercial Code Art 1038(1)(2)(3); Revised Family Code Art.288; Civil Procedure Code, Art.315;Proclamation No 341/2003, Arts 5(6),15(3),19(3); Proclamation 37/96 Art 22(2) ; Proclamation 273/2002, Art 7(21); Proclamation 377/2003 Art 143

[55] While there is no pure use of this word its derivative "astaraki" is used for arbitration under Article 118-122 of the Revised Family Code; and Art.945 of the Civil Code. Article 500(1) of the Commercial Code also uses "magbabat" as the Amharic translation of the term arbitration, while in the Amharic sense magbabat is a procedure more akin to mediation or conciliation which can best be translated as Irq.

[56] In the Civil Code, Art.941 uses the terms Giligil and Yezemed dangna, Art. 945 uses Giligil and Yezemed Astaraki Dangna; Art 1275 uses the terms Giligil and yeShimglina dangninet. Art 118-122 of the Revised Family Code also uses the terms Shimglina astaraki and astaraki shimagile. Atrs 316-319, - use the terms Giligil and Yebetezemed Dangninet, whereas Ats 350-357 of the same Code uses the terms Giligil and Yebetezemed Shimglina Dangninet, Regulation No 115/2005, Art 36 uses both Shimglina dangninet and yeGiligil dangninet interchangeably.

doesn't merely signify age; it rather refers to the wisdom and social status of a person as valued by the community in question including, of course age and experience.

The other cross cutting similarity of most of these "*shimglina*" institutions is their versatility in terms of offering all qualities of what can otherwise in modern terms be offered by arbitration, conciliation, mediation, compromise, etc. This, in fact, is what typically characterizes *Shimglina* in Ethiopia as one renowned Ethiopian scholar in the field wrote.[59] In almost all cases the elders can initiate the dispute resolution process,[60] there is hearing and party presen-

[57] For example, Jaarsummaa/Jaarsa Araaraa in Dejene Gemechu, *Conflict and Conflict Resolution among Waliso Oromo of Eastern Macha: The Case of the Guma*, Dept of Sociology and Social Anthropology, Addis Ababa University, 2007, p. 43; Jarsa Biyyaa of the Oromo See Areba Abdella and Berhanu Amenew, Customary Dispute Resolution Institution of the Oromia Region: The Case of Jarsa Biyya in *Grass-roots Justice in Ethiopia: Contributions of Customary Dispute Resolution*, Alula Pankhurst and Getachew Assefa (eds), p 172 ; Qabittino of Kafa, Shiyabe of the Berta, See Bayisa Besie and Lemessa Demie, Customary Dispute Resolution in the Benishangul Gumuz with Emphasis on Shinasha Society, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.124; The institution of Songo of Sidama, See, Ayke Asfaw and Mekonnen Felleke, Customary Dispute Resolution in the SNNPR: The Case of the Sidama, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), pp.209-214

[58] For Example the Institution of Maro of the Afar, See Shimelis Habtewold and Getachew Talachew, Customary Dispute Resolution in the Afar Society, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.96; Afocha of the Hariri People, See Biruk Haile and Jira Mekonnen, Customary Dispute Resolution In Harar, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.157; Odayaal of the Somali People, See Mohamed Melin Seid and Zemedie Jotte, Customary Dispute Resolution in the State of Somali: an Overview, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.190; Abbo Gereb of the Wajirat (Tigray), See Shimelis Gizaw and Tadesse Gessese, Customary Dispute Resolution in Tigray Region: Case Studies from three Districts, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.219

[59] *Supra* n 25

[60] Shimglina in Segat Kebele of North Shewa, See Melaku Abate and Wubeshet Shiferaw, Customary Dispute Resolution in Amhara Region: the case of Wofa Legesse in Northern shewa, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.108; Areba Abdella and Berhanu Amenew *Supra* note 57, page 172; Mohamed Melin Seid & Zemedie,

tation of some sort,[61] rendition of a morally binding decision,[62] compromise,[63] no payment of fee for the services of the dispute resolution,[64] etc.

Albeit the cross cutting uniformity in which it is applied in traditional Ethiopian communities, *Shimglina* in its broader sense remains to be a catch word used to refer to any out-of-court dispute resolution mechanism.[65] The following two cases presented to the Federal First Instance Court at Dire Dawa can further illustrate how confusing the use of the term is in practice.

Jotte, *Supra* n 58, p.190; Shimelis Gizaw and Tadesse Gessese, *Supra* n, 58, p.288; Sebsib Belay,Customary Dispute Reslolution in Addis Ababa,with Reference to Yeka Kifleketema, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.238, Mentewab Zelelew and Mellese Madda, Alternative Dispute Resolution in Addis Ababa:the Case of Markato, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.250.

[61] Shimelis Habtewold and Getachew Talachew, *Supra* n 58, p.98; Melaku Abate and Wubeshet Shiferaw, *Supra* n 60, p.109; Biruk Haile and Jira Mekonnen, Supra n 58, p.158; Areba Abdella and Berhanu Amenew, *Supra* n 57, p.174; Mohamed Melin Seid and Zemedie Jotte, Supra n 58, p.191; Ayke Asfaw and Mekpnnen Felleke, Supra n 57, p.209; Sebsib Belay, *Supra* n 60, p.242; Mentewab Zelelew and Mellese Madda, Supra n 60, p.251.

[62] Shimelis Habtewold and Getachew Talachew, *Supra* n 58, p.99; Melaku Abate and Wubeshet Shiferaw, Supra n 60, p.112; Biruk Haile and Jira Mekonnen, Supra n 58, p.160; Areba Abdella and Berhanu Amenew, *Supra* n 57, p.175; Mohamed Melin Seid and Zemedie Jotte, *Supra* n 58, p.191; Shimelis Gizaw and Tadesse Gessese, Supra n 58, p.233; Sebsib Belay, *Supra* n 60, p.243; Mentewab Zelelew and Mellese Madda, Supra n 60, p.251

[63] Shimelis Habtewold and Getachew Talachew, *Supra* n 58, p.100; Biruk Haile and Jira Mekonnen, Supra n 58, p.159; Mohamed Melin Seid and Zemedie Jotte, Supra n 52, p.190; Sebsib Belay, Supra n 54, p.242; Mentewab Zelelew and Mellese Madda, *Supra* n 54, p.251

[64] Shimelis Habtewold and Getachew Talachew, Supra n 52, p.95; Melaku Abate and Wubeshet Shiferaw, *Supra* n 54, p.110; Biruk Haile and Jira Mekonnen, Supra n 52, p.158; Mohamed Melin Seid and Zemedie Jotte, *Supra* n 52, p.191; Shimelis Gizaw and Tadesse Gessese, Supra n 52, p.232; Mentewab Zelelew and Mellese Madda, *Supra* n 54, p.251; But Sebsib Belay, *Supra* n 54, p.243- there can sometimes be fee for the shimagiles.

[65] The process of securing the release of CUD leaders carried out by the Elders led by Professor Ephrem Yisak was designated as Shimglina. Though the nature of that process still remains beyond the knowledge of the public in general, and has been recently a disputed issue between the government and some of the released CUD leadrers, the dispute has never been on whether or not it is Shimglina.

a) *Hajji Hassan Yusuf vs Hajji Amine Usso* [66]

The case was presented by Hajji Hassan Yusuf to the Federal First Instance Court at Dire Dawa in the form of application for the execution of a decision rendered by the Oromo Nation Cultural Institution which the parties had entrusted to resolve their dispute earlier. In brief the facts of the case are as follows:

Hajji Hassan Yusuf and Hajji Amine Usso were partners in a business. They wanted to dissolve their partnership but disagreed on sharing the proceeds. Three *Shimglina* processes were held to resolve the dispute in at least two of which the outcome was a decision in *favor of Hajji Hassan* Yusuf. During the first *Shimglina*, he was awarded Birr 181,200 and in the third *Shimglina* he was awarded 115,641 Birr, plus a share of 159 TV sets in the stock. [The result of the second Shimglina was not mentioned.]

Hajji Amine Usso defied the "decision" of the shimaglina and referred the matter to another *Shimilina* by the Oromo Nation Cultural Institution (ONCI). The ONCI after conducting oral hearing and without written presentations (submissions) constituted new valuation experts with two more *Shimagiles* as observers to make a report on the accounts of the business. In the meantime the ONCI made the parties to sign an undertaking to be bound by the outcome of the proceeding. And, eventually the ONCI *Shimglina* Council with some degree of compromise decided that Hajji Amine Usso should pay his former partner 115,000 Birr and part of the proceeds from the sale of the TV sets in stock. Again Hajji Amine Usso refused to abide by the decision. Eventually Hajji Hassan Yusuf filed his application with the Dire Dawa First Instance Court for execution of the ONCI's decision invoking Arts 315,319(2) and 378 of the Civil Procedure Code as the basis of his application.

The issue is whether or not this is arbitration proceeding and the decision is an award in which case direct execution can be sought?

b) *Wro Abaynesh Tadesse vs Ato Wubshet et al (Seven respondents)* [67]

The parties had a dispute over inheritance since 1999. In April 2007 they resolved their dispute by a four member panel of *shimagiles* each side appointing two. The panel after examining the matter gave its "decision and opinion" – as it referred to what it gave. The "decision and opinion" contained five counts four of which state that the panel's decisions are based on

[66] *Hajji Hassan Yusuf vs Hajji Amine Usso (Federal First Instance Court at Dire Dawa ፣ Civil File No 24186)*

[67] *Wro Abaynesh Tadesse vs Ato Wubshet et al (Federal First Instance Court at Dire Dawa ፣ File No 02257)*

the agreement of the parties (than on interpretation of legal provisions and determination of the rights based thereon.) The panel in fact did not invoke any legal provision for its "opinion and decision." What is more, the panel, interestingly enough, made all parties to sign at the end of the document which embodied its "decision and opinion."

The decision of the *Shimglina* was presented by Wro Abaynesh to the Federal First Instance Court at Dire Dawa for execution on the contention that it is an arbitral award per Art 378 of the Civil Procedure Code. The issue that would arise is whether this is arbitration, and whether the decision executable as an arbitral award?

The first case is more controversial than the second. It triggers at least two important questions: (1) what type of institution can be entrusted with the task of resolving disputes by arbitration; and (2) what procedure should be followed for a given dispute resolution proceeding to be taken as arbitration and its outcome as an enforceable award?

As far as the first question is concerned, there is no clear answer. But the general State policy seems to give this power only to selected institutions; it is only the chambers of commerce and the Ethiopia Commodity Exchange that the State has so far recognized by law to resolve disputes of their members by arbitration as per their rules [68] - institutional arbitration.[69] The Ethiopian state policy seems to be further clarified by the prohibition of the Ethiopian Arbitration and Conciliation Center (EACC) from offering the service of arbitration while the same institution is not barred from giving mediation services.[70] What makes the case of ONCI further complicated is the fact that it is a cultural institution that falls within the scope of Constitutional protection under Art.78(5) which states:

> Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.

But can article 78(5) of the Constitution be of any help in the above context? Note that, the above provision refers to article 34(5) of the Constitution

[68] See proclamation 341/2003 Art 5(6), 15 (3),19(3); and Proclamation 550/2007 Art 6(7).

[69] See *infra* note 71.

[70] My attempt to secure an official document evidencing the prohibition was not successful. But on phone conversation with Wro Haregewoin Ashenafi, Managing Director of EACC, it has been confirmed. Wro Haregewoin also added that the prohibition has been lifted unofficially on condition that arbitration is carried out by volunteer arbitrators and EACC exacts no fees.

which authorizes cultural and religious dispute resolution institutions in relation to personal and family law matters only. Thus, it may literally be argued from the state policy perspective that, even if the ONCI had followed the right procedures in arbitrating the above mentioned case, its award may not be valid. But the law (both the Civil Code and the Code of Civil Procedure) nowhere prohibits arbitration by an institution. If parties can entrust resolution of their dispute to their chosen arbitrators Mr. X, Y and Z, there is no any reason why they should be prohibited from referring their dispute to an institution for the latter to resolve it for them. What is the difference between the following two scenarios?

Parties refer to a given law firm, or association of arbitrators to appoint three arbitrators from its members and resolve their dispute

Parties appoint three members from the law firm, or the association of arbitrators in question to arbitrate their dispute

Strictly speaking, there is no difference. This is not to suggest that the much treasured service of arbitration be reduced to an over-the-counter merchandize. But we cannot conjure up unnecessary prohibitions where the law lays none. Thus, there is no reason why such arbitration as in the above example will not be valid as ad-hoc arbitration.[71] Thus, the law does not prohibit ad-hoc arbitration by institutions if parties willfully submit to it. This should however, be taken with the caveat that only legally empowered institutions can make their own rules and administer arbitration (institutional arbitration).

In as far as the second question is concerned, it is pretty clear that the procedure required for arbitral proceeding is not observed. So the decision of the ONCI will be invalid as an award from that respect at least.

When we come to the second case, the only issue is how and in what form the award should be given. Can arbitrators issue their decisions without analyzing submissions of the parties solely based on their agreement? No, be-

[71] The ad-hoc vs institutional arbitration dichotomy is seldom clarified in literatures. But, arbitration will qualify as institutional arbitration if the following two conditions exist: 1. it proceeds under the auspices of an arbitration institution; 2 pursuant to the rules of such institution. The only exception to this is the widespread acceptance by many arbitral institutions to auspice arbitration per UNCITRAL Rules- See *UNCTAD International Commercial Arbitration Module*, Geneva, 2005, pp.31-32; See also Article 5 of the Revised Arbitration Rules of The Addis Ababa Chamber of Commerce and Sectoral Associations'(AACCSA) 25, December 2008 which defines ad-hoc arbitration as an arbitration in which the Institute offers secretarial services in situations where the Institute's Rules are not used.

cause, arbitration must involve the rendition of reasoned decision which responds to the parties' arguments and proofs. In fact, the decision of the arbitrators in this case bears the signatures of all the parties involved implying it is an agreement, and not just a decision independently reached by the tribunal. And, this shows that the proceeding is not arbitration – it is conciliation in its true sense. Thus, it cannot be submitted for courts for direct execution as an award.

There are certain similarities between the institution of *shimglina* and *ex aeqo et bono* arbitration-sometimes known as extra legal arbitration.[72] But *shimglina* is broader than *ex aequo et bono* arbitration. *Ex aeqo et bono* arbitration relates to the circumstances where a tribunal decides a dispute based on standards (such as equity, fairness, and conscience) other than on any given positive law, and does not have anything to do with the procedural law applicable on arbitration.[73] It refers to the substantive law applicable on the merits of the dispute. *Shimglina* on the other hand is completely independent both in terms of the substantive as well as the procedural rules it applies. Moreover, while the outcome of an *ex aeqo et bono* arbitration is an arbitration award pure and simple, the outcome of *shimglina* is not.[74]

6.2 Giligil

Giligil on the other hand is much less commonly used in the codes though it is not devoid of confusion in its turn. The confusion in relation to this term is basically the Civil Code's use of it as the Amharic equivalent of the concept of *compromise* in Articles 3307-3325. Obviously this is not just a slip of the pen. The term *Giligil* appears in the chapter several times. Moreover, the popular and intuitive understanding of the term, indeed, conforms to a kind of amicable process of dispute resolution.[75] What is further confusing is that the Code uses this term in the chapter dealing with arbitration, i.e., Chapter two of Title XX only once under Article 3325(5) and in the rest of the chapter the term used is *Yezemed dangninet*. *Shimglina* is used only under Article 3327. But most of the proclamations issued after the codes use the term *Giligil*. The Addis Ababa Chamber of Commerce and Sectoral Association's Arbitration Rules also uses the term *Giligil*.[76]

[72] One of the assessors of this article holds that the two are the same.

[73] UNCITRAL Arbitration Rules Article 33 (1) and (2); Also see generally, Leon Trakman, Ex Aeqo Et Bono: De-Mystifying an Ancient Concept, University of New South Wales, Faculty of Law, Research Paper Number 2007-39

[74] *Supra* n 62

[75] *Supra* n 60, p. 109.

[76] The Revised Arbitration Rules of the Addis Ababa Chamber Commerce and Sectoral Associations, 25 November 2008.

6.3 Yezemed danginet/ Yebetezemed danginet

The "*yezened danginet*" and "*yebetezemed danginet*" are much related terms. Though much more widely used in the Codes, these terms do not appear in proclamations reviewed by this writer. Nor could this writer find these terms in the several arbitration cases he reviewed.[77] This being the only discernible pattern in this respect, the terms seem to have originated in the traditional family law institutional setting. This seems to be apparent from the word "*yezemed*" which means "*of a (by blood or consanguinity) relative*." Entrusting the task of resolving disputes to the relative of both parties might have been practicable in the traditional agrarian close knit society. But using it to translate arbitration in modern Ethiopia will surely be a digression from the basic tenets of the institution, such as impartiality and independence of the arbitrator. In this respect why these terms are abandoned in the recent proclamations and in arbitral cases seems to be clear.

6.4. Irq

The term *Irq* is the Amharic translation of the term "conciliation" in the English version of the Civil Code. Title XX of the Code which contains provisions on Compromise and Arbitral submissions is fairly well organized. It is, following the formulation of the heading, divided into two chapters: Chapter One on Compromise and Chapter Two on Arbitral Submission. Section 1 thus sets out with a definition that goes: "a compromise is a contract…." Interestingly, Section 2 on conciliation doesn't give a definition for the term. The reason for this is clear; conciliation is a compromise, and thus a contract as per the general definition of compromise in Article 3307. This in a way conforms to the claim made earlier that the essence of ADR is contract.

Explaining the confusion in relation with the institution of Arbitration in Ethiopia only from the perspective of terminology may be oversimplification. There has much to do as well with the concept itself as incorporated in the codes. One typical provision having such confusion is Articles 2271of the Civil Code. The provision reads:

> Article 2271 price estimated by third party
>
> 1. The price may be referred to the arbitration of a third party.
> 2. There shall be no sale where such third party refuses or is unable to make an estimate

What the above provision calls for is an estimator when the parties (seller and buyer) fail to agree on the price. But the problem is whether we would con-

[77] More than 30 arbitration cases have been reviewed for the purpose of writing this article.

sider the process of involving third party expert evaluation as arbitration. Certain questions arise at this juncture. Does it involve party presentation or at least the right thereto in the form of proof and arguments? Can the estimation of the third party be regarded as an award and thus binding?[78]

Moreover, the provision contemplates the likelihood of such "arbitrator" being unable to estimate the price. An arbitrator has no room (as there is none for the judge in a state court) to be unable to give decision once he rightly assumes jurisdiction unless the plaintiff withdraws his case or the parties settle their dispute outside the tribunal. No doubt this provision should have referred to conciliation instead, if not to the most appropriate current schemes such as expert determination, neutral evaluation, etc. Is article 2271 just a slip of the pen? On the face of it, it seems to be so if one reads the equivalent of Article 2271 in the Code Civil of France[79] which reads as Article 1591 and 1592.

> Art-1591: the price of sale must be determined and stated by the parties.
>
> Art-1592: it may however [sic] left to the estimation of a third person; where the person is unwilling or unable to make an estimate there is no sale.

Despite the closeness in wording between these two provisions, Article 2271 is not modeled after the above provision. The above quoted provisions from the French Civil Code Articles 1591 and 1592 are of course, the revised versions of *Act no 2000-1208 of 13 Dec. 2000.* It follows that Article 2271 is modeled after the Code Napoleon of 1804 since the latter was one of the major sources of the Ethiopian Civil Code. Indeed, Art. 1592 of the Code Napoleon uses the word arbitration just like Art.2271.

> Art. 1591: The price of sale must be determined and designated by the parties
>
> Art.1592: It may nevertheless be left to the arbitration of a third person; if such third person is not or cannot make an estimate there is no sale.

This begs the question as to what the old usage of the term arbitration was in France and possibly in the Civil Law traditions in general. There were many distinct procedures which bore the name of arbitration in medieval Europe. France for instance had three distinct procedures in the name of arbitration which were arbitration and amiable composition dealt by the Code of Civil Procedure, and arbitration dealt within the Civil Code.[80] Likewise, in medie-

[78] See the comparable provision in Articles 1472, 73 where arbitrators may be called in only to make valuation which is binding on the parties as an award.

[79] http://www.google.ca/search?hl=en&q=Code+Civile+of+France&start=10&sa=N

[80] Rene David, Arbitration in international Law, Kluwer law and Taxation Publishers, 1985, p.84

val Italy as well three types of arbitration processes existed: arbitration proper, amiable composition, and *arbitraggio*.[81] *Arbitraggio* was a process which aimed at the completion of a contract (gap filling) – a function which is outside of the jurisdiction of the courts."[82] The amiable *compositeur* in both cases (of France and Italy) "was not bound to decide in accordance with the law, since he was regarded fundamentally, as a conciliator;…he wasn't also a conciliator pure and simple since he was regarded as empowered to impose his decisions."[83]

As time went by, however, the concept was further refined leaving behind more conciliation like procedures and sticking to the adjudicative essence. Such a development must have also been reinforced by influx of common law conceptions. Furthermore, the special need to achieve harmonization of arbitration laws to suit the growing need of uniformity in international commerce must have added the impetus for the emergence of the modern quintessence of arbitration.

6.5- Which Amharic term may be taken as equivalent to Arbitration?

The foregoing discussion might have in a way alluded that arbitration is an imported institution. If so, the writer's effort has met one of its objectives. But now is the time to be candid about it. Indeed, the main cause of the confusion is the attempt to translate the imported institution of arbitration by means of an existing (domestic) institution. Arbitration is a western institution [84] transplanted into Ethiopia along with many other institutions. This is not to undermine its importance; not every transplanted institution should be condemned, or for the mere fact that it is a transplant it should not be taken to be a threat to indigenous institutions, as far as it has important purposes to serve. There is no doubt that the major importance of arbitration lies in the

[81] *Id*, p.93

[82] *Ibid*. Rene David adds that the sense in which the word arbitraggio is used in Italy is different. It is said that Italians do not use the word arbitraggio in the context of a dispute; and their 'arbitrators' are called third persons or good men…they are asked to give a decision or an answer to the question submitted to them, not to render an award. Id.p.95. it appears that articles 1765 is inspired by this tradition.

[83] *Id*, p.87

[84] See Michel T. Moser "Arbitration in Asia: An overview in International Commercial Arbitration in Asia") *Special Supplement to (1998) ICC International Court of Arbitration Bulletin* (Nov)6-10; Fails Narimy, East Meets West: Tradition, Globalization and the Future of Arbitration, *Arbitration International*, Vol. 20, No2,2004, pp.124-125; But see Bezawork Shimelash, The Formation, Content and Effect of an Arbitral Submission Under Ethiopian Law, (1994) 17*JEL* 69

fact that it is internationally the most recognized reliable mechanism of dispute resolution for foreign investors. Without robust system of arbitration, attracting foreign investment is indeed very difficult. The importance of arbitration for the growth of the private sector in the domestic arena cannot be downplayed as well.

Thus the transplantation of the institution into the Ethiopian legal system is not objectionable. But what term should have been used to translate it into Amharic? The best option would be to spell the word arbitration in Amharic characters and abandon the futile attempt of translating it via existing institutions. It seems too late, however to introduce such a solution at this juncture. It may create more confusion. It would thus be easier and more plausible to consistently use either "*Shimglina*" or "*Giligil dangninet*". This writer however suggests "*Giligil dangninet*" for *Shimglina* as indicated above represents a distinct, independent and salient institution that is perhaps unique to Ethiopia.

In this way we will not only resolve the confusion revolving around the institution of Arbitration and ADR in Ethiopia, we will also have one more alternative in the Ethiopian kit of ADR in the form of *Shimglina*. Thus the new law ought to give explicit recognition to conciliation-Shimglina and arbitration. Does this sound odd? May be yes, as it does not match up with the international practice. But should we always establish congruence between our institutions and the international (or rather western) institutions? In fact, many legal systems have their salient domestic dispute resolution institutions; Italy has *arbitraggio*, USA has the '*rent a judge*' scheme. If Ethiopia has *Shimglina* as a separate and distinct institution from arbitration, it would not be that strange.

Conclusions

The distinction between ADR and Arbitration has much more to do with their underlying institutional foundations than mere degree of intrusiveness of the neutral during the dispute resolution process. The belief that ADR and Arbitration can be placed along a continuum in one spectrum is thus an oversimplification of the matter. Thus, as far as their underlying institutional bases are concerned, ADR is a contract while Arbitration falls under Adjudication. It is only when each form is rightly placed in its proper institutional context that it can both be properly understood and be effectively used. Or else, any attempt of looking at each scheme outside its core institutional basis is bound to erode its essence and utility.

Thus, one position that results from this distinction is the mutual exclusiveness of ADR and Arbitration. Although one cannot deny commonalities between the two institutions as dispute resolution institutions, such common-

alities are too little compared to their difference to justify pigeonholing them together.

In the Ethiopian context, what vaguely lies between ADR and Arbitration is *Shimglina*. Strictly speaking, this is a mixture of both Arbitration and ADR at least in terms of the process aspect. Being unique to Ethiopia, however, *Shimglina* is both pervasive throughout the country and also sometimes used as a catch word to refer to all forms of out-of-court dispute resolution mechanisms. Thus, the concept of *Shimglina* is so nebulous and imprecise to translate the concept of arbitration into Amharic. In this connection, Ethiopian law doesn't have consistent term in Amharic for the concept of arbitration, but freely uses *giligil, yezemed dangninet, irq and shimglina*.

Although none of these words hit the nail on its head with due precision, '*giligil dangninet*' seems to be preferable for it has gained better acceptance among the lawyer community, and owing to its wider use in recent legislations. Such interpretive short-term solutions will indeed serve a limited purpose, until the problems highlighted above are resolved through the enactment of comprehensive law on arbitration and ADR that sufficiently reflects the distinction between the two institutions. Meanwhile, this legislative solution is expected to accord express recognition to *shimglina* as a variant of ADR and as a deep-rooted legacy distinct from arbitration. ■

SHARING THOUGHTS

To and From the Community

Peter L. Strauss

Betts Professor of Law,
Columbia University Law School, USA

I am glad to have been asked to share with the readers of Mizan Law Review, the thoughts that occurred to me at the end of my two-week stay in Ethiopia. It is difficult to express thoughts upon impromptu invitation. On the other hand, conversations like the one I had when I was invited to express my thoughts unveil one's inner voice which readily responds although words from the heart might lack the pattern and the roadmap of thoughts and memories polished through the mind.

Keeping and working together

I graduated from Yale Law School in 1964, and in 1966, after two years of experience as a clerk for American judges, I volunteered to teach at the newly established Faculty of Law, Haile Selassie I University (later renamed Addis Ababa University). The law school had already started when I joined the faculty in 1966. The years 1966 to 1968 have a special place in my life. These years remind me of Henry Ford's words: "Coming together is a beginning, keeping together is progress, and working together is success."

About eighteen expatriates, about half young Americans and the rest from Canada and Europe, formed a strong community of hardworking and enthusiastic staff. The inspiring leadership of James CN Paul, the school's first Dean, created a strong team spirit among ourselves and with all our students and stakeholders. This spirit enabled the law school to achieve a standard that was indeed exemplary. They produced a very strong and close commu-

nity, creating for me lifetime friendships with colleagues like Norman Singer, Hap Dunning, Dean Paul, the late Daniel Haile and many others.

This was the decade that saw thousands of young Americans volunteering as Peace Corps and serving in other teaching or similar assignments. We were responding to John F. Kennedy's famous words, "ask not what your country can do for you, but what you can do for your country." This motto is not as idealistic and utopian as it sounds. Every person is a member of his/her community, and the benefactors from the common good are eventually the members themselves. Indeed, this marked a shift from the self-regarding times that had immediately preceded it. After all, our makeup is not for lonely existence, like leopards or sharks. Society, the need for community is a natural need and trait of ours. Like baboons, we survive, we live, we succeed in communities.

Baboon communities, to be sure, have dominant male leaders, and human history has been marked, well I would say stained, by oppressive patriarchy and tyranny in the name of 'order' and 'community.' Democracy, that is to say equal political rights, and not individualism in its *atomistic* conception, appears to be the answer. In American discourse today, republicanism and communitarianism are the names commonly associated with this view. Republicanism should not be confused with the Republican political party, the American political party that in recent years has seemed more susceptible to atomistic individualism, with its characteristics of greed and disregard for the common (and global) good. What must be joined are empowerment, liberty and freedom of the individual in the context of the common good.

This ideal is common throughout the world. The western philosopher Martin Buber expressed the idea as "I and thou." Many religious traditions celebrate a reciprocal golden rule, "Do unto your neighbor as you would have him do unto you." And the Swahili expression of *Ubuntu* which means "*I am, because you are, because we are*" also articulates the togetherness that genetically permeates us all.

This bond of community exists not only among us, here and now, but also with the generations before and after us. What we might currently see as clash of civilizations may eventually give way to a phase of convergence, synthesis and tolerance. I see my sister, as European as I am, embracing Buddhism. Since he was eight, my son has been a committed environmentalist, knowing that his life is committed to the values and protection of the natural world all of us share with all creation. Values and lifestyles coexist and converge.

As I am getting closer to retirement or extended service with a reduced teaching load, I reflect upon some perspectives from my religious heritage.

We live through childhood, adolescence, adulthood, late adulthood and old age. Suppose, one of our holiest texts asks, we would be given two options: *either* (1) we could live eternally under the progression of aging always with our own generation and no other; *or* (2) we could give place to a new generation of renewal and energy in life such as the passion of loving, having and bringing up children, mentoring the younger ones to take your place. Is it not clear what choice we would make? Mustn't any sane person take the latter option? The succession of our lives is like a *Relay Race* in which generations come and go as members of the extended family of the humanity, and always with the hope of building greater community. Although I don't believe in oriental reincarnation, there seems to be linear reincarnation when a person continues to live physically through children, mentally through students and readers of one's publications, and spiritually through all those to whom he/she has been a role model. What is more gratifying than a community of life and aspirations with others and the next generation?

Community, numbers and crowds

My first visit to Ethiopia was a lesson in how much easier community is in small settings than large. I come from a metropolis, New York City, where few neighbors know each other, and people pass in the streets without eye contact. At a party one always has the impression that people have their eyes on lookout for someone across the room who might be more interesting to talk to. Addis Ababa when I arrived was already large enough that many Ethiopians might have had the same experience. But I was part of a small community of expatriates with a shared commitment to shaping legal education in Ethiopia, with the knowledge that, at that time, all lawyers being trained in the community were being trained by us. The shared task and responsibility bound us together. Our small numbers denied us the luxury of looking across the room for a better match. Of course there could still have been hostilities or frictions that tore us apart; one of the wonders of James Paul's deanship was his skill in steering our enterprise. But life's lesson, for me, was of the depth of engagement that comes from accommodation and adjustment to the realities of our group. We learned more about each others' strengths and weaknesses, about the daily state of our minds and our stomachs, than I had experienced before.

These lessons have stayed with me, as a testimony to the values of community and friendship. Back in New York City now, teaching at a much larger school in a much larger city – a wonderful school with accomplished colleagues, but one responsible for training only a small fraction of our lawyers – I see how hard it is to maintain a community sense with large numbers. My colleagues even take some pride in their independence – that we each go

home to a different place, have different circles of friends and activities. The anonymity of city life is a corrosive force. We are collegial, but not nearly in the sense that so blessed my time in Addis.

Timket, Russia Road and the Entoto-Yeka Mountains

I had returned very briefly to Ethiopia in 1992 with Dean Paul, and now here I am again after 16 years. I see lots of changes. I am glad to see and take the pictures of the home where I and my family lived in from 1966 to 1968. My home in Addis was on continuous rental by AAU law school. Goldberg lived in it before me, and Sklar after I left it. I call it *home* because it is more than a house to me and memories rolled from the very moment I saw it on *Timket* Holiday, January 19th 2009. On Friday, January 30th Elias Nour managed to take me and Tadesse Lencho to the living room because his relatives live there. The event brought back memories that I cherish. The premises and its compound are well preserved. But I do not have to tell you readers there have been changes. The road in front of the fence (Russia Road) is about four times as wide as it then was. Addis Ababa itself is eight times as large today as it was then.

I would like to appreciate the roads and construction works that are booming. Yet, my camera has rather consistently focused on the graceful mountains of *Entoto* and *Yeka* which majestically stand green and beautiful. Thank God that they are greener than I had feared after reading the statistics that Ethiopia's forest cover had declined to 2.3 % of its land from around 16% in the early 1950s. It is the sense of community in every household and the unique culture of diversity and tolerance accompanied by the landscape, the greenery and the inexplicably unique weather that constitute Ethiopia's treasures. I hope development endeavors, including roads, buildings, industries, etc., can be accomplished without diminishing them. Awareness and commitment in this regard and a strong sense of community with every neighbor and the generations to come can substantially reduce the potential damage to Ethiopia's treasures. ■

NOTES CORNER

NOTES ON JURISPRUDENCE

Positivist Theory of Law– H. L. A. Hart: Hart's Concept of Law

*Elise G. Nalbandian**

Written works on Hart's theory of Law usually start with clarifying the position this theory enjoys in modern legal positivism and indeed in 20th Century Jurisprudence. First published in 1961, "The Concept of Law" continues to be regarded as one of the most important works of legal philosophy. Following the publication of the second edition of the book containing the "epilogue" which clarifies Hart's opinions of his theory, this book, the theory and its author remain supreme figures in the world of Jurisprudence.

This can be confirmed by his proponents as much as his critiques, the most prominent of which includes Dworkin. In fact, when Dworkin embarked on his mission to define what the law was, his criticism against positivism formed the base of his theory. In his extended and continuously developing critique which is itself a very prominent part of Jurisprudence, Dworkin paid a great deal of attention to criticising Hart's theory as he contended that Hart's theory was the "ruling theory of law." Before studying the actual text of "The Concept of Law" and its critiques, it is first important to understand the platform upon which Hart developed this theory which became a hallmark and defining theory of jurisprudence.

1. The theoretical background to Hart's concept of law

Hart presents his approach to law as an alternative to previous attempts made to explain the nature of law. He rejected the imperative positivism as developed by Austin, Kelsen and even Bentham arguing that these theories provided a narrow and inadequate definition of law. Hart's main point is that the questions *what is law?* cannot be effectively and simply defined based on specific key features of law, examples of which can include the coercive ele-

* LL.B LL.M, Lecturer in Law, Faculty of Law, St. Mary's University College

ments (as the imperative positivists tend to do) or its moral dimension (as the natural lawyers tend to do). Such singular and narrow approach, according to Hart, will not serve any useful purpose as it will obscure many different important elements of the law which should not be ignored in the development of an "adequate" explanation of the nature of law. Hart therefore identified that the nature of law can only be dealt with properly if three recurring issues (which none of the previous theorists had looked at completely and at the same time) are dealt with. These three key recurring issues he identified were the relationships that exist between:

a) **Law and coercion**: Hart believed that a comprehensive answer about the nature of law would need to consider how the law differed from coercion as well as considering the way it is related to orders backed by threats.

b) **Law and morality**: Unlike other positivists before him, Hart did not totally reject morality from the study of the nature of law, rather he acknowledge that a study of how legal obligations differed from and are similar to moral obligation needed to be made.

c) **The nature of rules**: Hart indicates that ignoring the nature of rules was a major error that previous jurists had made. His opinion was that rules and the extent to which law is an affair of rules needed to be studied.

In fact this third recurring issue was the most important for Hart as he argued that earlier jurists had tended to limit their considerations to only the first or second recurring issues. A good example of this type of argument can be seen in Hart's arguments whereby he states that the problem of imperative theories of law is that these approaches have by and large lacked the concept of rules. This deficit has caused them to regard law as an external system of coercion which in turn has caused them to ignore what Hart called "the internal element" of legal obligations which leads people to obey laws even when there is no threat of force forcing their compliance.

Another issue which was central to Hart's study was the '*open texture*' of words and therefore of law. Language is a major consideration in law as any attempt to communicate requires use of words which signify notions of reality. However, as numerous studies in the field of linguistic philosophy indicate, of which Hart was a keen proponent, words are problematic as instruments of communications as they may carry within them various meanings or can be interpreted differently depending on contexts. Thus any definition which has to be constructed out of words can actually be obscured by the same words which, according to Hart, can lead to misunderstanding and misinterpretation of legal theories as well as laws.

In Hart's opinion, this problem is linked to the fact that ambiguity in language cannot be cured by studying the facts or the aims of the laws due to the following reasons:

a) **Relative ignorance of facts**: When creating laws, it is not possible or even realistic to deal with particular circumstances or to cover all material issues that may confront anyone seeking to use the law to resolve disputes.

b) **Relative indeterminacy of aim**: The legislator also cannot fully or accurately anticipate future developments and thus it is not possible to ascertain the best way to deal with new situations which may arise to which existing laws may need to be applied and thus the open-textured nature of language can be useful in such a situation.

c) **Relative uncertainty of what the law is**: In past theories, international law and so called customary law were both rejected as laws due to the fact that both were argued to lack salient features normally associated with law, such as a legislature or a system of courts with no clear explanation as to why this was the case.

All these factors considered together convinced Hart that in actual fact, it is not possible to address all these issues in a single defintion and approach that adequately reveals the nature of legal rules. It is for this reason that Hart recognised law as a complex social phenomenon which is linked to other social phenomena in various ways. Such an approach would naturally make it difficult to answer the question *what is law?* And would require a more comprehensive approach than those adopted in previous times.

Hart therefore presented his theory as an exercise in analytical jurisprudence arguing that a wholistic theory would appreciate the law as a system and not as a single-tiered moral or imperative compulsion as long as what can be called law ultimately is that which has been created and posited by the proper law-making authority. Furthermore, Hart's recognition that law is a social phenomenon which can be understood and explained in terms of social facts requires a more complicated approach which encompasses an understanding of various social facts including the attitudes of people towards language used in expressing conceptions of the law morality and coercions all as issues which are common social phenomena. Thus, Hart attempts to explain the law in terms of social context and this can also be described as an exercise in descriptive sociology.

It is to be noted that Hart remains to be a positivist because he does not eject morality. Hart himself would not accept any description of him as any

type of jurist other than as a positivist (such as sociological jurist). As a committed positivist, his intention was to provide an improved positivist account of law and what he therefore produced has become known as "soft positivism".

2. Hart's concept of law: Crtique of earlier positivistic approaches

Hart's "The Concept of Law" starts with a long and general rejection of imperative positivism. The gist of his criticisms has been summarized in previous notes, particularly those on Austin. Hart argued that the command theorists, in emphasizing force as the core component of law, have studied only the external element of law which only focuses on the 'bad man's view' of the law. Hart's argument was that in focusing only on commands of a sovereign and the actions of officials in imposing sanctions, the internal element of law has been ignored. This is what Hart calls the '*internal aspect or point of view*' which makes people feel a sense of obligation to obey the law. Hart's project therefore draws a sharp distinction between the notions of "being obliged" and to be under an obligation.

"To be obliged" is to be forced to act in a certain way because of some threat, such as when an armed attack orders a person to hand over money, and on the other hand, "*to be under an obligation*" means to feel within oneself a sense of duty to act in a certain way without some external stimulus compelling such action. Hart argues that the command theories explain only in terms of the former notion which is not totally discountable but is inadequate because the law operates both in an external and an internal fashion to induce compliance. However, Hart also notes that the law acts more as an *internal inducement* to action and that the external element comes into play only in the occasional event of a breach, when officials act to apply sanctions. Hart's justification for arguing that the external element is less important is that such an argument lacks any concept of the issue of rules.

Hart defines rules as s*tatements of accepted standards of behavior*. Where there is any type of rule – preferably a rule of law - which most people are aware of, there is no need to have officials constantly watching over citizens to ensure compliance because most of these citizens would comply regardless of the existence of force since they accept the rule as a standard. Hart indicates that people use the rule to judge their own behaviour and that of others, and criticize acts which do not comply with the rule.

In Hart's explanation of the external and internal elements of law, it becomes clear that every legal rule has an internal and external aspect.

a) The external aspect of rules (*being obliged*) refers to an observable pattern which can be seen in human conduct prompted by habits as well as rules.

b) The internal aspect of rules (*having obligations*) refers to a critical reflective attitude (CRA) of members of society towards the specific *pattern* of behavior as a common standard or guide which they have to follow.

So ultimately for Hart, it is a contrast between external and internal attitudes that makes it possible for us to understand what it means *to have* and *to breach* legal rules. Hart's explanation of this issue is as follows:

If an external attitude is adopted towards the rules then firstly, there will not be an acceptance that legal rules which then influence human behavior as a result of the rule; and secondly, the rule being breached becomes a sign or a prediction of what is going to happen based on observable behavior. This is the extreme external view that an observer who does not accept the rules may make. Statements from this point of view predict sanctions for the deviations while this perception will never be able to describe the conduct of people who live in society peacefully in such a manner that sanctions against them becomes unnecessary. Hence this understanding of the law will be "one will be punished if he does x" rather that "I ought to do X as it is a legal rule")

On the other hand, an internal attitude is when people know and accept restrictions derived from their obligations (which come from legal rules). This does not mean that rules have to have the moral approval of the people who live by them. This Critical Reflective Attitude is not the peoples' need to conform to the rules to avoid criticism. Thus this internal aspect exists when people who are members of a group *accept and are committed* to use the rules as a standard for their behavior of society. The term "acceptance" is problematic as it may refer to undesirable ideas of what the internal attitude may be. Hart makes it clear that laws do not derive their validity from social acceptance, and his most important arguments underline the existence of a Rule of Recognition which is the standard by which a law can be recognised as a law. Hart appreciates that the internal aspect is difficult to have in every single individual and so he admits that the core of officials/people who are committed to the CRA are the central case and everyone else who adopts an internal attitude for prudential reason will be penumbral.

3. The union of primary and secondary rules

For Hart, law is first and foremost a matter of rules as has been emphasized repeatedly throughout the text. This is due to the fact that law is a system of

social rules and to this extent it is similar to morality, which also is constituted of social rules. Both types of rules are 'social because they arise within a social context, apply to a social activity and have social consequences.' However, the rules of law are different from those of morality in a number of fundamental ways.

The main distinction arises out of the fact that legal rules have what Hart calls a systemic quality. What this means is that rules of law are of different types and that each of them categories interact with the other in a manner which enables them to be called a system rather than say 'a body of rules.' Rules of morality generally lack this systemic quality. The rules of law can be classified into two main groups, *namely primary and secondary rules*, and it is the interaction between these groups which justifies the description of legal arrangements in certain societies as being a legal system.

3.1- Primary Rules

These are basic duty-imposing rules of law. They specify what people ought and ought not to do, can and cannot do and in this way they create obligations which members of a society are required to comply. Examples are rules of criminal law, tort and so on. In more mature legal systems, these rules are normally created, validated, enforced and changes by officials.

It is possible to envisage a pre-legal society which may not have institutions such as legislature, courts etc. In such societies, there may still be rule of law because there would be certain rules which are accepted by the majority of the citizens as accepted standards of behavior and to which weight and authority are given by consensus. The validity of these rules as law would then depend on what Hart calls the '*internal point of view*' of the citizens in the community, which describes a critical reflective attitude enabling citizens to feel a sense of obligation to obey such laws. This type of arrangement would however, not be a legal system as such and it would raise a number of problems for the citizens such as:

a) *The problems of uncertainty*- it would always be difficult to determine whether there exists a certain rule of law or whether it was some other type of rule, such as a rule of morality, custom or religion;

b) *The problem of the static nature of laws*– even where rules of law were known, new situations might arise which would need the immediate modification of an existing rule to cover that situation or failing that, the creation of an entirely new rule to resolve a problem. It would be easy to create with sufficient expedition, a new rule through the process of establishing consensus amongst all citizens;

c) *The problem of inefficiency*– where rules of law were broken, there would

always be difficulty in ascertaining the reality and the extent of the breach as well as determining the extent of compensation or the severity of punishment. Self-help schemes in this respect would result in wastage of resources.

In order to resolve these difficulties, there would be a need for a different set of rules which would determine the processes of creation, validation, transformation and adjudication in respect of the primary rules of law.

3.1- Secondary Rules

Secondary rules deal with three problems: first the problem of uncertainty about what the law is (the secondary rule is called the rule of recognition and states whether the law is valid), second the problem of rigidity of rules (which requires rules of change allowing laws to be varied), and third the problem of how to resolve legal disputes (from which rules of adjudication arise). Hart describes these rules as power-conferring rules which allow for those who receive the power to legitimately cure the problems of the primary (duty-imposing) rules.

Hart includes the concept of a *Rule of Recognition* (RoR) as one and possibly the most important of the Secondary Rules of Law. This RoR is the ultimate rule providing criteria by which validity of the other rules of a system are assessed and this cures the uncertainty of the primary rules. According to Hart, RoR is not in itself assessed and cannot be valid or invalid since it is merely a complex social fact about official attitudes and practices (and so it has to be accepted by the officials of the system who have an internal attitude about this RoR). Hart contends that the union between primary and secondary rules is the key to the science of jurisprudence and within it these two hold a distinction between power-conferring (secondary rules) and duty imposing (primary rules). In short, there are two criteria for RoR: (1)All valid rules must be obeyed, and (2) valid rules must be validated by RoR which must be effectively accepted as common public standards of behaviour.

4. Summary of criticisms against Hart:

Hart's theory is indeed a holistic theory which tries to cover validity of law to issues of obedience. Yet, the theory has been subject to some criticisms. The first set of critiques criticize the description of the internal and external aspects and the critical and reflective attitude. The second category of the critiques argues against the Rule of Recognition provision in Hart's theory.

Three jurists have been mentioned for their prolific critique of Hart's theory specifically over the issue of the internal and external aspects including

MacCormick, Finnis and Cotterrell. The core issues that critiques forward in this regard against Hart can be summarized as follows:

a) Hart has failed to consider situations where neither the extreme internal or extreme internal attitude functions; and

b) Hart does not pay enough attention to distinguishable elements of the internal aspect such as the split between the cognitive/reflective element of the critical reflective attitude and the volitional/critical element of this aspect. In fact, Hart ignores the reflective/cognitive element of the internal aspect.

4.1- Criticisms against the internal-external aspects in Hart's theory

4.1.1- MacCormick

MacCormick contends that Hart has not fully explored the full implications of the difference that exists between the internal and external aspects but also within the aspects themselves. Hart, according to MacCormick, has only properly looked at the extreme external aspect and when looking at the internal aspect, Hart has generalized what this aspect is about to the point where he seems to be suggesting that the internal aspect is fully volitional/critical while ignoring the reflective/cognitive element.

MacCormick argues that there is a reflective/cognitive element in between the two aspects which he calls the 'hermeneutic aspect and proposes as the third aspect as a solution to the two problems he has mentioned. This third, 'hermeneutic' aspect links the external and internal aspects to explain the position of the agents within the law who are neither volitionally (willingly, accepting and being committed to) involved with the law or legal rules nor are they fully detached observers who only see the external aspect of rules and predict the outcomes to deviations from the patterns of behavior in society.

These agents under the hermeneutic aspect tend to be external observers who do not accept the rules but will still comment on the group's internal understanding of the law at a cognitive level. The existence of this aspect means that the opposition between the internal and external understanding (of what it means to breach legal rules) is not nearly complex enough for Hart's theory to function without also utilizing MacCormick's contribution of the hermeneutic cognitive element.

4.1.2– Cotterrell

Cotterell points out that Hart's theory is about the majority of citizens having a critical reflective attitude when it comes to understanding rules. But when

it is about the existence of the legal system in question, Cotterrell holds that only a few officials need to have an internal attitude. This for Cotterrell, this sounds like Austin's sanction based theory in that laws in a legal system will only need to be understood by select officials and that the acceptance of these laws by the wider public will be coincidental.

4.1.3- Finnis

According to Finnis, Hart's theory has elements of natural law. Finnis firstly accepts the importance of an internal attitude and then he goes on to point out that if Hart chooses to keep his original theory as it is and not accept the hermeneutic aspect, his theory will have an element of natural law. Finnis argued that the attitude of being committed to a law is definitionally linked to some notion of duty or order-maintenance, and a CRA will still require the official or person to morally commit himself/herself to the legal rule and legal system and even the CRA may have a moral base. If Hart's theory accepts the hermeneutic third aspect, as suggested by MacCormick, then Hart's idea entails the need for the selection and prioritizing of factors. Such selection will be according to the agents themselves, and in effect, morality will creep in through the back door even more than Hart's allowance for the minimum content of natural law.

4.2- Criticisms against Hart's Rule of Recognition (RoR)

The other large body of criticism leveled against Hart stems from his inclusion of the concept of a Rule of Recognition as one of the Secondary Rules of Law. The critiques forwarded by Raz, Dworkin and D'Entreve belong to this category.

4.2.1- Raz

Raz goes along with Hart's RoR in that a rule has to conform to some criteria set in another rule of the system. Raz also sees the validity of ultimate RoR's as a matter of social and political facts. He does however question Hart's views on validity of the RoR. Raz thinks that RoR's are valid because they belong to a legal system in response to the problem that Hart does not try to validate the RoR. Raz also presents several other objections or corrections to Hart's view of the RoR:

a) RoR is as much a power-conferring rule as it is a duty imposing as well as a tool to settle unregulated disputes. So Hart saying it is purely power-conferring is wrong as RoR imposes duty upon all those applying law to recognize and apply laws satisfying the criteria of validity. RoR also provides means for resolution of conflicts between laws. Hence Hart has misunderstood the nature of RoRs.

b) Hart makes it clear that RoR is a vague and open-textured concept – it might even be incomplete as it does not contain validity of rules of Public International Law. So, long as the rule is incomplete, there will be unsolved problems in clarifying what the primary rules are. Also there may not be a system of conflict resolution.

c) Raz contends that there must be more than one Rule of Recognition as one ROR is not enough and furthermore ROR provides no complete answer to the problems of the scope of the Legal system (momentary legal systems in a state may often have to apply laws of other legal systems).

d) RoR has to be accepted by the officials for a legal system to exist. However, acceptance has its own problems as there is a need to show that it is a law that underlies the constitutions and the whole legal system.

e) The nature of the RoR is ambiguous: Is it a law or is it a fact? Hart calls it a social fact, Raz calls it a political one and Natural Law opposes this and says it is a meta-legal area of law where morality may be factored in.

f) Finally Raz states that Hart has overlooked questions of relation of law and state. This has two different effects with regards to the scope of the laws as well as the continuity. The continuity of the legal system is tied up to that of the political system and therefore must be affected by the fate of non-legal norms that are part of the political system. Hence in not recognizing this, Hart's system lacks a very important angle. As to the scope of the law- sometimes the courts are under a duty to apply norms from other social and political systems, and so do they become part of the legal system or is it being enforced as it is part of law's function to support other social system.

4.2.2- Dworkin

Dworkin goes further in that he queries what the acceptance of the RoR consists of. Is it rooted in fear (then we get a repeat of Austin). Dworkin also claims that RoR is unable to account for validity of legal principles –that Hart glosses over and under-represents. Dworkin states that there is a clear distinction between legal principles and legal rules (even if both do point to particular decisions about legal obligations in particular cases). Principles have weight and dimension as compared to legal rules where two rules conflict, and principles are relevant and judges use them to work out the conflict. Underlying principles also explain the connection between cases but have no connection to RoR. Dworkin's more fundamental critique is that the RoR merely says that whatever is accepted as being legally binding is legally binding. This for Dworkin is not a test at all – thus he says Hart's argument is circuitous as the test is one which would have been formulated even if he had not formulated it.

4.2.3- D'Entreve

D'Entreve contends that Hart's claim that there is a minimum content of natural law in positivism to guarantee the stability of a system is problematic. As far as D'Entreve is concerned, this implies that Hart admits that positive law is closely linked to natural law while trying to maintain that laws need not fulfill any criteria of morality. If the RoR, as Hart insists, has no morality criteria in it, what happens is that in a case where a law is inequitable, the judge will have to say "the law is valid according to the RoR but I refuse to apply it in the name of a higher cause" which actually allows natural law to trump positive law. This, according to D'Entreve, doesn't only allow a minimum content of natural law, but is making natural law superior.

Concluding Note

In spite of the somewhat numerous criticisms leveled at Hart's concept of law, it is very important to once more keep in mind that this theory has had a wide-ranging influence in shaping legal thinking in the latter half of the 20th century and the beginning of the 21st century. Even Hart's critiques such as Dwokin and Raz have conceded to the importance of this theory and its influence on the study of modern jurisprudence. Moreover, Hart's characterization of his concept of law cannot be captured in the writing of one summarized note such as this note whose scope does not allow it to fully take into consideration the response Hart had been working on before his death in 1992. Although his responses were published in the form of notes, Hart's understanding of his own theory and his response to the criticisms were expounded in these notes in which Hart has countered a lot of the critiques while reconciling his theory with some of them. This simply indicates, as always, that jurists and students of Jurisprudence need to keep in mind that no theory and no criticism is completely correct thereby necessitating the need to critically examine various thoughts and theories with a view to synthesizing them in light of the issues involved and the distinct setting we are in. ■

COMMENT

River Maiteb's Location in the Ethio-Eritrean Western Border : Critical Reflections

Elias N. Stebek *

Background

The boundary decision rendered by the Eritrea-Ethiopia Border Commission on April 13th 2002 involves three sectors of the border in dispute namely the *western sector* where Badme is located, the *central sector* (the Zalambesa-Tsorona Front) and the *eastern sector* (i.e. the Bada Front). This comment examines the decision of the Border Commission regarding the *western sect*or of the disputed Ethio-Eritrean border and the grounds thereof, after which brief critical reflections are forwarded.

The Boundary Commission was established in accordance with the agreement signed by Ethiopia and Eritrea on 12 December 2000, hereinafter referred to as the December Agreement. The Commission's decision has eight chapters and three appendices. Chapter I entitled "*Procedural Introduction*" states the agreement of the parties regarding the laws applicable in the settlement of the disputed boundary and deals with pertinent procedural issues including appointment of commissioners, rules of procedure, submission of memorials (June 2001) and counter memorials (September 2001), and hearings (December 2001).

In the submissions presented by the parties, Ethiopia and Eritrea had submitted maps in which both forwarded arguments based on the 1900, 1902 and 1908 colonial treaties. Neither party did contest the validity of the treaties, but merely submitted arguments that its claims are in accordance with these treaties.

Chapter II of the Decision embodies *Substantive Introduction*. Paragraphs 2.6 to 2.9 of Chapter II/A forward introductory background on brief history of the parties, colonial presence of Italy at Assab and Masssawa since 1885

* LL.B, LL.M; Dean, Faculty of Law, St. Mary's University College

and its subsequent inland expansion, the historical setting in which the 1900, 1902 and 1908 treaties were signed between Emperor Menelik II and Italy, Italian occupation of Ethiopia (1935-1941), Post-1941 British Military Administration in Ethiopia and Eritrea and the 1950 UN General Assembly Resolution 390A(V) which brought about Federation of Eritrea to Ethiopia. The substantive introduction gives a brief profile of the setting that surrounded the border dispute despite its apparent imbalance in historical narration that presents Eritrea as historically affiliated to Egypt and the Ottoman Empire before the 1880s [1] thereby undermining the historic bond between the two sides of the border since Axumite civilization.

The decision states that "On 11 September 1962, *Ethiopia declared null and void the Treaties of 1900, 1902 and 1908*"[2] by enacting Order No 6 of 1962 which led to the incorporation of Eritrea in Ethiopia as a province by ending its federal status. It then briefly narrates the armed resistance in Eritrea, the eventual independence of Eritrea on 27 April 1993, the hostilities that broke out in May 1998 and the agreement signed on 12 December 2000 to provide for the permanent termination of military hostilities between the states.[3] It is on the basis of Article 4 of the December Agreement that the Border Commission was established. This comment limits itself to the dispute over the western border, and in particular will focus on the reasoning and findings of the Border Commission regarding the location of River Maiteb and with regard to what the Commission considered as subsequent state practice.

Subject Matter of the Dispute in the Western Sector

The decision of the Border Commission states that the 1902, 1900 and 1908 treaties respectively lay down the western, central and eastern sectors of the boundary although they "have never been implemented by demarcation." According to the 1902 Treaty, the boundary shall run eastwards along the Setit to the point where it is met by River Maiteb (English and Italian versions) referred to as Maiten (in the Amharic version) after which the boundary runs in a generally northeastwards direction to the confluence of the Mareb and the Mai Ambessa rivers. However, "Ethiopia contends that the boundary runs first to the headwaters of the Maiteb and only from there does the boundary run in a straight line to the Northeast." [4]

[1] Eritrea-Ethiopia Border Commission Decision Regarding Delimitation of the Border between The State of Eritrea and The Democratic Republic of Ethiopia (13 April 2002) Paragraph 2.7
[2] *Ibid*, Paragraph 2.10
[3] *Ibid*, Paragraph 11 *ff*
[4] *Ibid*, Paragraph 2.21

The dispute in the western sector of the boundary dispute thus depended on which river is referred to in the 1902 Treaty as Maiteb and Maiten. The different *claim lines* of Ethiopia and Eritrea regarding the point at which the river stated in the 1902 Treaty joins the Setit River have been pointed in the map presented as Map 2 in the Decision.

1. The Commission's Perception of the December Agreement

Article 4, Paragraph 1 of the December Agreement[5] provides the following:

> Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16 (1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

Paragraph 2 of Article 4 further provides:

> The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.

The Commission stated the need to address three core elements of Article 4 of the December Agreement, namely:

a) the treaties specified
b) applicable international law, and
c) the significance of the reference made to the 1964 OAU Summit Resolution.[6]

1.1- Treaty Interpretation

The reasoning of the Commission starts with the statement that "Both Parties agree that the three treaties cover the whole of the boundary between them. The 1900 Treaty covers the central sector, the 1902 Treaty covers the western sector, and the 1908 Treaty covers the eastern sector."[7] The Commission then proceeded to the meaning of these treaties which it considered as the central feature of the dispute.

---

[5] Agreement between the Government of the Federal Democratic Republic of Ethiopian and the Government of the State of Eritrea, December 12, 2000

[6] *Supra* note 1, Paragraph 3.2

[7] *Ibid*, Paragraph 3.3

According to the reasoning of the Commission, interpreter of treaties should be able to establish the 'common will' based on an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[8] The Commission states to have considered the following in construing the treaties:

a) The doctrine of "*contemporaneity"*, i.e interpretation of a treaty 'by reference to the circumstances prevailing when the treaty was concluded' by, *inter alia*, 'giving expressions (including names) used in the treaty the meaning that they would have possessed at that time;[9]
b) The present day state of scientific knowledge as reflected in the documentary material submitted by the Parties in order to illuminate the meaning of words embodied in treaties;[10]
c) Ascertainment of 'the common will' [11] in preparatory documents or even subsequent action of the Parties. [12]

Although the Border Commission accepted the doctrines of *contemporeneity* and *subsequent action* of the Parties, it expressed the requisite precaution that it would take in considering the latter factor, i.e. *subsequent practice or conduct*. The Commission pursued the reasoning in the *Serbian Loans* case [13] in which it was decided that:

> If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the (treaty), but whether the Parties by their conduct have altered or impaired their rights.[14]

The Commission made further reference to various cases [15] and stated that: "the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject to a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning."[16] The Commission noted that the "nature and extent of the conduct effective to produce a variation of the treaty" depend on each case,[17]and it usually involves a Party's being *estopped*

[8] *Ibid*, Paragraph 3.4
[9] *Ibid*
[10] *Ibid*, Paragraph 3.12
[11] *Ibid*, Paragraph 3.13
[12] Palena, 38 ILR 10, at p.89 (1969).
[13] *Supra* note 1, Paragraph 3.6
[14] *Serbian Loans, PCIJ Series A. Nos. 20/21, p.5, at p. 38 (July 1929)*
[15] The Namibia Advisory Opinion of the International Court of Justice, 1971, The Temple of Preah Vihear (Cambodia v. Thailand, Merits) ICJ Reports 1962. P.s) and Arbitral Award in the Dispute concerning certain Bounday Pillars between the Arab Republic of Egypt and the State of Israel, 80 ILR 226 (1988), 27 ILM 1421 (1988)
[16] *Supra* note 1, Paragraph 3.8
[17] *Ibid*, Paragraph 3.9

or *precluded* from challenging the validity and effect of conduct of the other Party after implied or tacit agreement (acquiescence) which is presumed owing to failure to reject (or dissociate from) the conduct under consideration within a reasonable time.

1.2- Applicable International Law

The Border Commission referred to the Kasikili/ Sedudu case [18] and it came up with the conclusion that the stipulation (in Article 4/1 of the December Agreement) that provides for "the determination of the border on the basis of pertinent colonial treaties *and applicable international law"* envisages the application (in addition to treaties) of "*any rules of customary international law that might have a bearing on the case*, for example, prescription and acquiescence *even if such rules might involve departure from the position prescribed by the relevant treaty provisions.*"

Ethiopia had argued that the boundary must be determined "exclusively on the basis of the *three specified Treaties as interpreted in accordance with the rules of International Law* governing treaty interpretation." However, the Commission did not accept Ethiopia's contention and it instead gave a wider interpretation to the words "*applicable international law'"* under Article 4/1 of the December Agreement. According to the Commission, "it is required also to apply those rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of the conduct of the parties."[19]

1.3- Subsequent Conduct of the Parties

The Border Commission took three factors in the examination of the conduct of the parties, namely: *maps*, *effectivités*, and *diplomatic and other similar exchanges and records* including *admissions* before the Commission. The latter factor has not been discussed in detail in the Commission's decision [20] and the decision states the following regarding maps and *effectivités.*

a) Maps

The Commission expressed its awareness "of the caution with which international tribunals view maps", and stated that authoritative maps are those such as the ones that are attached to treaties. According to the Border Commission "The Treaty map annexed to the 1900 Treaty is such a map."[21]

With regard to maps that are not part of a treaty, the Commission has held the following:

[18] Palena, *Supra*, note 12, at 89
[19] *Supra* note 1, Paragraphs 3.14, 3.16
[20] *Ibid*, Paragraph 3.30
[21] *Ibid*, Paragraph 3.18

> The effect of a map that is not part of a treaty will vary according to its provenance, its scale and cartographic quality, its consistency with other maps the use made of it by the parties, the degree of publicity accorded to it and the extent to which, if at all, it was adopted or acquiesced in by the parties adversely affected by it, or the extent to which it is contrary to the interests of the party that produced it. A map that is known to have been used in negotiations may have a special importance. ... [22]

The Commission made reference to the Chamber of the International Court of Justice in the Frontier Dispute Case [23] and it stated that "it is not the maps '*in themselves alone*' which produce legally significant effects, but rather the maps in association with other circumstances."[24] It added, "A map per se may have little legal weight: but if the map is cartographically satisfactory in relevant respects, it may, as the material basis for, e.g., acquiescent behavior, be of great legal significance."

The Commission further addressed the issue of *signature*, i.e. the general shape, silhouette, contour or outline on maps, as distinct … from its particular details.[25] The Commission did not reject reference to *signature* but noted that it ought to be approached with caution. The Border Commission finally examined the impact of disclaimers of maps [26] and stated that they "may influence the decision about the weight to be assigned to the map" without excluding admissibility.

b) *Effectivités*

Effective assertion of legislative, administrative and judicial authority over a disputed area can, according to the Commission, play a role "either as assertive of that state's position or, expressly or impliedly, contradictory of the conduct of the opposing state."[27] The Commission's position on the nature and impact of *effectivités* is the following:

> … There is no set standard of duration and intensity of such (effective assertion of authority). Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on and the extent of any contradictory conduct (including protests) of the opposing State. It is also important to bear in mind that conduct does not by itself produce an absolute and indefeasible title, but only a title relative to that of the competing State. The conduct of one Party must be measured against that of the other. Eventually, but not necessarily, so, the legal result may be to vary a boundary established by a treaty.[28]

[22] *Ibid*, Paragraph 3.21
[23] Case concerning the Frontier Dispute (Burkina Faso v. Mali), ICJ Reports 1986, at p.583, para. 56)
[24] *Supra* note 1, Paragraph 3.22
[25] *Ibid*, Paragraphs 3.23 to 3.25
[26] *Ibid*, Paragraphs 3.26 to 3.28
[27] *Ibid*, Paragraph 3.29; [28] *Ibid*

1.4- Relevance of the 1964 OAU Summit Declaration

The last parts of Chapter III of the Border Commission's Decision deal with the relevance of the reference made by the December Agreement to the 1964 OAU Summit Declaration, and the scope of the Decision. The Border Commission stated that the reference made to the 1964 OAU Summit Declaration doesn't have a particular consequence, other than the inference that "the Parties have thereby accepted that the date as at which the borders between them are to be determined is that of the independence of Eritrea, that is to say, on 27 April 1993."

1.5- Scope of the Border Commission Decision

And finally, the last paragraph of Chapter III of the Border Commission Decision expresses the scope of the decision. It reads:

> The task of the Commission extends both to delimitation and to the making of arrangements for the expeditious demarcation of the boundary (Article 4 paragraphs 2 and 13). The latter aspect of the Commission's work is not covered by the present decision and will be the subject of the next phase of its activities."[29]

2. The Commission's interpretation of Maiteb as Sittona

Chapter VIII of the decision embodies the conclusion of the Border Commission regarding the western sector of the disputed border according to which:

i. "The boundary begins at the tripoint between Eritrea and Ethiopia and the Sudan and then runs into the center of the Setit opposite the (the tripoint, indicated as point 1 in the map annexed)

ii. The boundary then follows the Setit eastwards to its confluence with the *Tomsa* (at point 6)

iii. At that point the boundary turns to the northeast and runs in a straight line to the confluence of the Mareb and the Mai Anbessa (Point 9)." [30]

River Tomsa has not been stated in the Treaty. Nevertheless, the Commission arrived at the conclusion that the term River Maiteb actually referred to the western Maiteb (Point 3)[31] indicated in the Ethiopian claim line, while in fact the Parties had River Sittona (Point 4) in mind. The Commission further pushed the line even eastwards to River Tomsa (Point 6) on the ground that subsequent practice has moved the border towards Tomsa.

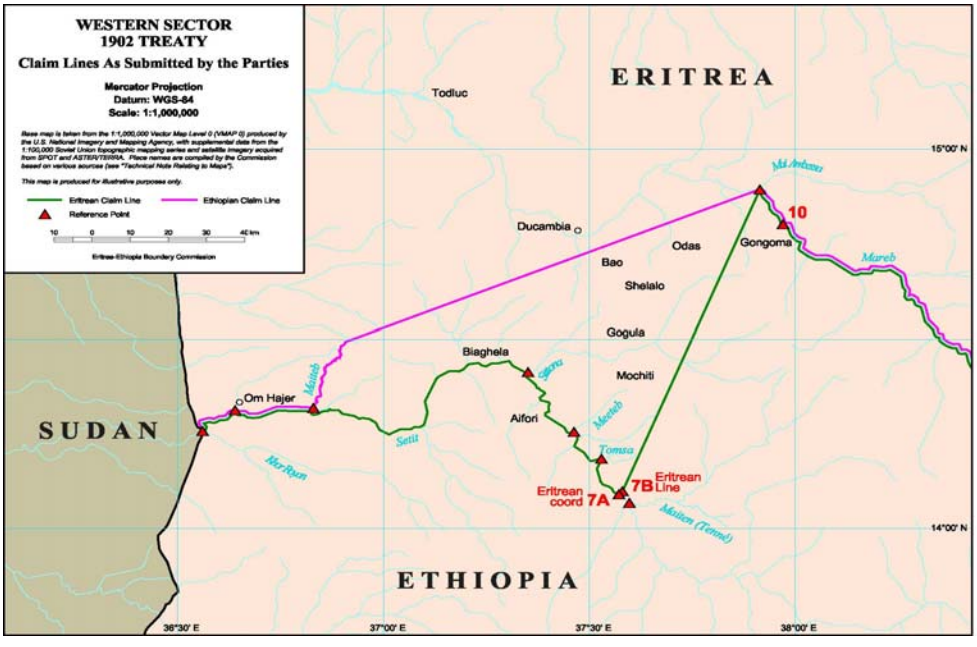
---

[29] *Ibid*, Paragraph 3.37

[30] *Ibid*, Ch VIII Paragraph 8.1

[31] Point 1 is the tripoint between Eritrea, Ethiopia and the Sudan while Point 2 is Om Hajer. As we move eastwards we get Point 3 (River Maiteb), Point 4 (Riber Sittona), Point 5 (River Meeteb), Point 6 (River Tomsa).

Map 2



2.1- The river referred to as 'Maiteb" in the 1902 Treaty

The second paragraph of Article 1 of the 1902 Treaty provides that:

> Commencing from the junction of the khor Um Hagar with the Setit, the new frontier follows this river to its junction with the Maiteb following the latter's course so as to leave Mount Ala Tacura to Eritrea, and joins the Mareb at its junction with the Mai Ambessa.

The last paragraph of the same treaty provision reads:

> The line from the junction of the Setit and Maiteb to the junction of the Mareb and Mai Anbessa shall be delimited by Italian and Ethiopian delegates, so that Cunama tribe belong to Eritrea.

a) Claim lines of Ethiopia and Eritrea

The Amharic version uses "Maiten" instead of 'Maiteb.' The 1902 Treaty was signed in Italian, English and Amharic, and "Ethiopia has not sought to invoke the Amharic version while Eritrea has."[32] Ethiopia contended that "as used in the Treaty, 'Maiteb' refers to the river of that name that reaches the Setit from the northwest at Point 3, from the source of which a straight line is drawn to (the junction of Mereb and Mai Ambessa) Point 9."[33]

[32] *Supra* note 1, Paragraphs 5.5, 5.1533 | [33] *Ibid*, Paragraph 5.13

As stated in the Commission's Decision:

> Eritrea initially maintained that the river designated in the equally authoritative Amharic version of the Treaty is named the Maiten. A river of similar name, the Mai Tenné, joins the Setit at point 8, some 87 kilometers further east that the western Maiteb. … Eritrea later submitted that the boundary line subsequently established and maintained by the Parties was a straight line running from the confluence of the Setit and the Tomsa (Point 6) to Mai Anbessa (Point 9). … Eritrea also suggested that the original Treaty reference to the 'Maiteb' was actually to the Sittona (River, Point 4).[34]

b) The Commission's understanding of River "Maiteb"

The Commission cites various authoritative and reliable maps:

> One contemporary map in particular, the Sketch Map illustrating Article 1 of the Treaty between Great Britain and Ethiopia relating to the Sudan border signed on the same day as the 1902 Treaty involved in the present case, shows clearly in its top right corner the northern terminus of that boundary ending at the Setit and then indicates a short eastward-extending stretch of the Setit, which in its turn, ends at a tributary that the Sketch Map calls the "Maiteb". The same is shown on a map of the Anglo-Egyptian Sudan of 1901 and even more clearly on the so-called Talbot-Colli map of the same year. These maps extend no further east than the Maiten as there presented. Nor is there any evidence that the possession on 15 May 1902 of any map showing a river Maiten (or Mai Tenne) … even further east.[35]

The Commission also cited other maps that locate Maiteb at the point indicated in the Ethiopian claim line. These include:

a. Carta Dimostrativa produced by the Istituto Giograficao Miliare in 1903 (paragraph 5.49),
b. the Captan Miani Map (1905) stated in Paragraph 5.58,
c. Commando del Corpo di Stato Maggiore map (1905), Paragraph 5.59
d. The 1923 Official Map of Ethiopia by Kh. B. Papazian (usually referred to as Haile Selassie Map) Paragraph 5.65,
e. the map accompanied by Governor of Eritrea (Zoli)'s report to the Minister of Colonies in (1929), Paragraphs 5.68 and 5.71.

The Commission admits that the first map on which a river with the name 'Maiten or Mai-Tenne' (Point 8) appeared was in the 1904 Italian Carta Dimostrativa.[36] In spite of all this evidence, the Commission didn't come up with a strong and assertive conclusion. Yet it stated that the term "Maiteb" in the 1902 Treaty refers to River Maiteb as indicated in the Ethiopian claim

[34] *Ibid*, Paragraph 5.15 | [35] *Ibid*, Paragraph 5.18 | [36] *Ibid*

line. Despite its hesitant tone, however, the Border Commission has arrived at the following conclusion regarding "River Maiteb":

> … On the basis of these maps, therefore, it is arguable that the river identified by Ethiopia as the Maiteb (the confluence of which with the Setit is shown at Point 3) is the Maiteb to which the Treaty refers.

2.2- "Maiteb" in words while having Sittona in mind?!

After having admitted that the 1902 Treaty refers to River Maitem and not River Mai-tenne, the Commission refrains from upholding Ethiopia's claim on the ground that the Parties had another river in mind:

> As against this (i.e. the reference made to Maiteb), however, there is more convincing evidence that the Maiteb is not the river which the Parties had in mind. The maps just referred to were not the only ones to likely to have been familiar to the negotiators who were, on the Ethiopian side, the Emperor Menelik and, on the Italian side, Major Ciccodicola. Nor were these maps used in the negotiations.[37]

The Commission stated that the map used during the negotiations could only be the Mai Daro Map (1900) and it stated four reasons [38] to that end, based on which the Commission concluded that "the river named 'Meeteb' and the mountain called 'Ala Tacura' shown on this map could not actually have been situated in the proximity of the western Maiteb. The Commission further substantiated the significance and evidentiary weight of the Mai Daro Map by its similarity with the de Chaurand map of 1894 [39] which is the map "expressly stated to have been the basis for the 1900 Treaty", and which "does not show any Maiteb or Meeteb remotely near the confluence of the western Maiteb and the Setit (Point 3)." The Commission gave credibility to these two maps and explained their difference in naming the same river:

> (The Chaurand map of 1894) also shows a 'Mount Ala Tacura' just north of the river. In these major respects, it is almost identical with the Mai Daro map. The only respect in which both the Mai Daro map and the de Chaurand map differ significantly from later maps is in the name given to the river. What is called in them 'Maitebe' or 'Meeteb' was known even at the time by some as Sittona and was so called on other maps soon afterwards.[40]

The letter written by Martini (Governor of Eritrea) to Ciccodicola (on August 3rd 1902) states the misunderstanding in river names and bears the following conclusion: stated in paragraph :

> In any event, it must be kept in mind that the boundary described in Article 1 of the Convention of 15 May 1902 is in open contradiction with the attri-

[37] *Ibid*, Paragraph 5.19
[38] *Ibid*, Paragraph 5.25
[39] *Ibid*, Paragraph 5.26
[40] *Ibid*

> bution of the Cunama to Italy which is the basis of that Convention and which is explicitly wanted, as essential condition for the modifications of the boundary with England, also by the secret agreement of 22 November of last year. The designation of the boundary in the May Convention cannot, in my opinion, be considered if not as subordinated to the conditions that that boundary be such as to be in harmony with the main stipulation, which is the transfer of the Cunama to Italy. I have to insist particularly on our right to have all the Cunama up to the Sittona.[41]

2.3- Further Italian desire towards Tomsa

In a letter dated 10 January 1906, Martini, Governor of Eritrea, sent the following report to the Italian Ministry of Foreign Affairs:

> (T)he border towards Adiabo is still to be defined on the ground following Article 1 of the … May 1902 (Treaty). Following the intention of the last sentences of the mentioned article and following the present de facto possession, the border can be marked with the line that goes from the confluence Mareb-MaiAmbessa and meets the Setit at the confluence with the torrent Tomsa, which is about thirty kilometers (upstream) to the confluence of the torrent Sittona, erroneously called Maeteb in the Dechaurand [sic] used as the basis for the treaty. ..[42]

The Governor of Italy, Martini, had initially harboured the intention to request for extension of the boundary juncture (87 kilometers eastwards) from Setit-Maiteb to Setit-Sittona. Three years later, however, he had his eyes on River Tomsa (located about 30 kms further east). Nevertheless, the various clashes throughout this period in the area clearly show that there was no Italian *effectivités* in the disputed region (accompanied by Ethiopia's acquiescence) that would imply variation of the 1902 Treaty provision. Ethiopia's claim as shown in its 1923 Official Map indicated western Maiteb as its boundary juncture. A case in point is the Governor of Eritrea (Zoli's) 1929 Report [43] which stated doubts "whether 'Maiteb' 30 kms east of Ombrega, or the 'Meeteb' a further 100 km east, should be regarded as the river mentioned in the 1902 Treaty. Zoli's report included lines based on the respective claims of both parties.

After having reinterpreted the word "Maiteb" into "Sittona" the Commission went further towards what it considered as the object and purpose of the 1902 Treaty.[44] According to the Commission, the 1902 Treaty was yet to be followed by delimitation that would ensure that the Cunama people would be on the Eritrean side of the border.[45]

---

[41] *Ibid*, Paragraph 5.46
[42] *Ibid*, Paragraph 5.60
[43] *Ibid*, Paragraphs 5.68 to 5.71
[44] *Ibid*, Paragraphs 5.29 *ff*
[45] *Ibid*, Paragraph 5.34

3. Findings of the Commission

The findings of the Commission regarding the western sector have been stated in paragraphs 5.83 to 5.95. The conclusions of the Border commission include the following:

> Although Article 1 of the 1902 Treaty refers to a river called the Maiteb, the explicit object and purpose of the Treaty, namely, the assignment to Eritrea of the Cunama tribe, clearly indicates the intention and 'common will' of the Parties that the boundary river should not be the western Maiteb.[46]
>
> …
>
> The Commission considers that the river named "Meeteb" in the Mai Daro map is really the Sittona, which flows into the Setit from the northeast at Point 4 along a primarily east-west course and that the name "Meeteb" was wrongly attached to it. The Commission therefore interprets the name "Maiteb" in the 1902 Treaty as being the present-day Sittona.[47]

The Commission has observed that the term "Maiteb" in the 1902 Treaty refers to the western Maiteb stated in the Ethiopian claim line. However, it has considered it incompatible with the object and purpose of the Treaty that assigns the Cunama into the Eritrean territory. It then reached to the conclusion that the river referred to as River Maiteb in the 1902 Treaty is in fact River Sittona.

Nor is this all. The Border Commission pushed the disputed point further eastwards to Tomsa on the following grounds:

> The Commission has taken into account the many maps presented to it in evidence, but has only given weight in relation to this sector to maps produced by the Parties themselves in the period prior to 1935. It has noted that three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923. However, all the other relevant maps show the Eritrean claim line in accordance with what has, in the present proceedings, come to be called the 'classical' or 'traditional' signature characterized by a straight line from the confluence of the Tomsa with the Setit (Point 6) to Point 9 at an angle of about 28^{0} from true north. There is no record of Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary. These maps amount to subsequent conduct of practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line. [48]

The Commission admits that the classical line drawn from the confluence of River Tomsa and River Setit (Point 6) to the juncture where Rivers Mereb and Mai Ambessa meet "accords more territory to Eritrea than the Cunama actually occupied". However, the Commission attempts to balance this with

[46] *Ibid*, Paragraph 5.83 | [47] *Ibid*, Paragraph 5.85 | [48] *Ibid*, Paragraph 5.88

the Cunama territory left in Ethiopia by this "classical" line.[49] The Commission then sums up its conclusion:

> In short, the Commission concludes that as at 1935, the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along line from Point 6 to Point 9. [50]

The Border Commission finally raised the issue whether developments since 1935 have affected this conclusion. It stated the events from 1935 to 1941 (Italy's Occupation of Ethiopia), the federation between Ethiopia and Eritrea and the events thereafter, and then arrived at the conclusion that nothing in this chain of developments has altered the boundary between the Parties.[51] It further stated the evidence submitted by Ethiopia regarding the friction at Achua Morchiti (1929-32) and Ethiopia's authority exercised over the area as manifested by various activities west of Eritrea's claim line (at Shelalo, Afra, Sheshebit, from Jerba up to Tokomlia, Dembe Dina and Dembe Gunagul and Badme Woreda).[52] However, the Border Commission has not accepted Ethiopia's contention in this regard:

> These references represent the bulk of the items adduced by Ethiopia in support of its claim to have exercised administrative authority west of the Eritrean claim line. The Commission does not find in them evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935.[53]

4. Critical Reflections

4.1-Hierarchy between treaties and customary international law

Treaties are among the primary sources of international law enumerated under Article 38 of the ICJ Statute. Article 38/1 (a/b) states treaties and custom as sources that shall be resorted to for international disputes. However the provision doesn't expressly deal with hierarchy in cases of inconsistency between treaty and principle of customary international law.

According to Starke the order stated under Article 38/1 of the ICJ Statute is generally followed:

> (So far as treaties, custom and general principles recognized by modern legal systems are concerned) "priority would normally be attributed to treaties and conventions expressly recognized by the states concerned provided that the treaty or convention is not in conflict with *jus cogens*. i.e. applicable peremptory norms of international law. If there were no treaties or conven-

[49] *Ibid*, Paragraph 5.89
[50] *Ibid*, Paragraph 5.90
[51] Ibid, Paragraph 5.91
[52] Ibid, Paragraphs 5.92, 5.94, 5.94
[53] Ibid, Paragraph 5.95

> tions applicable, preference would be accorded to established customary rule, while if there were no such rules, recourse could be had to general principles of law recognized by civilized nations. [54]

S. K. Verma holds a similar view that treaty provisions should prevail over customary norms "though there are always attempts to give a harmonious construction, unless the language of the relevant provision or the treaty is unambiguous and the intention is clear." [55] The decision of the Permanent Court of International Justice in the *S.S Wimbeldon case* supports this view:

> In the S.S Wimbeldon case Article 380 of the Treaty of Versailles, by which Kiel Canal was made 'free and open' to vessels of all nations at peace with Germany, was in issue before the Permanent Court of International Justice. In a war between Poland and Russia, German officials stopped the Wimbledon, a British ship carrying munition through the canal to Poland on the ground that by allowing the passage of munition through its territory to a belligerent State, Germany would be compromising its neutrality under customary international law. The court while accepting the obligatory force of this rule, nevertheless held that Article 380 of the Treaty must take precedence over such a rule. The stopping of the vessel of a State, at peace with Germany, amounted to a breach of Germany's obligation under the Treaty of Versailles. [56]

On the other hand, Hugh Thirlway argues that the text of Article 38 of the ICJ Statute does not indicate the existence of hierarchy between custom and treaty, and added, "a proposed provision, indicating specifically that the Court should apply the sources in the order in which they were mentioned in that Article, was rejected during the drafting."[57] Nevertheless, Thirlway noted that "treaty is *lex specialis*, and as such prevails over any inconsistent rules of customary international law." [58]

Hirlway then deals with the issue whether new customary rule to whose formation the parties have contributed overrides treaty provisions:

> If the parties to the treaty have themselves contributed to the development of the new customary rule by acting inconsistently with the treaty, or have adopted the customary proactive in their relations after the rule has become established, then the situation may be analyzed as in effect a modification (or even interpretation) of the treaty. [59]

---

[54] J. G. Starke(1989) *Introduction to International Law* (10th Edition), Butterworths, Singapore p. 54

[55] S. K. Verma (1998) *An introduction to Public International Law*, Prentice-Hall, New Delhi p. 35

[56] *Ibid*

[57] Hugh Thirlway (2003) *The Sources of International Law*, in Malcolm D. Evans (ed), *International Law* (Oxford University Press, p. 136

[58] *Ibid*, 137

[59] *Ibid*

Malcolm Shaw's interpretation leans towards giving relatively equal status to treaties and custom. "The question of priority as between custom and treaty law is … complex. As a general rule, the latter in time will have priority. Treaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and be replaced by new customary rules." [60]

As stated earlier under Section 1.2, The Eritrea-Ethiopia Border Commission has resorted to a wider interpretation of the words "applicable international law" under Article 4/1 of the December Agreement. According to the Commission the phrase allows the application of "*any rules of customary international law that might have a bearing on the case*, for example, prescription and acquiescence *even if such rules might involve departure from the position prescribed by the relevant treaty provisions."*

Articles 31, 32 and 33 of the 1969 Vienna Convention on the Law of Treaties lay down general rules of interpretation of treaties. The first question that comes to one's mind in light of these provisions pertains to the validity of the Border Commission's decision which declared that "River Maiteb" in the 1902 Agreement must be interpreted as "River Sittona." Does this amount to changing the content of the Treaty? If mistake is to be invoked, does an arbitration organ have the mandate to vary terms of a treaty?

As indicated earlier, the Commission admits that "three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923." However, it relies on what it called "'classical' or 'traditional' signature characterized by a straight line from the confluence of the Tomsa with the Setit (Point 6) to Point 9 at an angle of about 28^{0} from true north" and it stated that "there is no record of Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary." The Commission then proceeds to the conclusion that "*these maps amount to subsequent conduct of practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line.*"[61] And finally, "the Commission concludes that as at 1935, the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along line from Point 6 to Point 9." [62]

This conclusion raises queries regarding the peripheral value given to treaties and the excessive weight that has been accorded to maps as "evidence of subsequent state practice." Even further, the decision evokes interest for closer scrutiny whether the elements of custom have been fulfilled in what

[60] Malcolm Shaw (2003) International Law, 5th Ed., (Cambridge Univ. Press) p. 116

[61] *Supra* note 1, Paragraph 5.88

[62] *Ibid*, Paragraph 5.90

the Commission regarded as "subsequent conduct of state practice evidencing mutual acceptance of the *Tomsa-Setit* juncture.

4.2- State practice and *opinio juris*

Article 38/1 (b) of the ICJ statute that reads "International custom, as evidence of *general practice accepted as law*" clearly bears the *material element* of 'state practice' which ought to be general and consistent, and secondly, the *mental element* (*opinio juris sive necessitatis* i.e. the intention to be bound) if a given conduct is to be regarded as customary norm of international law. Accordingly, the Border Commission's general statement that considers the so-called "classical" or "traditional" signature as evidence of state practice needs closer examination. Various questions can be reflected upon. Could the concept of Ethio-Eritrean boundary be envisaged under the Italian Occupation (1935-41)? Does internal boundary between provinces or regions of a country (1952-1993) constitute boundary under international law? If not, how can the so-called "traditional signature" apply to the post-1935 period? Was there consistent state practice between Eritrea and Ethiopia that proves mutual acceptance of the Tomsa-Setit juncture? Has there ever been intention (on the part of Ethiopia) to be bound by the Tomasa-Setit confluence from 1902 to 1935? Can the concept of binding (subsequent) state practice be perceived in isolation from *opinio juris*?

Another pertinent question would be whether the Cunama population remained constant and whether the area inhabited by them remained unchanged for a century throughout the period from 1902 until the Border Commission's decision in 2002. One may also validly raise the question why the earliest Italian and English maps consistently indicated western Maiteb instead of Sittona as the border juncture if the latter was the river which the Parties had in mind while concluding the 1902 Treaty.

4.3- Acquiescence and Estoppel

According to the Border Commission, "there is no record of Ethiopian objection" to the "traditional (classical)" signature [63] and the "maps amount to subsequent conduct of parties evidencing their mutual acceptance of a boundary" that corresponds to the Eritrean claim line. The issue pertaining to "absence of objection" is related to acquiescence. In the *Gulf of Marine case*, the Chamber of the International Court defined acquiescence as "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent' and as founded upon the principles of good faith and equity." [64]

[63] *Ibid*, Paragraph 5.88
[64] ICJ Reports, 1984, pp. 246, 305; ILR, p.74

Shaw noted that "Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate." [65] Shaw highlights opinions of scholars in this regard:

> Some writers have maintained that acquiescence can amount to consent to a customary rule and that the absence of protest implies agreement. In other words, where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimizing process.[66]

Preah Vihear is a leading case on *estoppel*. The frontier between Cambodia and Thailand which was agreed upon under a 1904 Treaty was found to be ambiguous regarding the location of the *Preah Vihear* temple area. After the Thailand Government received copies of maps from French authorities it accepted and requested for further maps. Various incidents including official visit of the temple by Thai prince while French flags were flown were considered by the ICJ as tacit acceptance of the temple's location in Cambodia. In effect Thailand was *estopped* from contesting the frontier that puts the temple in Cambodia.[67]

Although the doctrines of *acquiescence* and *estoppel* seem to be of use in situations of uncertainty and ambiguity, "it would not appear correct to refer to *estoppel* as a rule of substantive law." [68] A very important issue to reflect upon at this juncture is therefore whether the Border Commission has used these principles in the absence of a treaty provision that deals with issues in dispute? If acquiescence is to be perceived as tacit acceptance of the Tomsa juncture as at 1935, the question remains to be whether it was "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent' and as founded upon the principles of good faith and equity" as in the *Gulf of Marine* case (1984).

There are certain basic questions that call for further analysis. Was there an objective and subjective setting (in the Ethio-Eritrean context) comparable to the *Preah Vihear* case that would imply tacit consent through subsequent state practice? And did the Border Commission use such principles for the purpose of interpretation of the 1902 Treaty? Or, did it alter the content of Article 1 of the 1902 Treaty rather that interpreting it?

Concluding Remarks

The core point of observation that captures our attention is whether the decision of the Border Commission (with regard to the western sector of the dis-

[65] Shaw, *Supra* note 60, pp. 84, 85
[66] *Ibid*, 85
[67] ICJ Reports, 1962, ILR
[68] Shaw , *Supra* note 13, pp. 439, 440

puted border) amounts to interpretation of the 1902 Treaty. The ordinary meaning that can be given to River Maiteb is clear, and the Border Commission has observed that it refers to the Maiteb stated in the Ethiopian claim line.

It is to be noted that the assignment of the Cunama into Eritrea cannot be regarded as the object and purpose of the Treaty, but among the terms of the Treaty. Apparently, Emperor Menelik signed the 1902 Treaty not for the sake of assigning the Cunama inside Eritrea but to delimit boundaries beyond which Italy would not keep on encroaching. The object and purpose of the Treaty was thus to agree on the limits beyond which Italy could not go, and as a result bring about peace.

Had demarcation begun immediately after the 1902 Treaty, efforts could have been made to assign most of the Cunama in the Eritrean side of the border. And some curves could also have possibly been renegotiated in the process. Unfortunately, however, events thereafter witnessed Italy's intentions beyond the 1900, 1902 and 1908 frontiers which ultimately developed onto the Maichew War and the 1935-41 occupation. And nearly a century after the frontier treaties, the time-bomb behind the ambiguity of the 1902 Treaty had its adverse contribution towards the 1998 border conflict which claimed lives of tens of thousands of citizens from both sides, who are indeed closely bound by shared roots, history, culture and intertwined destiny.

The Border Commission's decision seems to have exacerbated the difficulties rather than curbing them. When the dust settles, and when reason, pragmatism, reconciliation and regional integration become pervasive, these tragic chapters can indeed become events of the past. Meanwhile, the extent to which both Parties give primacy to reason and forward looking optimism would determine whether the Border Commission's decision is yet another explosive lying under our feet. ■

ICJ Judgment (1994) on the Libya/Chad Territorial Dispute:

A Brief Overview and Observations

Elias N. Stebek *

Introductory remarks

The frontiers of African States as we know them today would have been drastically different if it were not for the (post-1880's) European Scramble for Africa and the various treaties concluded by colonial powers between themselves, and in rare cases with African States. Many communities in Africa had not yet developed to the level of kingdoms or other forms of political entities in the present sense of the term, and in effect, there could have been expansion or contraction of such entities in due course of subjugation or assimilation among neighboring peoples.

One may assume that many boundaries would have followed shared historical, cultural, religious and linguistic identities. However, the path that German and Italian populations (for example) have gone through to arrive at their current boundaries clearly indicates that the march towards stable demographic frontiers could have possibly taken longer.

Colonial boundaries are thus bittersweet. On the one hand, relatives were arbitrarily given citizenships of two neighbouring States in spite of their bond. And on the other hand, delimitation of boundaries based on demographic factors would have resulted in hundreds of mini-states that could have still faced internal and external turmoil owing to polarized demands for independence on the ground of minuscule differences and variations in identity. Wisdom and pragmatism have thus forced African States to respect the boundaries that they have inherited from the colonial powers despite the shortcomings of the artificial fences imposed on them. Such was the decision of African Heads of States during the Cairo Declaration (1964). The same principle of respect to colonial boundaries has been enshrined in the Charter of the Organization of African Unity (1963), and Article 4/b of the (2000) Constitutive Act of the African Union.

Various episodes of history have determined the frontiers of African States. For example, the colonization of neighbouring peoples by the same colonial power has led to the unification of neighbouring clans, nationalities,

* LL.B, LL.M; Dean, Faculty of Law, St. Mary's University College

sovereign entities and kingdoms after independence. Such is the case of the old civilizations of Tripolitania and Cyrenaica whose shared history under the Ottoman Empire and colonization by Italy after 1912 enabled these two 'provinces' and Fezzan to be regions of Libya. It is to be noted the current borders of most North African states might have been drastically different if it were not for fall of the Ottoman Empire as a result of the First World War. North Africa could either have had smaller states based on their independent peripheries of accountability to the Ottoman Empire, or a wider assimilation depending on the strength and magnitude of the Pan-Arabic and Pan-Islamic mindset upon independence.

The Libya/Chad territorial dispute is thus a typical outcome of the colonial legacy. In the territorial dispute before the International Court of Justice (1990-1994), Libya mainly invoked the issue of coalescence of rights and titles, while Chad underlined, *inter alia*, claimed the rights it has succeeded from the treaty concluded while France was the colonial power of French Equatorial Africa. This comment briefly highlights the issue of jurisdiction, the contentions of both States, findings of the Court, and reasoning of the Court followed by critical observations.

1. Territorial Dispute and ICJ's Jurisdiction

1.1 The Territorial Dispute: Aouzou Strip

The population of Northern Chad[1] and Southern Libya have shared roots. The term "Aouzou strip" is not designation of a region based on demographic

[1] "Traditionally, the region around Lake Chad was a focal point for trans-Saharan trade routes. Arab traders penetrated the area in the 7th cent. A.D. Shortly thereafter, nomads from North Africa, probably related to the Toubou, entered the region; they eventually established the state of Kanem, which reached its zenith in the 13th cent. Its kings converted to Islam, the religion also practiced by the successor state of Bornu. The Wadai and Bagirmi empires arose in the 16th cent.; they warred with Bornu and in the 18th cent. surpassed it in power. By the early 1890s all of these states, weakened by internal dissension, fell under the control of the Sudanese conqueror Rabah el Zobaír."

"French expeditions advanced into the region in 1890, and French sovereignty over Chad was recognized by agreements among the European powers. In 1900, French forces defeated Rabah's army, and by 1913 the conquest of Chad was completed; it was organized as a French colony in French Equatorial Africa and remained under military rule. Chad was later linked administratively with Ubangi-Shari (now the Central African Republic), but in 1920 it again became a separate colony. It was granted its own territorial legislature in 1946. In the French constitutional referendum of 1958, Chad chose autonomy within the French Community. Full independence was attained on Aug. 11, 1960, with Ngarta Tombalbaye as the first president."

Chad, History (Encyclopedia) Accessed March 19, 2009 http://www.infoplease.com/ce6/world/A0857238.html

considerations. The strip of land that was seized by Libya (known as the Aouzou Strip) was the center of dispute between the two States. Eventually, Libya's claim went beyond the Aouzou Strip and by the time the dispute was brought to the International Court of Justice, the territory claimed by Libya (during the ICJ adjudication) included the entire *BET* (the Borkou, the Ennedi and the Tibetsi) *Region*. In addition to series of Libyan military operations until the dispute was settled by ICJ decision in 1994, factional polarities made Chad vulnerable to incessant political instability and civil wars starting from 1963 during which the FROLINAT (*Front de libération Nationale*), with the support of Libya started its rebellion against Tombalbaye's government.

The strip (as stated in ICJ's judgment)[2] is mainly the area of land that is between the frontier line in the 1919 Anglo-French Convention line which is now upheld in the 1994 ICJ decision and the 1935 Franco-Italian Treaty (sometimes referred to as the Laval-Mussolini Treaty) line, which didn't enter into force because it was not exchanged between the States even if both States had ratified it.[3]

Various efforts were made to facilitate negotiations towards the peaceful settlement of the territorial dispute. The efforts made by the Organization of African Unity towards negotiations and mediation were stronger and more effective than those made by individual governments. In 1977, the Organization of African Unity set up a commission to look into the border dispute. In 1981, the OAU attempted to replace Libyan forces by pan-African peacekeeping force, but in vain. Despite escalated fighting between Chad and Libya, OAU managed to mediate cease fire in 1987 which came into effect in September 1987.

Unfolding events witnessed Talks in Gabon (July 1988) and resumption of diplomatic relations since October 1988. It was under such setting that Libya and Chad concluded a Framework Agreement (August 1989) to peacefully settle their territorial dispute, and then opted to refer their territorial dispute to the International Court of Justice in August-September 1990.

---

[2] International Court of Justice, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/ Chad*) Judgment of 3 February 1994 , Paragraph 69

[3] One of the episodes of history that had impact on the Chadian/Libyan border was Italy's invasion of Ethiopia in 1935. During the same year, France and Italy had signed a boundary treaty that had put most parts of the Aouzou Strip into Libya. The treaty was ratified in both States, but due to the French non-recognition of Mussolini's act of invading Ethiopia and other subsequent factors, the ratified treaty was not exchanged between the signatories. As a result, the treaty could not be in force, and Libya's legal ground to claim the Aouzou Strip has been substantially weakened as a result.

1.2 Jurisdiction

The International Court of Justice based its jurisdiction on two notifications (from Libya and Chad) of the Framework Agreement (*Accord-Cadre*) on the Peaceful Settlement of the Territorial Dispute that was concluded between Libya and Chad on 31st August 1989.[4] Libya requested *decision upon the limits* of the respective territories of the parties "in accordance with the rules of international law applicable in this matter." And, Chad relied as a basis for the court's jurisdiction principally on Article 2/1 of the 31 August 1989 Accord-Cadre, and "subsidiarily, on Article 8 of the Franco-Libyan Treaty of Friendship and Good Neighborliness of 10 August 1955. Chad requested the Court to *determine the course of the frontier* between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties."

The legal grounds that led the parties towards the decision to resolve their territorial dispute peacefully (as stated in the preamble of the Framework Agreement) are:

a) "[T]he resolution of the Organization of African Unity (OAU), in particular resolution AHG/Res. 6 (XXV) on the Libya /Chad territorial dispute" and,

b) [T]he fundamental principles of the of the United Nations, namely:
   - Peaceful settlement of international disputes
   - Sovereign equality of all States,
   - Non-use of force or threat of force in relations between States;
   - Respect for the national sovereignty and territorial integrity of each State;
   - Non-interference in internal affairs.

According to the Framework Agreement, The parties undertook "to settle first their territorial dispute by all political means, including conciliation, within a period of approximately one year, unless the Heads of State otherwise decide."[5] The Framework Agreement further provided that "In the absence of a political settlement of their territorial dispute, the two parties undertake to submit the dispute to the International Court of Justice."[6]

---

[4] The ICJ received the notifications from Libya (on 31 August 1990) and Chad (on 3 September 1990) and a letter from the Agent of Chad on September 20th 1990. Both States agreed that "the proceedings had in effect been instituted by two successive notifications of the Special Agreement constituted by the Accord-Cadre of 31 August 1989."

[5] Art. 1, Framework Agreement (*Accord-Cadré*) on the Peaceful Settlement of the Territorial Dispute between Libya and Chad (31 August 1989)

[6] *Ibid*, Article 2(a)

Both Parties accepted the jurisdiction of the Court on the basis of the *Accord-Cadre*. However, Chad has added that, subsidiarily, the jurisdiction of the Court is also based upon Article 8 of the 1955 Treaty which provides that:

> 'Such disputes as may arise from the interpretation and application of the present Treaty and which may prove impossible to settle by direct negotiations shall be referrd to the International Court of Justice at the request of either Party, unless the High Contracting Parties agree upon some other methods of settlement.'[7]

The jurisdiction of the court as conferred upon it by the *Accord-Cadre* has not been contested, and the issue of additional ground of the Court's jurisdiction has not been considered by the Court.

Moreover, Articles 2/b to 6 of the Framework Agreement embodied various commitments of both parities regarding measures and monitoring schemes that would de-escalate the tension and conflict and stabilize peace and order while adjudicatory peaceful settlement is underway.[8] And after the decision of the International Court of Justice, efforts were made to monitor withdrawal of Libyan forces from Aouzou Strip.

2. Issues of Contention

2.1 Libya's core arguments

Libya contested the existence of boundary with Chad, and argued that there is no boundary in the contested region (East of Tuommo) by virtue of any existing international agreement, and requested for the *determination of* the boundary. Libya considered the case as *attribution* of territory, while Chad considered it as *location* of boundary.

Libya argued that the territory is not *terra nullis*. The title of the territory was vested in peoples inhabiting it; i.e. tribes and confederations of tribes owing allegiance to the *Senoussi Order* an order that accepted the Senoussi leadership and fought encroachments of France and Italy.

[7] *Supra* note 2, Paragraph 22

[8] The commitments include the following:

a) Withdrawal of forces (to distances to be agreed on – Art. 2/c) from the positions in the disputed regions, under the supervision of a commission of African observers, and to refrain from establishing any new presence in any form in the said region (Art. 2/b);
b) Observing the concomitant measures until the International Court of Justice hands down a final judgment on the territorial dispute (Art. 2/d);
c) Release of all prisoners of war (Art. 3),
d) Sustaining cease fire and restraint from all kinds of hostilities, particularly: media campaign, intervention in the internal and external affairs of the other State, refrain from assisting hostile forces in either of the two countries, and proceed to treaty of friendship and good neighborliness (Art. 4)

The *Senoussi Order* is a religious confederation founded around early 19th Century and welded good influence and a certain authority in North and North-East Africa. These indigenous peoples were religiously, economically and culturally part of the Libyan Peoples. The community of titles of these indigenous peoples had been transferred to the Ottoman Empire until 1912 after which Italy acquired the title, and ultimately, the title has been transferred to Libya since 1951. In short Libya claimed the coalescence of rights and titles.

2.2 Chad's claims

Chad's application (on September 3rd 1990) stated that its boundary with Libya has already been determined by the August 10th 1955 Treaty, and requested the Court to locate the boundary according to the treaty.

In the alternative, Chad claimed that even before 1955, France had acquired *effectivités* (i.e. peaceful and continuous exercise of state power) over the area under dispute. Chad further stated that the existence of boundary was not in dispute until the 1970s.

2.3 Other issues considered by the court

a) The existence of the 1955 Treaty is not an issue in dispute.
b) Libya's argument of inexperience (when it signed the 1955 Treaty) has not been pushed to the extent of invoking invalidity of the treaty itself.
c) The 1955 Treaty did not only recognize treaties in force on 24th December 1951 because there was no express statement to that effect. In fact, the minutes indicated the acceptance of an Agreement concluded in 1919.
d) The ICJ further considered whether the conduct of and the relations between Libya and Chad after the 1955 Treaty negated the terms of agreement in the Treaty. The Court found that the conclusion of a treaty in 1966 didn't indicate territorial disputes. Moreover, Libya never contested UN documents that recorded the area of Chad to be 1,284,000 square miles since Chad's independence in 1960.

3. Findings and Reasoning of the Court

3.1 Findings of the ICJ

The Court decided that the 1955 Treaty wished to define common frontiers. Reference to intertemporal law and examining the history of the dispute have not been found to be necessary to render judgment, because the 1955 Treaty was considered to be the basis of the Court's decision. And the Court (in paragraphs 57 to 65) stated the instruments that shall be the basis of delimitation. On February 3rd 1994, the International Court of Justice found that the

Treaty of Friendship and Good Neighbourliness that was concluded between France (the Colonial power of French Equatorial Africa) and Libya on 10 August 1955 *defines and determines* the course of the boundary between the Chad and Libya.

The Court (by votes 16 to 1) declared that the boundary between Libya Chad "is *defined* by the Treaty of Friendship and Good Neighbourliness concluded on 10 August 1955 between the French Republic and the United Kingdom of Libya."[9] Sixteen judges of the ICJ including the Court's President, Vice-President were in favour of the decision; and three of them appended separate opinions arriving at the same conclusion regarding the findings of the Court. However, Judge ad hoc Sette-Camara gave a dissenting opinion.

2.1– Reasoning of the Court

Under paragraphs 17 to 21 of its Judgment, the Court states the submissions of Libya and Chad. These paragraphs state Libya's contention that there is no existing boundary between Libya and Chad and its request for the *determination of* boundary. They also state Chad's submission that there is an existing boundary which can be *located*.

Libya's claim is based on *coalescence* of rights and titles. Libya contended that the indigenous inhabitants, the Senoussi Order, had rights and titles over the contested region, which according to Libya was transferred to the Ottoman Empire, and then to Italy in 1912. And upon independence, Libya claimed to have succeeded these rights and titles since 1951.

Chad, on the other hand, invoked the Treaty of Friendship and Good Neighbourliness that was concluded by France and Libya on 10 August 1955. Moreover, Chad alternatively submitted that "the line delimiting the zones of influence in earlier treaties referred to in the 1955 Treaty had acquired the character of boundaries through French *effectivités*" (i.e. peaceful and continuous exercise of State power)" which according to Chad can be a valid legal basis for Chad's claims irrespective of treaty provisions.

a) The 1955 Treaty and its significance in the decision of the case

Background

Paragraphs 35 to 56 of the Court's decision state the negotiations opened in 1955 between Libya and France and analyze the treaty in relation with the various issues involved in the border dispute. In November 1954, "Libya had informed France that it did not intend to renew a provisional military arrange-

[9] *Supra* note 2, Paragraph 77

ment of 24 December 1951 under which French forces remained stationed on Libyan territory, in the Fezzan." And France had the objective of putting an end to "the longstanding disagreement between France and Italy" with regard to the frontier resulting from the Anglo-French agreements of 1898, 1899 and 1999 (stated in paragraphs 28 and 31 of the Judgment). The Court noted that "obtaining Libyan acceptance of those agreements, which entailed recognition of the inapplicability of the non-enforceable Treaty of 1935, was important to the French."[10] (Paragraph 35).

Validity of the treaty

The Court in Paragraph 36 observed that "*Neither Party questions the validity of the 1955 Treaty* nor does Libya question Chad's right to invoke against Libya any such provisions thereof as relate to the frontiers of Chad."[11]

> Libya has contended that, at the time of the Treaty's conclusion, it lacked the experience to engage in difficult negotiations with a Power enjoying the benefit of long international experience. On this ground, Libya has suggested that there was an attempt by the French negotiators, to take advantage of Libya's lack of knowledge of the relevant facts, that Libya was consequently placed at a disadvantage in relation to the provisions concerning the boundaries, and that the Court should take this into account when interpreting the Treaty; it has not however taken this argument so far as to suggest it as a ground for invalidity of the Treaty itself.[12]

Article 3 of the Treaty and Annex I

Paragraph 37 states that the 1955 Treaty is "a complex treaty, comprised, in addition to the Treaty itself, four appended Conventions and eight annexes; it dealt with a broad range of issues concerning the future relationship between the two parties. It was provided by Article 9 of the Treaty that the Conventions and Annexes appended to it formed an integral part of the Treaty. One of the matters specifically addressed was the question of frontiers, dealt with in Article 3 and Annex I."

Article 3 of the 1955 Treaty reads as follows:

> The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. 1)."

In paragraph 38, the Court considers "Article 3 of the Treaty, together with the Annex to which that Article refers" as decisive regarding the outcome of

[10] *Ibid*, Paragraph 35 | [11] *Ibid*, Paragraph 36 | [12] *Ibid*

the case. The Court's reasoning reads "If the 1955 Treaty did result in a boundary, this furnishes the answer to the issues raised by the Parties: it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the Parties and to the request of Chad to determine the course of the frontier."

As stated in Paragraph 40 of the judgment, Annex I of the Treaty comprises an exchange of letters and reference to the following:

a) the Franco-British Convention of 14 June 1898;
b) the Declaration completing the same, of 21 March 1899;
c) the Franco-Italian Agreements (Exchange of Letters) of 1 November 1902;
d) the Convention between the French Republic and the Sublime Porte, of 12 May 1910;
e) the Franco-British Convention of 8 September 1919; and,
f) the Franco-Italian Arrangement of 12 September 1919.

Interpretation of the term 'recognize' in Article 3

The Court recalled customary international law as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties (paragraph 41) and stated that the principles of good faith and ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The Court then observed (paragraph 42) that according to Article 3 of the 1955 Treaty, the parties "recognize *[reconnaissent]* that the frontiers ... are those that result" from the international instruments annexed to the 1955 Treaty. "The word 'recognize' used in the Treaty indicates that a legal obligation is undertaken. To *recognize* a frontier is essentially to '*accept*' that frontier, that is, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future."

According to the Court, Article 3 of the 1955 Treaty would be deprived of its ordinary meaning if according to Libya's contention "only some of the specified instruments contributed to the definition of the frontier, or that a particular frontier remained unsettled." The Court (paragraph 43) thus observed that "[b]y entering into a treaty the parties recognized the frontiers to which the text of the Treaty referred; the task of the Court is thus to determine the exact content of the undertaking entered into."

Libya (paragraph 44) argued that "only the Franco-Ottoman Convention of 1910 and the Franco-Italian Agreement (1919) had produced frontiers binding on Libya at the time of independence, and that such frontiers related to territories other than those in issue in this case", and further contested the application of the 1899 Franco-British Declaration which, according to Libya "merely defined, north of the 15th parallel, a line delimiting spheres of influ-

ence, as distinct from a territorial frontier." Libya further argued that the 1919 Franco-British Convention does not confer any other status, and also contested the 1902 Franco-Italian Exchange of letters on the ground that it "was no longer in force, either because Italy renounced all rights to its African territories by the 1947 Peace Treaty …, or for lack of notification under Article 44 of that Treaty".

The Court did not accept Libya's arguments on the ground that the issue whether or not the instruments attached to the 1955 Treaty determined boundaries was irrelevant.[13] The Court stated that if any one of the instruments did not have the status of determining territorial boundary, the 1955 "agreement of the parties to '*recognize*' it as such invests it with a legal force which it had previously lacked." In paragraphs 46, 47 and 48 the Court rejected Libya's request regarding the plural form of the term "frontiers" in Article 3 of the 1955 Treaty, which according to Libya indicates the intention of the parties to delimit "some of their frontiers, not that of the whole of the frontier."

The issue of annexed instruments not in force (en vigueur)

One of the issues raised by Libya was the argument that "the instruments mentioned in Annex I …were no longer in force at the relevant date." The Court did not accept this contention [14] on the ground that "Article 3 does not refer merely to the international instruments '*en vigueur*' (in force) on the date of the constitution of the United Kingdom of Libya, but to the international instruments '*en vigueur*' on that date "*tels qu'ils sont définis*" (as listed) in Annex I."

The court observed that "[t]o draw up a list of governing instruments while leaving to subsequent scrutiny the question whether they were in force would have been pointless." The reasoning added, " It is clear to the Court that the parties agreed to consider the instruments listed as being in force for the purposes of Article 3, since otherwise they would not have referred to them in the Annex." The Court substantiated its reasoning by the fact that the "non-ratified Treaty of 1935, which was never *en vigueur* and is not mentioned n the Annex."

The Court added that the intention of the parties "to reach a definitive settlement of the question of their common frontiers" is conveyed in the text of Article 3 of the 1955 Treaty, and that "any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness." [15]

[13] *Ibid*, Paragraph 45 | [14] *Ibid*, Paragraph 50 | [15] *Ibid*, Paragraph 51

b) The frontier line (paragraphs 57-65)

The judgment considers the Franco-British Declaration of 1899, and discusses the *Livre jaune* published a few days after the adoption of that Declaration by French authorities that had the text of the Declaration including a map.[16] The Court observed that "the question of the position of the limit of the French zone may be regarded as resolved by the Convention of 8 September 1919 signed at Paris between Great Britain and France [17] supplementary to the 1899 Declaration signed in London on March 21, 1899." The Court explains the variations in the instruments regarding the frontier line (paragraph 60) and "concludes that the line described in the 1919 Convention represents the frontier between Chad and Libya to the east of the meridian 16^0 east. To the west of that meridian, the court examined the Franco-Italian Exchange of Letters of 1 November 1902 and ultimately observed that the map referred to in the Exchange of letters "could only be the map in the *Livre jaune*, which showed a pecked line indicating the frontier of Tripolitania. That line must therefore be examined by the Court."[18]

In paragraphs 63 to 65, the Court indicated "how the line which results from the combined effect of the instruments listed in Annex I to the 1955 Treaty is made up." The court stated that "[i]t is clear that the eastern endpoint of the frontier will lie on the meridian 24^0 east, which is here the boundary of the Sudan. To the west, the Court is not asked to determine the tripoint Libya-Niger-Chad; Chad in its submissions merely asks the Court to declare the course of the frontier "as far as the fifteenth degree east of Greenwich."[19]

The conclusion of the court[20] with regard to the frontier line is that it shall be determined "by the Anglo-French Convention of 8 September 1919. The Court then ruled that "the boundary is a straight line from the point of intersection of the meridian 24^0 east with the parallel $19^030'$ north to the point of intersection of the meridian 16^0 east with the Tropic of Cancer." And "From the latter point, the line is determined by the Franco-Italian exchange of letters of 1 November 1902, by reference to the *Livre jaune* map" which "runs towards a point immediately to the south of Toummo; before it reaches that point, however, it crosses the meridian 15^0 east, at some point on which from 1930 onward, was situated ... between French West Africa and French Equatorial Africa."

c) Attitudes of the parties subsequent to the treaty (paragraphs 66-71)

The Court [21] further examined the "subsequent attitudes of the parties to the question of frontiers" and found that "no subsequent agreement, either be-

[16] *Ibid*, Paragraph 58
[17] *Ibid*, Paragraph 59
[18] *Ibid*, Paragraph 61
[19] *Ibid*, Paragraph 63
[20] *Ibid*, Paragraphs 64, 65
[21] *Ibid*, Paragraph 66

tween France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty." On the contrary, the Court found that the treaty between Libya and Chad on 2 March 1966 "refers to friendship and neighborly relations between the Parties, and deals with frontier questions." The Court cited Articles 1 and 2 of the 1966 Treaty that "mention 'the frontier' between the two countries, with no suggestion of there being any uncertainty about it." The Court further cited Articles 4 and 7 of the 1966 Treaty that deal with frontier permits and frontier authorities, and concluded that "[i]f a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty." The judgment states the agreements in 1972, 1974, 1980 and 1981 in support of the finding that subsequent agreements implied the existence of frontiers between the two States. [22]

Moreover, the Court further stated that "[t]he report for 1955[23] shows the area of Chad's territory as 1,284,000 square kilometers, which expressly includes 538,000 square kilometers for the BET (Borkou, Ennedi, Tibesti Region)."[24] It further mentioned the United Nations publications which from the year of independence of Chad in 1960 "state the area of Chad as 1,284,000 square kilometers." [25] The court concluded that "Libya did not challenge the territorial dimensions of Chad as set out by France" which consider the BET Region as part of the territory of Chad in accordance with the 1955 Treaty.

On the contrary, Chad has consistently adopted the position that its boundary includes the Aouzou Strip.[26] The Court states the consistent claim of the Aouzou Strip in Chad's complaints submitted to OAU (1977), and complaints to the UN General Assembly about the encroachments alleged to have been made into its territories by Libya "[i]n 1977 and 1978, and in each year from 1982 to 1987)." The Court further noted Chad's repeated complaints to the Security Council, in 1978, 1983, 1985 and 1986, thereby indicating the consistency of Chad's conduct in relation to the location of its boundary."[27]

d) Permanence of boundaries despite temporary treaty

Article 11 of the 1955 Treaty provides that the Treaty "is concluded for a period of 20 years." The last paragraph of the provision further provides that the Treaty "can be terminated by either Party 20 years after its entry into force, or at any later time, provided that one year's notice is given to the other Party." Nevertheless, the Court regarded the effects of the Treaty with

[22] *Ibid*, Paragraph 67
[23] United Nations doc. ST/TRI/SER.A/12, p.66
[24] *Supra* note 2, Paragraph 68
[25] The decision indicates Yearbook 1960, p.693, App. I
[26] *Supra* note 2, Paragraphs 69,70
[27] *Ibid*, Paragraph 71

respect to the delimitation of boundaries as permanent independent of the fate of the 1955 Treaty.

> … The Treaty, must be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries…. (paragraph 72)
>
> A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised, the boundary remains. .. [T]he continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.'…[28]

3.3- Separate Opinions

Judge Ago forwarded a separate declaration[29] and added his vote to the majority opinion in favour of Chad. He stated his view and conviction that, at the time of the independence of Libya, its southern frontier, i.e. the French possessions of West Africa and Equatorial Africa "had not yet been the subject of a treaty delimitation between the parties then directly concerned." However Judge Ago recognized that "by concluding the Treaty of 10 August 1955 with France, the Government of Libya, which was primarily interested in other aspects of the body of questions to be settled, implicitly *recognized*, with regard to that southern frontier, the conclusions which the French Government deduced from the instruments mentioned in Annex I to that Treaty."

Judge Shahabuddeen observed that there is a treaty relating to the boundary between Libya and Chad which was intended to establish complete delimitation of frontiers "between Libya and all adjacent French territories, including the territory of Chad. … It is neither relevant nor necessary to import the principle of stability of boundaries to reach that conclusion: the normal principles of treaty interpretation suffice." [30]

The third separate opinion submitted by Judge Ajibola shares the finding that the 1955 Treaty with the Annex I attached thereto establish "the frontier which was the subject-matter of the dispute between the Parties." According to Judge Ajibola the separate opinion is "essentially supportive of the Court's

[28] *Ibid*, Paragraph 73

[29] Declaration of Judge Ago, *Supra* note 2 , page 43

[30] Separate Opinion of Judge Shahabuddeen , *Supra* note 2 , page 50

judgment and is meant to deal only with some peripheral but nor unimportant aspects of the case."[31] The separate opinion discusses the profile of African boundary problems caused by the colonial legacy. Judge Ajibola regarded Libya's claim of coalescence of rights and titles as the first leg of its argument and the Rome Treaty of 1935 (the Laval-Mussolini Treaty) as the second leg.

Judge Ajibola observed that the Court would have been compelled to look at the 1935 Treaty "in the event of the absence or invalidity of the 1955 Treaty" owing to the necessity of reference to equitable principles to fill gaps. "But since a conventional boundary had been *recognized* by the 1955 Treaty and (because) the Rome Treaty's instruments of ratification had not been exchanged, equity had in fact no role to play in this matter" (paragraph 29). Judge Ajibola also states why Libya's argument about transfer of titles from the *Senoussi Orde*r to the Ottoman Empire and then to Italy and Libya is not acceptable: "… As early as 1856 a Senoussi *zawiya* was established in Kuka Bornou. The logical consequence of Libya's claim based on Senoussi title alone could involve the integration of about eight nations altogether as one State in Africa" (para 36).

Judge Ajibola further raises the issues of estoppel, acquiescence, preclusion and recognition,[32] regarding which he noted that "by the silence and conduct of Libya, there is, without doubt, a strong case for saying, in favour of Chad, that Libya is estopped from denying the 1955 Treaty boundary since it has acquiesced in and in fact recognized it (paragraph 114). Moreover, he addresses the issue of *uti possidetis* in relation to Libya's arguments and supports Chad's argument of French *effectivités* (paragraph 128) as supplementary grounds to substantiate the reasoning of ICJ's judgment in favour of Chad.

4. Dissenting Opinion

Judge ad hoc Sette-Camara supports the Libyan argument that the borderlands were never a *terra nullius*. "In spite of the desertic nature of this zone, … it was never a *terra nullus*, open to occupation according to international law"[33] and that "the non-existence of areas of *terra nullus* excluded the possibility of occupation, short of outright conquest by armed forces." The dissenting judge stated that "[t]he land was occupied by local indigenous tribes, confederations of tribes, often organized under the Senoussi Order. Furthermore, it was under the distant and laxly exercised sovereignty of the Ottoman

[31] Separate Opinion of Judge Ajibola, *Supra* note 2 , p.52
[32] *Ibid*, pp. 51, 52
[33] Dissenting Opinion of Judge Sette-Camara, *Supra* note 2 , p. 93

Empire, which marked its presence by delegation of authority to the local people."[34] Historic title over the region, according to the dissenting opinion " belonged first to the indigenous peoples, and eventually passed to the Ottoman Empire, and later to Italy."[35]

The dissenting opinion then addresses the following key questions:

a) Whether there is or has there ever been, a conventional boundary between Chad and Libya east of Tuommo leading to the Sudanese border; and

b) Whether the Conventions listed in Annex I to the 1955 Treaty are actually boundary treaties to which provisions the Cairo Declaration of 1964 and Article 11 of the 1978 Vienna Convention on Succession of States in Respect of Treaties apply.

Judge Sette-Camara responds to the first issue in the negative (page 95), and states that the non-existence of boundary "was explicitly and clearly recognized by the French Government when it presented its *Exposé des motifs* to the French Parliament in relation to the ratification of the 1935 Treaty (which)… could have been a real treaty (if it were not) for lack of ratification due to the political evolution of events at the time."

With regard to the second issue, the dissenting opinion states that the 1899 Convention that is tagged to the 1898 Conventions was never meant to determine boundary lines but "was aimed at dividing spheres of influence between the two big colonial Powers, France and Great Britain.[36] Judge Sette-Camara holds the same view about the 1919 line and emphatically remarks that "both were intended to divide spheres of influence and by no means could be interpreted as constituting international boundaries" (page 96), and that the 1902 exchange of letters had little to do with the frontier in dispute. The dissenting opinion then examines whether the treaties listed in Annex I were in force (*en vigueur*) and considers the 1902 Fronco-Italian exchange of letters, secret agreements and thus unacceptable.[37]

Judge Sette-Camara concludes that "none of the three treaties invoked by Chad qualifies for international recognition as a frontier treaty."[38] The dissenting opinion further noted that the 1955 Treaty lapsed in 1975,[39] because "Article 54 of the Vienna Convention on the Law of Treaties provides, *inter alia*, that the termination of a treaty takes place in conformity with the provisions of the treaty." According to the dissenting opinion, Chad's argument that the boundary agreements in the 1955 Treaty remain effective despite lapse of the 1955 Treaty "cannot be taken for granted, and their role in providing an internationally recognized frontier remains to be proved."[40]

[34] *Ibid*
[35] *Ibid*, p. 94
[36] *Ibid*, p. 95
[37] *Ibid*, p. 98
[38] *Ibid*
[39] *Ibid*
[40] *Ibid*

The issue of *effectivités*, according to Judge Sette-Camara, should be disregarded.[41] He stated that *effectivités* requires the peaceful and continuous exercise of State power, and "the resistance of the local tribes, and particularly of the Senoussi, never allowed the establishment of the exercise of peaceful and continuous State power by France. It was always military occupation, and authority was exercised by military officers."[42] The dissenting opinion notes that "no concrete evidence of *effectivités*, was presented in the case file, of either Ottoman, French or Italian *effectivités*," and observes that "any invocation of *effectivités* should simply be disregarded."

The dissenting opinion further states that the Treaty of Co-operation and Mutual Assistance did not mention frontiers, and in "the 1974 Treaty the only reference to frontiers was a condemnation of the arbitrarily established colonial frontiers, obviously in contradiction to the 1964 Cairo Declaration." Moreover, Judge Sette-Camara cites the treaty signed in 1980 and notes that "there was no mention of the presence of Libyan troops on Chadian territory. Yet another treaty was signed in 1981 ignoring the 'invasion' by Libyan troops of the Aouzou strip."[43]

On the basis of the reasons summarized above, Judge Sette-Camara observes that "the titles to the territory asserted by Libya are valid. Neither France nor Chad could present any sounder titles than the three layers of title" namely the title of the indigenous peoples "and the Senoussi Order, the Ottoman Empire's sovereignty over the area, passing to Italy in 1912 and thence to Libya in 1951."[44]

Judge Sette-Camara states that it is inappropriate to invoke '*pacta sunt servanda*'in relation with the 1955 Treaty because this established principle of international law "applies only to treaties in force, and Article 11 of the 1955 Treaty renders its validity after the 20 years deadline, to say the least, debatable."[45]

With regard to delimitation, Judge Sette-Camara noted that a compromise solution [46] should not have been excluded, which regrettably, neither the Parties nor the Court explored. The two possibilities were "the United Nations Map No. 241, which is close to the 1935 line but not identical to it", or revert "to the 1899 strict south east line, which was at the origin of the dispute, and which continues to appear on very recent maps, for instance, the 1988 OAU map attached to its Sub-Committee's report on the Libya-Chad dispute." According to Judge José Sette-Camara, either of the lines "would have offered the advantage of dividing the Tibesti Massif between the two countries"

[41] *Ibid,* pp. 98-101
[42] *Ibid,* pp. 98-99
[43] *Ibid,* p. 99
[44] *Ibid,* p. 102
[45] *Ibid*
[46] *Ibid,* p. 103

which is necessary "for the possible defence of one country or the other, as repeatedly asserted by both parties."

5- Critical Observations

5.1- Background: Territorial and demographic paradigms

The Treaty of Westphalia (1648) was a turning point in the emergence of the current conception of nation-statehood, and the role of treaties in the determination of frontiers has been enhanced ever since. The major conferences that followed, namely, the Congress of Vienna (1815) and the Paris Conference of (1919) redrew certain boundaries of Europe and reshuffled spheres of influence. The European conception of rigidly defined territories was unknown to Africa. This conception of rigid inter-state boundaries "reached Africa by way of colonialism initiated at the Berlin Conference of 1884 where European powers agreed on how Africa would be divided among them." [47]

Pre-colonial African kingdoms followed demographic lines of dominion in which some entities were directly subjugated while others enjoyed wider autonomy subject to some loose symbolic manifestations of allegiance. Not every square mile of the land in Africa was susceptible to ownership and sovereignty. There were very wide buffer regions, range of mountains, forests and deserts that were not rigidly divided among communities and kingdoms. "[I]t is the dissonance between pre-colonial and colonial concepts of border which has been responsible"[48] for most border disputes in Africa.

Moreover, the European paradigm is at variance with Islamic legal theory:

> … [W]hereas Islamic political and legal theory and practice define sovereignty in communal terms – although it must be admitted that the provisions for this in Islamic legal practice … are sketchy and inadequate (Schacht 1964; 76) – European jurisprudence – which has effectively become the basis for international law – places a primary emphasis on territory (Delupis 1974; 3-6). This is a consequence of the development of the European concept of the state as an area of unique and sovereign power over which political authority is exercised, rather than relating sovereignty primarily to populations (Joffe 1986; 7). [49]

The 1994 Judgment of the International Court of Justice in favour of Chad thus reflects the prevalence of the European conception of primary emphasis

[47] Nejib Jibril (2004) "The Binding Dilemma: From Bakassi to Badme" *American University International Law Review*, 19 Am. U. Int'l L. Rev. 633, at 634

[48] George Joffe, From Boundaries and State Territory in the Middle East and North Africa. MENAS Press, 1987 © 2002 http://arabworld.nitle.org/texts.php?module_id=4&reading_id=119&print=1 (Accessed on April 19, 2007)

[49] *Ibid*

to territory irrespective of demographic considerations. Needless-to-say, the findings and reasoning of the majority clearly fall under this conception that is the basis of current international law. It is also the expedient option endorsed by African States since the 1964 Cairo Declaration.

5.2- Observations regarding events preceding ICJ adjudication

The temporal setting of the late 1980s and early 1990s seemed to have favoured Chad owing to the shift in international balance of forces after the ideological crisis of Libya's allies in the Eastern block, the diplomatic crisis that Libya was encountered after Lockerbie and Habré's successful offensive and victory in the late 1980's. Moreover, the frontier claims of Chad are consistent. On the contrary, Libya's claims ranged from the Aouzou Strip or the 1935 (unenforceable) Treaty line to claims of the entire BET region that would mean 538,000 out of 1,284,000 Square Kilometers (i.e. 41.9 percent) of Chad's territory. The role that Libya played in supporting civil wars in Chad and in fueling factional polarities within the various rebels has ultimately created sense of unity in Chad against Libyan forces, and sympathy from the international community.

Upon first impression, the timing of Libya's agreement to ICJ adjudication seems to be imprudent from the perspective of Libya's interests, because international trends were against Libya. The only explanation in this regard seems to be the possibility of political repercussions of Libya's defeat had it not been immediately followed by peaceful settlement schemes, because the August 1989 Framework Agreement and submission of the case to ICJ might have at least served the purpose of face saving for Libya's leadership. Unless the balance of forces could have changed thereafter, the ICJ decision merely gave a blessing to the facts on the ground because Libya had already been pushed out of the Aouzou Strip.

5.3- Observations regarding Libya's major argument

Tribunals don't substitute parties in invoking issues omitted or undermined by the parties themselves. Libya gave much focus to the demographic aspect of the argument relying much on indigenous peoples, Senoussi order, etc. while in fact international tribunals clearly give priority to territorial delimitations made by treaties. The core argument of Libya could thus have been contesting against the validity of the 1955 Treaty, and forwarding as much arguments as possible to that effect. Judge Ajibola has duly noted (in his separate opinion) that the Court would have been compelled to look at the 1935 Treaty "in the event of the absence or invalidity of the 1955 Treaty" thereby rendering reference to equitable principles with the view of filling gaps.

As stated in Paragraph 36 of the judgment, Libya did not question the validity of the 1955 Treaty other than its argument that "it lacked the experience to engage in difficult negotiations with a Power enjoying the benefit of long international experience." Libya has stated that "there was an attempt by the French negotiators, to take advantage of Libya's lack of knowledge of the relevant facts" and "that Libya was consequently placed at a disadvantage in relation to the provisions concerning the boundaries." However, Libya merely asked the Court "to take this into account when interpreting the Treaty" but didn't take "this argument so far as to suggest it as a ground for invalidity of the Treaty itself".

The problem in this regard for Libya seems to be the absence of a provision among Articles 46 to 53 of the 1969 Vienna Convention of the Law of Treaties that can enable a state to invoke inexperience and excessive unfair advantage for the invalidation of a treaty. Yet, attempt could have been made to persuade the court towards considering the situation based on general principles accepted by the major legal systems.

Mr. kamel Maaghur for Libya had said, "When the negotiations that ultimately led to the 1955 Treaty started in January 1955, I would estimate there were not more that five lawyers in Libya. Only one lawyer, Mr. Fekini, fresh from law school in Tunisia, with no experience of any kind, was assigned to assist the Libyan Team …"[50] This argument could have been taken to its logical conclusion to show the pressure to which newly independent Libya encountered when France used Article 3 of the 1955 Treaty as a package deal for its withdrawal from one of the provinces of Libya: Fezzan.

The Libyan delegation couldn't apparently realize the weight of the term "*recognize*" in Article 3. Moreover, the so-called period of lapse of effectiveness of the Treaty as stated in Article 11, might have easily misled the Libyan delegation towards the belief that the treaty would last for only two decades, while in fact the invisible dynamite of a *dipositive* territorial obligation has been concealed underneath which renders a territory binding despite lapse of the treaty.

This argument might not have convinced the Court, but could have at least enabled the court to address the issue of treaties concluded under conditions that can be considered lesion (or unconscionable agreements). Unlike most unfavourable treaties that involve terms of peace in favour of the victor against the interests of the vanquished, the 1955 Treaty was made between France that should have evacuated its forces from Fezzan with no conditions and strings attached.

[50] CR 93/14, p. 67. cited in Abijola's separate opinion, paragraph 45

Moreover, Libya hasn't done what it could have, in the diplomatic sphere. As stated in the judgment, Libya hasn't even protested against the area of Chad registered in UN documents, or hasn't even invoked Article 11 of the Treaty to declare its lapse in 1975. Libya had instead resorted to military operations and towards fuelling civil wars in Chad as a result of which the misery that Chad has undergone seems to have eventually eroded the legitimacy of Libya's position.

5.4- Brief remarks on the judgement and dissenting opinion

There seems to be a gap in the reasoning of the majority opinion pertaining to the expansive definitions given to the words "*recognize*" and "*in force*" in Article 3 of the 1955 Treaty. According to Article 3 of the 1955 Treaty:

> The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. 1)."

The words "*recognize*" and "*in force*" seem to deserve detailed and persuasive reasoning beyond what the Court has done. Had Article 3 of the 1955 Treaty been concluded in relation only to the frontier between Libya and the Chadian part of French Equatorial Africa, Libya's recognition of frontiers could have meant recognition of the lines in the conventions attached as Annex I as frontiers. But the Court seems to have pursued an expansive interpretation beyond what the constitutive elements of Article 3 warrant.

The frontiers that Parties to the Treaty "*recognize*" are "*those* that result from the international instruments *in force on the date* of the constitution of the United Kingdom of Libya *as listed* in the attached Exchange of Letters (Annex I)." The word "those" is a *demonstrative pronoun* that refers to "frontiers". In effect, it should be interpreted as "*those frontiers*". The Parties to the Treaty have thus *recognized those frontiers* that result from the instruments attached to the Treaty provided that they were *in force on the date* of the constitution of the United Kingdom of Libya (i.e. on 24 December 1951) *as listed* in the annex of the Treaty.

Libya should have thus been considered to have recognized only those frontiers that result from the instruments attached to the 1955 Treaty. If frontiers don't result from the attached instruments relevant to the Chad/Libya border, Article 3 shall only apply to Libya's border with Tunisia, Algeria, etc. to the extent that there are frontiers that result from the instruments under consideration. The second and third elements that could have been carefully considered are incorporated n the phrase "provided that *they were in force on*

the date of the constitution of the United Kingdom of Libya *as listed in the annex* of the Treaty." The term "they" clearly refers to "instruments attached to the Treaty, and the second element has attached a temporal condition to their application, i.e. their being in force on the day of Libya's independence, i.e.-1951. The phrase "*as listed in the annex*" cannot stand on its own, because if it does, it would render the phrase preceding it (i.e. the second element) superfluous and ineffective. Had this been the intention of Article 3, the phrase "*on the date of the constitution of the United Kingdom of Libya*" would not have been necessary.

Closer examination of the case indicates that the instruments regarded as relevant to the case merely determine spheres of influence and not binding frontiers. And if those instruments do not determine frontiers, careful reading of Article 3 could have taken the Court to the observation that *there is no frontier for Libya to recognize that results from the instruments* stated in relation to its boundary with Chad.

Nor is this all, whenever there is inconsistency between the instruments annexed to the Treaty, equitable compromise of interests of the Parties could have been considered. Careful interpretation of Article 3 of the Treaty could have thus enabled the Court to strike a compromise closer to the 1935 unenforceable Treaty on the grounds of equitable principles by disregarding Libya's exaggerated claims of the entire BET Region, and meanwhile upholding a certain portion of Libya's claims in Aouzu Strip.

The dissenting opinion gives more emphasis to coalescence of rights while in fact mainstream judicial jurisprudence is currently based on recognition of treaty-based boundaries. Careful reading of the instruments annexed to the 1955 Treaty clearly shows the non-existence of boundary (between Libya and Chad before 1955) other than spheres of influence. The dissenting opinion has forwarded strong arguments in this regard. Moreover, the dissenting opinion has duly focused on the element of "*in force*" in Article 3. We may validly say that Judge Sette-Camara could have given as much focus to the word "*recognize*." We may also make a major comment on the dissenting opinion's treatment of the issue of lapse of the 1955 Treaty because the dissenting opinion seems to have taken the lapse of the Treaty for granted (page 98) even without the exercise of the option by one of the parties.

Concluding remarks: A choice among two evils

Most communities in the contested region in Northern Chad and the Southern part of Libya share the same Berber ancestral background. They were also under the same Senoussi Order, and they still have a very strong religious, linguistic and historical bond. The Chadian/Libyan boarder, however,

has accorded different citizenships to relatives merely because their homes happened to incidentally fall within the latitude-longitude-meridian demarcations drawn as per the 1994 ICJ Judgment.

The question is thus *a choice among two evils*. On the one hand there were prolonged animosities, wars and quibbling between Libya and Chad over Aouzou and the BET Region, which had been raging throughout the 1970s and 1980s. And on the other hand, there is now an internationally binding frontier between the States, which in spite of some pitfalls at a closer scrutiny, is the lesser evil in comparison with endless wars due to volatile borderlands.

Subject to the optional clause (as per Article 36/2 of the ICJ Statute), Parties have the option to or not to submit their disputes to the ICJ. But once a dispute is submitted by mutual agreement, ICJ's judgment is binding. As clearly stipulated in Article 94/2 of the UN Charter "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment,"

After decades of bloodshed, civil wars and turmoil, the dust seems to have settled since 1994, despite the lesser evil that Libya is required to gracefully accept. As peace and good neighbourliness blossom in the years and decades ahead, the frontier line can possibly be merely symbolic and not an iron divide between upcoming generations of the Aouzou Strip and their northern relatives. And eventually, sub-regional and regional integration would push such tragic episodes of history into transient moments of pain that preceded African awakening and renaissance. ■

ፍ ር ዶ ች

ትኩረት- *የውርስ ይርጋ*

ማስታወሻ- የተከራካሪዎች የአባት ስም አልተገለፀም፡፡

<u>የውርስ ይርጋን በሚመለከት ትኩረት የሚሹ ነጥቦች</u>

1. ለአመልካች በውርስ ሊተላለፍ የሚገባ ንብረት ሆኖ ሳለ፣
   ሀ) በሌላ ሕጋዊ ወራሽ (heir at law) ወይም የኑዛዜ ወራሽ (legatee)
   ለ) ሕጋዊ ወራሽ ወይም የኑዛዜ ወራሽ ባልሆነ ሰው
   የተያዘ ንብረት ለማስለቀቅ የሚነሳ ጥያቄ ይርጋ ዘመን ስንት ነው?
2. የውርስ ንብረት ይገባኛል የሚል ሰው በሌላ ወራሽ ላይ ክስ ቢያቀርብ ክሱ የንብረት መካፈል እንጂ የንብረት ይለቀቅኝ ክስ ሊባል ይችላልን?
3. ከላይ በተራ ቁጥር 1(*ሀ*) ወይም 1(*ለ*) የተመለከተው ሁኔታ ሲፈጠር አግባብነት ያለው ሕግ የትኛው ነው?
   ሀ) የፍትሐብሔር ሕግ ቁጥር 999 እና 1000 (1) (የይርጋ ዘመን = 3 ዓመት)
   ለ) የፍትሐብሔር ሕግ ቁጥር 999 እና 1000 (2) (የይርጋ ዘመን = 15 ዓመት)
   ሐ) የፍትሐብሔር ሕግ ቁጥር 1677 (1) እና 1845 (የይርጋ ዘመን = 10 ዓመት)
   መ) የፍትሐብሔር ሕግ ቁጥር 1080/3 የመጀመሪያ ሀረግ (የውርስ አከፋፈሉን አመልካች ከአወቀ/ች ጀምሮ አንድ ዓመት)
   ሠ) የፍትሐብሔር ሕግ ቁጥር 1080/3 ሁለተኛ ሀረግ (አውራሽ ከሞተበት አንስቶ አሥር ዓመት)
4. *ሦስት* ወይም አስራ አምስት ዓመት የይርጋ ጊዜ ተፈፃሚ የሚሆንበት ሁኔታ ሲያጋጥም የትኛው ዘመን ይፀናል? (የፍትሐብሔር ሕግ ቁጥር 1000/1 እና 1000/2)
5. አንድ ወይም አሥር ዓመት የይርጋ ጊዜ ተፈፃሚ የሚሆንበት ሁኔታ ሲያጋጥም የትኛው ዘመን ይፀናል? (ቁጥር 1080/3)
6. ንብረት ጠባቂ ወይም የይዞታ መብት የሌለው ሰው በወራሽ ክስ ሲቀርብበት የውርስ ይርጋ ማንሳት ይችላልን?

"ይህ ድንጋጌ (አንቀጽ 1000) *መገኛው* (*መነሻው*) አንቀጽ 999 ሆኖ እውነተኛ ወራሽ እኔ ነኝ ከሚል ጥያቄ ጀምሮ የውርስ ንብረት ያላግባብ ተወስዷልና ይመለስልኝ በማለት የሚቀርቡትን ክሶች /ጥያቄዎች/ የሚያካትት ለመሆኑ አንቀጽ 999 ን መመልከቱ ይበቃል፡፡"

የሰ/መ/ቁ 25567 (ጎንደር 12 ቀን 2000 ዓ.ም.)

<u>አወያይ ጭብጥ</u> - ይህ ውሳኔ ሕጋዊ ወራሽ ወይም የኑዛዜ ወራሽ ያልሆነ ተከሳሽን አይመለከትምን?

* *

"(ሕጋዊ ወራሽ በኑዛዜ ወራሽ ላይ ያቀረቡት ክስ) የቀረበው የ3 /ሦስት/ ዓመት ጊዜ ካለፈ በኋላ በመሆኑ በይርጋ ሊታገድ የሚገባው ነው፡፡

የሰ/መ/ቁ. 34824 (ታህሣሥ 02 ቀን 2001 ዓ.ም)

<u>አወያይ ጭብጥ</u> - በዚህ ጉዳይ የይርጋው ጊዜ 15 ዓመት ሊሆን ይችላልን?

የሰበር መዝገብ ቁጥር 25567

የሰ/መ/ቁ 25567
ጎንደር 12 ቀን 2000 ዓ.ም.

አመልካች ፡ ወ/ሪት አይናለም ...
ተጠሪ ፡ አቶ ደገፉ ...

ዳኞች ፡ መንበረፀሐይ ታደሰ፤ ፍስሐ ወርቅነህ፤ መስፍን እቁበዮናስ፡ ተሻገር ገ/ሥላሴ፤ አብዱራሂም አህመድ

ፍርድ

ይህ የሰበር አቤቱታ የቀረበው አመልካች ሰኔ 16 ቀን 1998 ዓ.ም. የተፃፈ ማመልከቻ በማቅረቧ መነሻነት ነው፡፡

የጉዳዩ የሥር አመጣጥ በፌደራሉ የመጀመሪያ ደረጃ ፍርድ ቤት የተጀመረ ክርክር ሲሆን ፍሬ ነገሩም ያሁኑ ተጠሪ የሥር ከሣሽ በመሆን በሥር 1ኛ በመቃወም ተጠሪ ወ/ሮ ደስታ... /በዚህ መዝገብ የሌሉበት/ እና ባሁኗ አመልካች የሥር 2ኛ በመቃወም ተጠሪ ላይ ባቀረቡት ክስ፤ ሟች ወንድማቸው አቶ አበበ ... ልጅ አለመውለዱ እየታወቀ አመልካች የሟች ልጅ ናት ተብሎ ወራሽነቱ የተረጋገጠው ባግባቡ ስላልሆነ ውሣኔው ይሻር የሚል ነው፡፡ ለክሱም 1ኛ የመቃወም ተጠሪ በርግጥ አመልካች ከኔም ሆነ ከሟች አትወለድም፣ ልጄ ነች ብዬ ውሣኔ ያሰጠሁት ከሕፃንነቷ ጀምሮ ስላሳደኳትና እንደ ልጅ ስለምቆጥራት ነው ሲሉ፣ አመልካችም በበኩሏ ተጠሪ ሕፃን ሆኜ ውሣኔ ሲሰጥ ቀርበው መቃወም ሲችሉ ከ21 ዓመት በኋላ መቅረባቸው በፍ/ብ/ሕ/ቁ 1000 መሠረት ተቀባይነት የለውም በማለት በየበኩላቸው መልስ ሰጥተዋል፡፡ ፍርድ ቤቱም የግራ ቀኙን ክርክርና ማስረጃ ከሰማ በኋላ የፍ/ብ/ሕ/ቁ 1000 የሚሠራው የውርስ ንብረት ይገባኛል ለሚል ክርክር እንጂ ወራሽ ናት አይደለችም ለሚል ክርክር አይደለም በሚል የይርጋ ወቃወሚያውን ውድቅ አድርጎ አመልካች ከሟች የማትወለድ በመሆኑ አለ ኑዛዜ ወራሽ ልትሆን አትችልም በማለት ወስኗል፡፡ ጉዳዩ በይግባኝ የቀረበለት የፌዴራሉ ከፍተኛው ፍርድ ቤትም በበኩሉ የግራ ቀኙን ክርክርና ማስረጃ ከመረመረ በኋላ ሟችና 1ኛ የመቃወም ተጠሪ በቤተሰብ ሕግ አንቀጽ 143/ሠ/ መሠረት አመልካችን ወደ ቤት በመውሰድ፣ በማንከባከብና በማስተማር እንደ አባት በመሆን የተሳተፉ በመሆኑ አመልካች የሟች ልጅና የመጀመሪያ ደረጃ ወራሽ ነች በማለት ወስኗል፡፡

ያሁኑ ተጠሪ በዚህ ውሣኔ ቅር ተሰኝተው ለፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ አቅርበው ፍርድ ቤቱም የከፍተኛውን ፍርድ ቤት ውሳኔ ሽሮ የመጀመሪያ ደረጃ ፍርድ ቤትን ውሳኔ አጽንቷል፡፡

አመልካች ይህን የሰበር አቤቱታ ያቀረቡት በዚህ መነሻነት ሲሆን ፍርድ ቤቱም አቤቱታውን መርምሮ ተጠሪን በማስቀረብ ግራ ቀኙን አከራክሯል፡፡ ክርክሩንም ከሕጉ ጋር በማገናዘብ መርምሯል፡፡

በዚህም መሠረት አመልካች ጎንደር 5 ቀን 1993 ዓ.ም የወራሽነት ማስረጃ ካገኙ በኋላ የሟች የመጀመሪያ ደረጃ ወራሽ መሆናቸውን በመግለጽ በቤቱ ላይ ያገኙት የጋራ ባለሀብትነት /ከሥር 1ኛ የመቃወም ተጠሪ ጋር/ ተቀባይነት ያጣው ባግባቡ መሆን አለመሆኑን ፍርድ ቤቱ እንደሚከተለው ተመልክቷል፡፡ አመልካች በሥር ፍርድ ቤቶች ያቀረቡት ክርክር ባንድ በኩል የሟች የመጀመሪያ ደረጃ ወራሽ መሆናቸውን፣ በሌላ በኩል ደግሞ ተጠሪ ከ20 ዓመት በላይ ቆይተው በቤቱ ላይ አለኝ የሚሉት የወራሽነት መብት በፍ/ብ/ሕ/ቁ 1000 መሠረት የሚታገድ ነው የሚል ሲሆን፣ የፌዴራሉ

የመጀመሪያ ደረጃ ፍርድ ቤት አመልካች በመጀመሪያ ደረጃ መቃወሚያ የጠቀሱት የፍ/ብ/ሕ/ቁ 1000 የሚሠራው የውርስ ንብረት ይገባኛል ይሰጠኝ ለሚል ክርክር እንጂ ወራሽ ናት አይደለችም ለሚል ክርክር ተፈፃሚነት ያለው አይደለም በማለት የሰጠውን ውሣኔ እንደተመለከትነው ድንጋጌው ባግበቡ አለመፈጸሙን ተረድተናል፡፡ ያሁኑ ተጠሪ በሥር ፍርድ ቤት ያቀረቡት ክስ በራሱም ሲታይ ይዘቱ ወንድሜ ልጅ አለመውለዱ እየታወቀ አመልካች በሐሰት ልጁ ነኝ ብላ የወራሽነት ማስረጃ የወሰደች ስለሆነ ትመልስ በቤቱ ላይ ያለው የሚች ድርሻ ለኔ ይሰጠኝ የሚል ሲሆን፣ አመልካች በበኩሏ የሚች ልጅ መሆኗን እና ንብረቱም እንደሚገባት መከራከራቸው ታይቷል፡፡ የክርክሩ ትክክለኛ (ገጽታ) ይህ ሁኖ እያለ የሥር ፍርድ ቤት አመልካች ክሱን ያመኑ ይመስል ገና ከጅምሩ ድንጋጌውን አጥብቦ በመተርጎም በልጅነት ጥያቄ ቢነሣ ድንጋጌው ተፈፃሚነት የለውም ማለቱ ቀጣይ ሆኖ አልተገኘም፡፡ ይህ ድንጋጌ መገኛው አንቀጽ 999 ሆኖ እውነተኛ ወራሽ እኔ ነኝ ከሚል ጥያቄ ጀምሮ የውርስ ንብረት ያላግባብ ተወስዷልና ይመለስልኝ በማለት የሚቀርቡትን ክሶች /ጥያቄዎች/ የሚያካትት ለመሆኑ አንቀጽ 999 መመልከቱ ይበቃል፡፡ በዚህ ረገድ አመልካች ክርክሩን ባስነሳው ቤት ላይ ከ20 ዓመት በላይ የቆየ የባለሀብትነት ድርሻ ማግኘታቸው እየተመለከተም ተጠሪም ድርሻቸውን ለመጠየቅ ከሚያስችላቸው ጊዜ በላይ ቆይተው ክስ ለማቅረባቸው አመልካች ያቀረቡት የይርጋ ክርክር ተቀባይነት ያጣው ድንጋጌውን በጠባቡ የሥር ፍርድ ቤት በመተርጎሙ ሳቢያ መሆኑን ይህ ፍ/ቤት ተገንዝቧል፡፡ በመሆኑም የመጨረሻ ውሳኔ የሰጠው ጠቅላይ ፍርድ ቤት የይርጋውን ነጥብ አልፎ ውሳኔ መስጠቱ መሠረታዊ የሕግ ስህተት ሆኖ አግኝተነዋል፡፡

የከፍተኛው ፍርድ ቤት ምንም እንኳ የአመልካችን ልጅነት ተቀብሎ የሥር ፍ/ቤትን ውሳኔ የሻረ ቢሆንም ፍ/ቤቱ በቅድሚያ ለይርጋው ጥያቄ (...) ምላሽ ቢሰጥ ኖሮ ወደዚህ ነጥብ መግባት ያስፈለገው እንዳልነበር ተገንዝበናል፡፡ ስለሆነም ክሱ በይርጋ ታግዷል ብለናል፡፡

<u>ውሣኔ</u>

- የፌዴራል ጠቅላይ ፍርድ ቤት በመ/ቁ. 21679 ግንቦት 23 ቀን 1988 ዓ.ም.፣ የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በመ/ቁ 03562 ጥር 19 ቀን 1996 ዓ.ም. የሰጡት ውሳኔ ተሽሯል፤...፡
- የፌዴራል ከፍተኛ ፍርድ ቤት በመ/ቁ. 28193 ሐምሌ 27 ቀን 1997 ዓ.ም. የሰጠው ውሣኔ ተሽሯል፤...
- (በ)ከፍተኛ ፍርድ ቤት በመ/ቁ. 28193 ... በ21/10/98 የተሰጠው እግድ ተነስቷል ...
- ክሱ በይርጋ ይታገዳል ...፡፡ ...

* * *

የሰበር መዝገብ ቁጥር 34824

የሰ/መ/ቁ. 34824

ታህሣሥ 02 ቀን 2001 ዓ.ም

አመልካች፡- አቶ ፈቃደ ...

ተጠሪ፡- አቶ አስፋው ...

ዳኞች፡- ዓብዱልቃድር መሐመድ፤ ሒሩት መለሰ፤ ፀጋዬ አስማማው፤ አልማው ወሌ፤ ዓሊ መሐመድ

ፍ ር ድ

ጉዳዩ የውርስ ሕግ ድንጋጌዎች አተረጓጐምና አፈፃፀምን የሚመለከት ሲሆን ክርክሩ የተጀመረውም የአሁኑ ተጠሪ ሰኔ 28 ቀን 1996 ዓ.ም በተፃፈ ማመልከቻ የእናታቸው የወ/ሮ በላይነሽ መኩሪያ ህጋዊ ወራሽነታቸውን በፍ/ቤት የካቲት 09 ቀን 1996 ዓ.ም ማረጋገጣቸውን፣ የሟች እናታቸው ንብረት የሆነውን በሰበታ ከተማ ቀበሌ 02 ውስጥ የሚገኘውን ቁጥሩ 225 ግምቱ ብር 10,000.00 (አሥር ሺህ ብር) የሆነውን ቤት የአሁኑ አመልካች መብት ሳይኖራቸው ይዘው እንደሚገኙ በመዘርዘር አመልካች ቤቱን እንዲለቁ ይወሰንላቸው ዘንድ ዳኝነት ጠይቀው በአመልካች ላይ በዓለም ገና ወረዳ ፍ/ቤት በመሠረቱት ክስ መነሻ ነው፡፡ የአሁኑ አመልካችም በተከሳሽነታቸው ቀርበው መስከረም 27 ቀን 2000 ዓ.ም በተፃፈ ማመልከቻ የመከላከያ መልሳቸውን ሰጥተዋል፡፡ ይዘቱም በአጭሩ፣ ተጠሪ በጉዳዩ ስለማያገባቸው ለመክሰስ መብት የሌላቸው መሆኑን፣ በሟች ኑዛዜ መሠረት ቤቱን ከ12 (አስራ ሁለት) ዓመታት በላይ ይዘው የሚገኙ በመሆኑ ክሱ በይርጋ የታገደ መሆኑን በመጀመሪያ ደረጃ መቃወሚያነት አቅርበው በፍሬ ጉዳዩ ላይ ሙሉ መልስ መስጠታቸውን የሚያሳይ ነው፡፡ ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው ፍ/ቤትም የመጀመሪያ ደረጃ መቃወሚያ ነጥቦችን በመመርመር አመልካች ለክርክሩ መነሻ የሆነውን ቤት በኑዛዜ ተላልፎላቸው የያዙት መሆኑን፣ ኑዛዜው ላይ ተቃውሞ ቀርቦ ሳይፈርስ ቤት የማስለቀቅ ክስ ተጠሪ ለማቅረብ መብት የሌላቸው መሆኑን በምክንያትነት ይዞ ተጠሪ በፍ/ብ/ሥ/ሥሕ/ቁ. 33 መሰረት አመልካችን ለመክሰስ አይችሉም ሲል ክሱን ወድቅ አርጐ ወስኗል፡፡ በዚህ ውሣኔ የአሁኑ ተጠሪ ባለመስማማት ይግባኛቸውን ለደቡብ ምእራብ ሸዋ ዞን ከፍተኛ ፍ/ቤት አቅርበው ይኸው ፍ/ቤትም ግራ ቀኙን ከአከራከረ በኋላ የሥር ፍ/ቤትን ውሣኔ በማጽናቱ በድጋሚ ለክልሉ ጠቅላይ ፍ/ቤት ይግባኝ አቅርበው ይግባኛቸው በፍ/ብ/ሥ/ሥ/ሕ/ቁ ተሰርዞባቸዋል፡፡ ከዚህም በኋላ ጉዳዩን ለክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቅርበው ግራ ቀኙ እንዲከራከሩ ከተደረገ በኋላ ይኸው ችሎት ሟች አደረጉ የተባለው ኑዛዜ ቢፀና ባይፀና ለውጥ የማያስከትል መሆኑን፣ ልጅ በዝምታ ከውርስ እንደማይነቀል በምክንያት በመያዝ ለክርክሩ መነሻ የሆነውን ቤት ግራ ቀኙ እኩል ሊካፈሉ ይገባል ሲል የበታች ፍ/ቤቶችን ውሣኔ በመሻር ወስኗል፡፡ የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ የክልሉ ሰበር ሰሚ ችሎት የሰጠውን ውሣኔ በመቃወም ለማስለወጥ ነው፡፡

የአመልካች የሰበር አቤቱታ ይዘትም ተጠሪ ያቀረቡት የውርስ ንብረት ይሰጠኝ ክስ በይርጋ ቀሪ ነው የሚል መቃወሚያ አቅርቤ እያለ ያላግባብ የታለፈ በመሆኑ ይኸው ታርሞ የተጠሪ ጥያቄ በይርጋ ቀሪ ነው ተብሎ ሊወሰንልኝ ይገባል በማለት ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ የአመልካች አቤቱታ ተመርመሮም በሰበር ችሎቱ ሊታይ ይገባል በመባሉ ተጠሪ ቀርበው መልስ ሰጥተዋል፡፡ በመልሳቸውም የአመልካች የይርጋ ጥያቄ በሥር ፍ/ቤት የተነሳ ቢሆንም በዚሁ ነጥብ ላይ ውሣኔ ሳይሰጥ በሌላ

ምክንያት በመወሰኑ ለይግባኝ ሰሚው ፍ/ቤት ተጠሪ ባቀረቡት ይግባኝ መስቀለኛ ይግባኝ ሳይቀርብበት አመልካች ለዚህ ሰበር ችሎት መሠረታዊ የሆነ የሕግ ስህተት ነው በማለት ሊያቀርቡት የማይገባ ነጥብ ነው በማለት ተከራክረዋል። አመልካችም ተጠሪ የእናታቸውን ሞት ሊያውቁ የሚችሉባቸው ሁኔታዎች መኖራቸውንና በሥር ፍ/ቤትም ያልተነሳ የክርክር ነጥብ መሆኑን፣ በሥር ፍ/ቤት በተሰጠው ውሣኔ በውጤቱ ተጠቅሚ በመሆናቸውም መስቀለኛ ይግባኝ የሚያቀርቡበት ሕጋዊ ምክንያት አለመኖሩን በመዘረዘር የሰበር አቤቱታቸውን በማጠናከር የመልስ መልስ ሰጥተዋል።

የጉዳዩ አመጣጥ አጠር አጠር ባለመልኩ ከላይ የተገለፀው ሲሆን ይህ ችሎትም የግራ ቀኙን የጽሁፍ ክርክር የሰበር አቤቱታው ከቀረበበት ውሣኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ በሚከተለው መልኩ መርምሯል። እንደመረመረውም የዚህ ችሎት ምላሽ የሚያስፈልገው አቢይ ነጥብ አመልካች ያቀረቡት የይርጋ መቃወሚያ ክርክር መታለፉ በአግባቡ ነው? ወይስ አይደለም? የሚለው ሁኖ ተገኝቷል።

በክርክሩ ሂደት የተጠሪ እናት የሆኑት ወ/ሮ በላይነሽ መኩሪያ ለክርክሩ መነሻ የሆነውን ንብረት ህዳር 30 ቀን 1984 ዓ.ም አደረጉ በተባለው ጉዛዜ ለአመልካች ማስተላለፋቸው፣ ተጠሪ የሚች ሕጋዊ ወራሽ መሆናቸው፣ የውርስ ንብረቱ ይለቀቅልኝ ጥያቄን ተጠሪ ያቀረቡት ሰኔ 28 ቀን 1996 ዓ.ም መሆኑ፣ አመልካች የተጠሪ ጥያቄ በይርጋ ቀሪ ነው የሚል ክርክር ከሥር ፍ/ቤት ጀምረው የሚራከሩበት ነጥብ መሆኑ የተረጋገጡ ጉዳዩች ናቸው። ተጠሪ የአመልካች የይርጋ ጥያቄ በዚህ ችሎት ሊስተናገድ አይገባም በማለት የሚከራከሩ ሲሆን ለዚህም መሠረት ያደረጉት ምክንያት በሥር ፍ/ቤት በተሰጠው ውሣኔ ተጠሪ ቅሬታ አድሮባቸው ለበላይ ፍ/ቤቶች ይግባኝ ባቀረቡበት ወቅት አመልካች በይርጋ ጥያቄአቸው ላይ መስቀለኛ ይግባኝ አላቀረቡም የሚል ነው።

በመሠረቱ ይግባኝ ማለት በመጀመሪያ ደረጃ ፍ/ቤት በተሰጠው ፍርድ ቅሬታ ያለበት ወገን ይህንኑ ቅሬታውን በሕጉ ሥልጣን በተሰጠው የበላይ ፍ/ቤት አቅርቦ በማሳየት በሥር ፍ/ቤት የተሰጠው ፍርድ እንዲሻሻል እንዲለወጥ፣ ወይም ሙሉ በሙሉ ውድቅ እንዲሆን ዳኝነት የሚጠየቅበት ሥርዓት ነው። ይግባኝ ለተከራካሪ ወገኖች የተሰጠ መብት ቢሆንም ገደብ የለሽ ግን አይደለም። በሌላ አገላለጽ በማናቸውም ፍርድ ወይም ትእዛዝ ላይ ሁሉ ይግባኝ ለማለት የማይቻልበት ሁኔታ ይኖራል። ይህም በግልጽ በሕግ ሊመለከት ይችላል። ለዚህ ዓይነት ሁኔታ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 320 ሥር የተመለከተው ድንጋጌ በዋቢነት ሊጠቀስ ይችላል። በመሆኑም በአንድ ፍርድ ወይም ትእዛዝ ላይ ይግባኝ ለማቅረብ መለኪያው ሊሆን የሚገባው በተሰጠው ፍርድ ወይም ትእዛዝ ተከራካሪ ወገን መብት የሚጐዳ ሆኖ መገኘት ነው። በዚህም መሠረት በመጀመሪያ ደረጃ ፍ/ቤት በተሰጠ ውሣኔ መብቱ ወይም ጥቅሙ የተነካ፣ አለያም ግዴታው ከፍ እንዲል የተደረገ ወገን የይግባኝ መብት ይኖረዋል። የይግባኝ ዓይነቱም ቀጥታ ወይም ቀጥተኛ ያልሆነ (cross-appeal) ሊሆን ይችላል። የይግባኝ ዓይነቱ ቀጥታም ሆነ ቀጥተኛ ያልሆነ ለይግባኝ ሰሚው ፍ/ቤት የሚቀርበው ፍርዱ የይግባኝ አቅራቢውን መብት በሚጐዳው መልክ/የሚነካ ሲሆን ብቻ ነው። የሥር ፍ/ቤት ውሣኔ ከተከራካሪ ወገኖች የቀረቡለትን ሁሉንም የክርክር ነጥቦች መሠረት ያላደረገ ቢሆንም በውጤቱ ደረጃ ጠቃሚ ሁኖ ከተገኘ ለውሣኔው መሠረት ይሆን ነበር የሚባል ምክንያት ብቻ በመያዝ ይግባኝ ሊል ይገባል ማለት የይግባኝ ሥርአትን መሠረታዊ ዓላማና መመዘኛውን እንዲሁም የፍትሐብሔር ሕግ ሥን ሥርአትን ዓላማ ያገናዘበ አይሆንም። በመጀመሪያ ደረጃ ፍ/ቤት የመከራከሪያ ነጥቡን ያቀረበ እና ከመከራከሪያ ነጥቦቹ መካከል በአንዱም እንኳ ቢሆን በውሣኔው ውጤት ተጠቃሚ የሆነ ወገን በሥር ፍ/ቤት

ለውሣኔው መሰረት ባልነው መከራከሪያ ነጥብ ብቻ ቀጥታ ወይም መስቀለኛ ይግባኝ ሳያቀርብ መከራከሪያ ነጥቡን በበላይ ፍ/ቤት በመልሱ እስከአቀረበ ድረስ ተቀባይነት አያገኝም የሚባልበት የሕግ ምክንያት የለም፡፡ ስለሆነም ተጠሪ በዚህ ረገድ ያቀረቡትን ተቃውሞ አልተቀበልነውም፡፡

ወደ ዋናው የአመልካች የይርጋ ክርክር ስንመለስ፤ አመልካች የሚች ወ/ሮ በላይነሽ መኩሪያ የኑዛዜ ወራሽ ሲሆኑ ተጠሪ ደግሞ የሚች የመጀመሪያ ደረጃ ህጋዊ ወራሽ ናቸው፡፡ እንግዲህ የውርስ ንብረት ክርክሩ በወራሾች መካከል መሆኑን በቀላሉ መገንዘብ ይቻላል፡፡ እንዲህ ከሆነ ለጉዳዩ ተፈፃሚነት የሚኖረው ድንጋጌ የፍ/ሕ/ቁ. 1000/1/ ነው፡፡ በዚህ ድንጋጌ መሰረት ከሣሹ መብቱንና የውርስ ንብረቶች በተከሣሹ መያዛቸውን ካወቀ ሦስት ዓመት ካለፈ በኋላ ስለወራሽነት ጥያቄ የሚቀርበው ክስ ተቀባይነት ለማግኘት የማይችል ስለመሆኑ ተመልክቷል፡፡

የተጠሪ እናት ለአመልካች ኑዛዜ ያደረጉት ጎዳር 30 ቀን 1984 ዓ.ም ሁኖ ከዚህ ዓ.ም ጀምሮ የውርስ ንብረቱ በአመልካች ይዞታ ስር መሆኑ፣ ተጠሪ ክስ የመሠረቱት ሰኔ 28 ቀን 1996 ዓ.ም ነው፡፡ ከዚህም የምንገነዘበው ለክርክሩ መነሻ የሆነው ቤት በአመልካች የተያዘው ከ12/አስራ ሁለት/ ዓመታት በላይ መሆኑን ነው፡፡ ተጠሪ ቤቱ ለዚህን ያክል ጊዜ በአመልካች መያዙን ሳይክዱ የእናታቸውን ሞት ያወቁት ከአሜሪካን አገር ሲመለሱ በ1996 ዓ.ም መሆኑንና የይርጋ ጊዜውም ከዚህ ጊዜ ጀምሮ መቆጠር እንደሚገባው ተከራክረዋል፡፡ በእርግጥ ተጠሪ የእናታቸውን ሞት ያወቁት ከ1996 ዓ.ም ጀምሮ ስለመሆኑ በበታች ፍ/ቤቶች በማንሳት ያልተከራከሩበት፣ ሥርአቱን ጠብቆ ያልቀረበ ከመሆኑም በላይ ይህ ችሎት ባደረገው ማጣራት ተጠሪ ለወኪላቸው ሙሉ የውክልና ሥልጣን ጥር 14 ቀን 1993 ዓ.ም በአዲስ አበባ ከተማ መስተዳደር ውልና ማስረጃ ምዝገባ ጽ/ቤት ቀርበው የሰጡ መሆኑ የተረጋገጠ ሲሆን ከዚህ ጊዜ ጀምሮ ክስ እስከመሰረቱበት እስከ ሰኔ 28 ቀን 1996 ዓ.ም ድርስ ያለው ጊዜ ቢሰላ እንኳ ተፈፃሚነት ባለው ድንጋጌ ስር የተመለከተው የሦስት ዓመት የይርጋ ጊዜ ያለፈ መሆኑን ያሣያል፡፡ ከሁሉም በላይ አሜሪካን አገር ስለነበሩ ብቻ የእናታቸውን ሞት ከ12/አስራ ሁለት/ ዓመታት በላይ ሳይሰሙ፣ ሳያውቁ እና ሳይጠይቁ ይቆያሉ ተብሎ አይገመትም፡፡ በመሆኑም ክሱ የቀረበው የ3/ሦስት/ ዓመት ጊዜ ካለፈ በኋላ በመሆኑ በይርጋ ሊታገድ የሚገባው ነው፡፡

ሲጠቃለልም ከላይ በተገለጹት ሕጋዊ ምክንያቶች የኦሮሚያ ክልል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የአመልካችን የኑዛዜ ወራሽነት እና የተጠሪን ህጋዊ ወራሽነት በመመልከት ብቻ በሕጉ ከተመለከተው ጊዜ በኋላ የቀረበውን ክስ መከራከሪያ ነጥቡ ቀርቦለት እያለ በዝምታ በማለፍ በፍሬ ጉዳዩ ላይ ውሣኔ መስጠቱ ተገቢነት የሌለው ነው፡፡ አመልካች የውሣኔው ተጠቃሚ እስከሆነ ድረስ በይርጋው መከራከሪያ ነጥብ መስቀለኛ ይግባኝ እንዲያቅርቡ አይገደዱም፤ በመሆኑም የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ውሣኔ መሠረታዊ የሆነ የሕግ ስህተት የተፈፀመበት ነው ብለናል፡፡ በዚህም መሠረት የሚከተለውን ወስነናል፡፡

ው ሣ ኔ

1. የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ/ቁ.33321 ጎዳር 02 ቀን 2000 ዓ.ም የሰጠው ውሣኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት ተሽሯል፡፡
2. የክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚው ችሎት በመ/ቁ. 28391 ሰኔ 29 ቀን 1997 ዓ.ም የሰጠው ትእዛዝ እና በደቡብ ምእራብ ሸዋ ዞን ከፍተኛ ፍ/ቤት በመ/ቁ. 04340 ግንቦት 19 ቀን 1997 ዓ.ም የዓለምገና ወረዳ ፍ/ቤት በመ/ቁ. 49/96

ታህሳስ 28 ቀን 1997 ዓ.ም የሰጧቸው ውሣኔዎች በውጤት ደረጃ ተገቢነት ያላቸው በመሆኑ በተለወጠ ምክንያት ፀንተዋል፡፡

3. ተጠሪ ሰኔ 28 ቀን 1996 ዓ.ም በአመልካች ላይ ያቀረቡት ክስ በይርጋ የታገደ ነው ብለናል፡፡
4. ወጪና ኪሣራ የየራሣቸውን ይቻሉ ብለናል፡፡ ...

<u>የሐሳብ ልዩነት</u>

እኔ በአምስተኛው ተራ ቁጥር የተሰየምኩት ዳኛ አብላጫው ደምጽ በደረሰበት መደምደሚያ ተስማምቸ በሰጠው ምክንያትና በጠቀሰው ህግ ባለመስማማት ይህንን ልዩንት ጽፊአለሁ፡፡ ክርክሩ በኑዛዜ ወራሽና በሕግ ወራሽ መካከል የሚደረግ ክርክር ነው፡፡ የፍ/ብሔር ሕግ ቁጥር 1000 ተጠቃሽ የሚሆነው ወራሽ የሆነ ሰው ወራሽ ካለሆነ ሰው የውርሱን ንብረት ለመጠየቅ በሚያቀርበውን ክስ እንጂ በሁለት ወራሾች መካከል ለሚደረገው ክርክር ተጠቃሽነት የለውም፡፡

በወራሾች መካከል የሚነሳው ክርክር የውርስ ንብረት ድርሻየ ይሰጠኝ የሚል ከሆነ ለዚህ (አግባብነት) ያለው የፍ/ብሔር ሕግ ቁጥር 1080/2/ ነው፡፡ ስለሆነም አመልካች ተጠሪ የሚች ብቸኛ ወራሽ ነኝ በሚል የወራሽነት ማስረጃ በመያዝ የውርሱን ንብረት ጠቅልሎ መያዙን ካወቀበት አንድ አመት ውስጥ የውርስ ንብረት ክፍያ ጥያቄውን ያላቀረበ በመሆኑ ጥያቄው በውርስ ቀሪ ይሆናል በማለት ያለኝን የልዩነት ሐሳብ ገልጫለሁ፡፡

* * *

የሰበር መዝገብ ቁጥር 32982

ቢጋረ-ጉዳይ (case summary) ... በምዕራፍ ግርማ

የሰ/መ/ቁ 32982
ጥቅምት 6 ቀን 2001 ዓ.ም.

አመልካች ፡ የመቀሌ ዞን ደቡብ ማዘጋጃ ቤት

ተጠሪ ፡ የመምህር ገበያው ... ተተኪዎች

የወራሽነት መብት የሌለውን ሰው ለማስለቀቅ የውርስ ንብረት ይለቀቅልኝ ብሎ ክስ የማቅረብ የይርጋ ጊዜ፤ - የፍ/ሕ/ቁ 1000 (2)፣ 1677 (1) እና 1845

የውርስ ንብረት በአሁኑ አመልካች ስለተያዘብኝ እንዲለቀቅልኝ ይታዘዝልኝ በማለት በ1998 ዓ.ም የአሁኑ ተጠሪ አመልክተው፣ የመቀሌ ዞን ከፍተኛ ፍርድ ቤት በፍ/ሕ/ቁ 1000 (2) መሠረት ክሱ በይርጋ ታግዷል በማለት ውሳኔ አሳልፏል፡፡ ይህን በመቃወም የአሁኑ ተጠሪ ለትግራይ ጠቅላይ ፍ/ቤት ይግባኝ ቢሉም ውሳኔው የሕግ ስህተት የለውም ተብሎ ተወስኗል፡፡ ከዚያም ለትግራይ ክልል ጠቅላይ ፍርድ ቤት ሰበር ችሎት አቤቱታ ቀርቦ፣ የፍ/ሕ/ቁ 1000 (2) ተፈጻሚነት በወራሾች መካከል የውርስ ሀብትን አስመልክቶ በሚነሳ ክርክር እንጂ የወራሽነት መብት ባለውና በሌለው ወገን በሚነሳ ክርክር ተፈፃሚነት የሌለው በመሆኑ የመቀሌ ዞን ከፍተኛ ፍ/ቤት የፍሬ ነገር ክርክር መርምሮ ወሳኔ እንዲሰጥ ተወስኗል፡፡ የአሁኑ አመልካች ይህንን በመቃወም ለፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አቤቱታ አቅርበዋል፡፡

ውሳኔ

በተጠሪ የቀረበው የውርስ ጥያቄ በፍ/ሕ/ቁ 1677 (1) እና 1845 መሠረት በይርጋ እንዲታገድ በአብላጫ ድምጽ ተወስኗል፡

- የፍ/ሕ/ቁ 1000 (2) ተፈፃሚነት የሚኖረው በወራሾች መካከል ለሚነሳ ክርክር ነው፡፡
- በወራሽ እና ወራሽ ባልሆነ ወገን መካከል ለሚነሳ ክርክር የተደነገገ ድንጋጌ ስለሌለ ወደ ፍ/ሕግ ቁ 1677 (1) እና 1845 በመሄድ የይርጋ ጊዜው 10 ዓመት እንደሆነ መረዳት ይቻላል፡፡
- የአሁኑ ተጠሪ ኑዛዜ የተደረገበት መስከረም 10 ቀን 1977 ዓ.ም ነው፤ ውርሱ በፍርድ ቤት የተረጋገጠው በ1986 ዓ.ም በመሆኑ ከዚያ ጊዜ ጀምሮ ቢቆጠር እንኳን ክሱ ከተመሠረተበት ከ1998 ዓ.ም ወዲህ 10 ዓመት በማለፉ ክሱ በይርጋ ታግዷል ፡፡

* *

ዳኞች ፡ ዓብዱልቃድር መሐመድ፤ ታፈሰ ይርጋ፤ ፀጋዬ አስማማው ፤አልማው ወሌ፤ ዓሊ መሐመድ

ፍ ር ድ

ይህ ችሎት በዚህ መዝገብና በመዝገብ ቁጥር 32975 የቀረበለት አቤቱታ ከአንድ የክስ ምክንያት የመነጨ በመሆኑ ጉን ለጉን መርምሮ ቀጥሎ የተመለከተውን ፍርድ ሰጥቷል፡፡

ይህ ጉዳይ የተጀመረው በትግራይ ብሔራዊ ክልላዊ መንግስት በመቀሌ ዞን ከፍተኛ ፍ/ቤት ሲሆን የአሁን ተጠሪ መምህር ገበያው ... በዚህ መዝገብ አመልካች የሆነውን 1ኛ ተከሳሽ፣ በመ/ቁ/ 32975 አመልካች የሆነውን 4ኛ ተከሳሽ በማድረግ ባቀረቡት ክስ በመቀሌ ከተማ ቀበሌ 13 ክልል የሚገኘውን ቤትና ቦታ ከወ/ሮ አበራሽ ... በውርስ ያገኘሁት ሲሆን ነገር ግን ተከሳሾች ያለአግባብ ይዘው የሚገኙ ስለሆነ እንዲለቁ ይወሰንልኝ በማለት ጠይቀዋል፡፡

የከፍተኛው ፍ/ቤትም ግራ ቀኙን አከራክሮ ከሳሽ የውርስ ሐብት ይለቀቅልኝ በማለት ያቀረቡት ክስ በፍ/ሥ/ሕ/ቁ 1000 /2/ መሰረት በ15 ዓመት ይርጋ የታገደ በመሆኑ የከሳሽ ክስ ተቀባይነት የለውም በማለት ብይን ሰጥቷል፡፡

ጉዳዩን በይግባኝ የተመለከተውም የትግራይ ክልል ጠቅላይ ፍ/ቤት የሥር ፍ/ቤት የሰጠው ብይን ጉድለት የሌለው ነው በማለት ይግባኙን በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 337 መሰረት ሰርዟል፡፡

ከዚህ በመቀጠልም የአሁን ተጠሪ የሰበር አቤቱታ ለክልሉ ጠቅላይ ፍ/ቤት ሰበር ችሎት አቅርበው ሰበር ችሎቱም በበኩሉ ግራ ቀኙን አክራክሮ የፍ/ብ/ሕ/ቁ 1000 ተፈጻሚነቱ በመራሾች መካከል የውርስ ሀብትን አስመክቶ በሚነሳ ክርክር እንጂ የወራሽነት መብት ባለውና በሌለው ወገን በሚነሳ ክርክር ተፈፃሚነት የሌለው ስለሆነና በተያዘውም ጉዳይ ተጠሪዎች የወራሽነት መብት የሌላቸው በመሆኑ የሥር ፍ/ቤቶች ክሱ በፍ/ብ/ሕ/ቁ 1000 /2/ መሰረት በይርጋ ቀሪ ሆኗል ያሉት ለድንጋጌው የተሳሳተ ትርጉም በመስጠት ስለሆነ ተገቢነት የለውም ብሎ የሥር ፍ/ቤቶችን ብይንና ትእዛዝ በመሻር ጉዳዩ በይርጋ ቀሪ ያልሆነ ስለሆነ የመቀሌ ዞን ከፍተኛ ፍ/ቤት የግራ ቀኙን የፍሬ ነገር ክርክር መርምሮ ውሳኔ ይሰጥበት በማለት በፍ/ብ/ሕ/ሥ/ሥ/ቁ 341 መሰረት ጉዳዩን መልሷል፡፡

ለዚህ ሰበር ችሎትም የሰበር አቤቱታ የቀረበው ይህንኑ በመቃወም ሲሆን ይህ ሰበር ችሎትም በዚህ መዝገብና በመዝገብ ቁጥር 32975 የቀረበለትን አቤቱታ መርምሮ

በይርጋ ረገድ የቀረበው ክርክር ተቀባይነት ሳያገኝ መቅረቱ ተጠሪ ባለቡት ተጣርቶ ሊወሰን እንደሚገባው በማመኑ ተጠሪን በመጥራት ግራ ቀኙን አከራክሯል፡፡

በአጠቃላይ የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን የሰበር አቤቱታውም ያስቀርባል ከተባለበት ነጥብ አኳያ እንደሚከተለው ተመርምሯል፡፡

የመቀሌ ዞን ከፍተኛ ፍ/ቤትና የትግራይ ክልል ጠቅላይ ፍ/ቤት ክሱን ውድቅ ያደረጉት በፍ/ብ/ሕ/ቁ 1000/2/ መሰረት በ15 ዓመት ይርጋ ታግዷል በማለት ነው፡፡ ተቀባይነት የሌለው የወራሽነት ማስረጃ ይዞ ንብረቱን በእጁ ያደረገውን ሰው ትክክለኛ ወራሽ የሆኑት ሰዎች ይህንኑ ንብረት አስመልክቶ ክስ ማቅረብ የሚችሉት ንብረቱ መያዙን ባወቁ በ3 ዓመት ጊዜ ውስጥ መሆን እንዳለበትና ንብረቱ ከዘር የወረደ ካልሆነ በስተቀር በማናቸውም ምክንያት 15 ዓመት ካለፈ ይህንኑ ንብረት መጠየቅ እንዳማይቻል በፍ/ብ/ሕ/ቁ 1000 /1/ /2/ ላይ ተደንግጐ ይገኛል፡፡

ወደ ተያዘው ጉዳይ ስንመለስ በዚህ መዝገብ አመልካች የሆነው የመቀሌ ዞን ደቡብ ማዘጋጃ ቤት አካባቢያዊ አገልግሎትም ሆነ የመዝገብ ቁጥር 32975 አመልካች የሰሜን ወረዳ ሚሊሻ ጽ/ቤት በተጠሪ በኩል ክስ የቀረበባቸው ተቀባይነት በሌለው የወራሽነት ማስረጃ ለክርክሩ ምክንያት የሆነውን ቤትና ቦታ ይዘዋል በማለት ስላልሆነ የመቀሌ ዞን ከፍተኛ ፍ/ቤትም ሆነ የክልሉ ጠቅላይ ፍ/ቤት በፍ/ብ/ሕ/ቁ. 1000 /2/ መሠረት አቤቱታው በይርጋ ቀሪ ሆኗል ማለታቸው ለድንጋጌው የተሳሳተ ትርጉም በመስጠት እንደሆነ በእኛም በኩል ታምኖበታል፡፡ ስለሆነም የትግራይ ክልል ጠ/ፍ/ቤት ሰበር ችሎት የቀረበው ክስ በፍ/ብ/ሕ/ቁ 1000 /2/ መሰረት በይርጋ ቀሪ ሆኗል ማለቱ አግባብነት ነበረው፡፡

ይሁንና የአንድ ንብረት ወራሽ የሆነ ሰው ይሄው ንብረቱ ወራሽ ባልሆነ ሰው አሁን በእጃችን እንዳለው ጉዳይ በሌላ ምክንያት ንብረቱን ይዞበት የሚገኝበትን ሰው መጠየቅ ስለሚችልበት የጊዜ ገደብ አልተበጀለትም ማለት አይደለም፡፡

አሁን ለተያዘው ጉዳይ የሚሆን በተለየ ሕግ የተለየ የይርጋ ድንጋጌ ያልተቀመጠ በመሆኑ በልዩ ሕግ ያልተሸፈነን ጉዳይ በጠቅላላ ሕግ ላይ ተመስርቶ እልባት መስጠት /*Adjudicate*/ የሕግ አተረጓጐም መርህ ግድ ስለሚል በዚሁ መሠረት ጠቅላላ ስለ ውሎች በሚደነግገው የፍ/ብሔር ሕጉ ክፍል ሥር ግዴታዎች ከውል የመነጩ ባይሆንም የውል ሕግ ድንጋጌዎች ተፈጻሚነት እንዳላቸው በፍ/ብ/ሕ/ቁ. 1677/1/ ላይ ስለተመለከተና ውልን አስመልክቶ የይርጋ ጊዜው ደግሞ 10 ዓመት እንደሆነ በቁጥር 1845 ላይ ስለተመለከተ ከዚህ ድንጋጌ አንፃር ጉዳዩን ስንመለከት ለክርክሩ ምክንያት የሆነውና በውርስ በቅድሚያ ለመምህር ገበያው ... ከዚያም ከተተኪዎች ተለልፏል የተባለው ቤት ኑዛዜ የተደረገበት መስከረም 10 ቀን 1977 ዓ.ም ሲሆን የኑዛዜ ወራሽነት በፍርድ የተረጋገጠው ደግሞ ኅዳር 28 ቀን 1986 ዓ.ም እንደሆነ ከመዝገቡ መረዳት ይቻላል፡፡ በሌላ በኩል በተጠሪዎች አውራሽ በኩል የውርስ ንብረት ይለቀቅልኝ ተብሎ ክስ የቀረበው መጋቢት 25 ቀን 1998 ዓ.ም ሲሆን የአንድ ሰው ወራሽነት የሚረጋገጠው ወራሽነቱ በፍርድ ከተነገረበት ጊዜ ጀምሮ ሳይሆን አውራሹ ከሞቱበት ጊዜ ጀምሮ ነው፡፡ ይሁንና ሟች ከሞቱበት ጊዜ ጀምሮ ወራሽነቱ በፍርድ እስከተረጋገጠበት ጊዜ ድረስ ያለው ሳይቆጠር እንኳን ወራሽነት ከተረጋገጠበት ክስ እስከቀረበበት ድረስ ያለው ጊዜ ሲታሰብ 10 ዓመት ያልፈዋል፡፡

ስለሆነም የትግራይ ክልል ጠቅላይ ፍ/ቤት የቀረበው ክስ በፍ/ብ/ሕ/ቁ. 1000 /2/ መሰረት በይርጋ ሊታገድ አይችልም በማለት የሰጠው ውሳኔ አግባብነት የነበረው ቢሆንም ለጉዳዩ አግባብነት ካለው ድንጋጌ አንፃር ይርጋውን ሳይመለከተው መቅረቱ ግን

የሕግ ስህተት የተፈጸመበት ሆኖ አግኝተነዋል፡፡

ውሳኔ

የትግራይ ክልል ጠ/ፍ/ቤት ሰበር ችሎት በመ/ቁ. 19235 በሰኔ 14 ቀን 1999 ዓ.ም ክሱ በይርጋ ቀሪ አልሆነም በማለት የሰጠው ውሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት ስለሆነ ሽረነዋል፡፡

የመቀሌ ዞን ከ/ፍ/ቤት በመ/ቁ. 02890 ህዳር 11 ቀን 1999 ዓ.ም በሰጠው ብይን እንደዚሁም የክልሉ ጠ/ፍ/ቤት በመ/ቁ 17425 በየካቲት 6/ቀን 1999 ዓ.ም በሰጠው ትህዛዝ የቀረበው ክስ በፍ/ብ/ሕ/ቁ 1000 /2/ መሰረት በይርጋ ቀሪ ሆኗል ማለታቸው የተሳሳተ ቢሆንም ከውጤት አኳያ ግን ተቀባይነት ያለው ስለሆነ አጽንተነዋል ፡፡

ግራ ቀኙ ወጭና ሲካራ ይቻቻሉ፡፡

በዚህ መዝገብ የተሰጠው ፍርድ በመ/ቁ 32975 ላይ ተፈፃሚነት ስላለው የፍርዱ ግልባጭ ከዚሁ መዝገብ ጋር ይያያዝ ብለናል፡፡ ...

የሐሳብ ልዩነት

እኔ በአምስተኛው ተራ ቁጥር የተሰየምኩት ዳኛ አብላጫው ድምጽ በደረሰበት መደምደሚያ ላይ የምስማማ ቢሆንም ለፍ/ብሔር ሕግ ቁጥር 1000 በሰጠው ትርጓሜ የማልስማማ በመሆኑ ይህንን የልዩነት ሐሳብ ጽፌአለሁ፡፡

የፍ/ብሔር ሕግ ቁጥር 1000 የይርጋ ሕግ ድግጋጌዎች በወራሾች መካከል ለሚደረግ ክርክር ነው የሚያገለግሉት? ወይስ ወራሽ በሆነ ሰውና ወራሽ ባልሆነ ሰው መካከል የለውን ክርክር ነው ለመዳኘት የሚያገለግሉት? የሚለውን መወሰን የሚቻለው ይህንን ድንጋጌ ከፍ/ብሔር ሕግ ቁጥር 999 እስከ ፍ/ብሔር ሕግ ቁጥር 1000/2/ ካሉት ድንጋጌዎች ጋር አያይዞ በማሳየት መሆን አለበት፡፡ የፍ/ብሔር ሕግ ቁጥር 1000 የወራሽነት ጥያቄ የማቅረቢያ ጊዜ ገደብ ነው፡፡ የወራሽነትን ጥያቄ በእግሊዘኛው “petitio hereditatis” በማለት ሕግ አውጭው የገለፀው ሲሆን፣ ይኸም ወራሽ የሆነ ሰው በውርስ ያገኘሁት ሀብት ወራሽ ባለሆነ ሰው ተይዞብኛልና በውርስ ያገኘሁት ሀብት ይመለስልኝ በማለት የሚያቀርበው ክስ ነው የሚል እምነት አለኝ፡፡ ይኸንንም ሕግ አውጭው በፍ/ብሔር ሕግ ቁጥር 998/1/ ግልጽ አድርጐታል፡፡ አንድ ሰው በፍ/ብሔር ሕግ ቁጥር 998/1/ እና በፍ/ብሔር ሕግ ቁጥር 999 የወራሽነት ጥያቄ የሚያቀርበው ንብረቱን የሚች ወራሽ ያልሆነ ሰው ሲይዝበት ነው፡፡

ንበረቱ የተያዘው የሚች ሕጋዊ ወራሽ በሆነ ሰው የሆነ እንደሆነ ከመጀመሪያውኑ ጥያቄው የሚሆነው የውርሱን ንብረት ሙሉ በሙሉ ይልቀቅልኝ ሳይሆን በሕጉ መሠረት ከሚች ውርስ ሊደርሰኝ የሚገባውን ድርሻ ያካፍለኝ የሚል ነው፡፡ ከሚች ውርስ የሚጠየቅ የድርሻ ጥያቄ ራሱን የቻለ የጊዜ ገደብ በፍታብሔር ሕግ 1080 ንዑስ አንቀጽ 3 ተደንግጐለታል፡፡ ስለዚህ የፍ/ብሔር ሕግ ቁጥር 1000 የይርጋ ድንጋጌዎች ተፈፃሚነት ወራሽ የሆነ ሰው የሚች ወራሽ ካልሆነ ሰው የውርስ ንብረት ለመጠየቅ ስለሆነ አብላጫው ድምጽ ይህንን ድንጋጌ በመተው የፍ/ብሔር ሕግ ቁጥር 1845 በመጥቀስ ውሳኔ መስጠቱ ተገቢ አይደለም በማለት የልዩነት ሐሳቤን ገልጫለሁ፡፡

* * *

የሰበር መዝገብ ቁጥር 34940

ቢጋራ-ጉዳይ (case summary) ... በምዕራፍ ግርማ

የሰ/መ/ቁ 34940፤ የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት
ታህሳስ 28 ቀን 2001ዓ.ም

አመልካች ፡ ወ/ሮ ሐጅራ ...

ተጠሪ ፡ አቶ ሐሺም ...

የውርስ ንብረትን በሚመለከት በሥር ፍርድ ቤት የይርጋ ጥያቄ ተነስቶ የነበረ መሆን አለመሆኑ፤ ጥያቄው ከቀረበ ደግሞ የፍ/ቤቱ ውሳኔ ይህንን አለማስተናገዱ የሕግ አግባብ ያለው መሆን አለመሆኑ፤ (የፍ/ሕ/ቁ 1677 (1) እና 1845)

ይህ ጉዳይ ለፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት የቀረበው የኦሮሚያ ጠቅላይ ፍ/ቤትና በክልሉ ሰበር ችሎት ውሳኔዎች መሠረታዊ የሕግ ስህተት አላቸው በማለት ነው፡፡ የአሁኑ ተጠሪ ምስራቅ ሐረር ዞን ከፍተኛ ፍርድ ቤት ቀርበው፣ አባቴ ዘንድ ትቼው የነበረ ቤቴን አባቴ በሞት ሲለይ የአሁኗ አመልካች የያዙት በመሆኑ ይመልሱልኝ በማለት ክስ አቅርበዋል፡፡ የአሁኗ አመልካችም በበኩላቸው ባለቤቴ በ1969 ቤቱ የተሠራበትን መሬት በመውሰድ የሠራው ቤት ስለሆነ ከ38 ዓመት በኋላ ልጠየቅበት አይገባም ሲሉ ተከራክረዋል፡፡

ውሳኔ

የሥር ፍ/ቤት ውሳኔ እና ትእዛዝ መሠረታዊ የሕግ ስህተት ስላለባቸው ተሽረዋል፡፡

- በአሁኗ አመልካች የይርጋ ጥያቄ ይዘት ያለው ክርክር ተነስቷል፤ ሆኖም ግን የሥር ፍ/ቤቶች ይህንን ጥያቄ አላስተናግዱም፡፡
- የውርስን ይርጋ በቀጥታ የሚመለከት የሕግ ድንጋጌ የለም፤ የፍ/ብ/ሕ/ቁ 1000 የሚመለከተው ከሁለት ወራሾች መካከል የሚደረገውን ክርክር ይርጋ ነው፡፡
- ስለዚህም በፍ/ሕ/ቁ 1677(1) እና በ 1845 መሠረት አንድ ሰው መብቱን መጠየቅ ካለበት ጊዜ ጀምሮ 10 ዓመት ጊዜ ካለፈ ጉዳዩ በይርጋ ቀሪ ይሆናል፡፡
- የአሁኑ ተጠሪ አባት በሞት የተለዩት በ1978 ሲሆን ከዚህ ጊዜ ጀምሮ የተጠሪ ማመልከቻ ጊዜ ቢቆጠር ከ10 ዓመት በላይ ስለቆየ ክሱ በይርጋ ቀሪ ተደርጓል፡፡

* *

ዳኞች፡- ዓብዱልቃድር መሐመድ፤ ሐጐስ ወልዱ፤ ሂሩት መለሰ፤ ተሻገር ገ/ስላሴ፤ ሱልጣን አባተማም

ፍ ር ድ

ለሰበር አቤቱታ መነሻ የሆነው ጉዳይ የጀመረው በምስ/ሐረ/ዞን ከፍተኛ ፍ/ቤት ነው፡፡

ተጠሪ በዚህ ፍ/ቤት ባቀረቡት ክስ በአወዳይ ከተማ የሠሩትን ቤት ለአባታቸው ትተው ከሄዱ በኋላ አባታቸው ሲሞቱ አመልካች ቤቱን ይዘው ያሉ ስለሆነ እንዲለቁላቸው ጠይቀዋል፡፡ አመልካች ደግሞ ቤት የተሠራበትን ቦታ ባለቤታቸው አቶ ዮሴፍ ኡመር ከተባለ ሰው ወስደው በ1969 ዓ.ም ቤቱን የሠሩ በመሆኑ ከ38 አመት በኋላ ሊጠይቋቸው እንደማይችሉ በመግለጽ ተከራክረዋል፡፡ ቤቱን ከረጅም ጊዜ በፊት የአመልካች ባለቤት ከአመልካች ጋር አብረው ሲኖሩ የሠሩት መሆኑን የግራ ቀኙ ምስክሮች አረጋግጠዋል በማለት ፍ/ቤቱ የተጠሪን ክስ ውድቅ አድርጐታል፡፡ ተጠሪ በዚህ ውሣኔ ላይ ይግባኝ ለኦሮሚያ ጠቅላይ ፍ/ቤት አቅርበው ፍ/ቤቱም ክርክር የተነሳበት ቤት በከሳሽ (ተጠሪ) ስም የተመዘገ በመሆኑ አመልካች ቤቱን ለተጠሪ ይልቀቁ ሲል ውሣኔ ሰጥቷል፡፡ በዚህ ውሣኔ ላይ አመልካች ለክልሉ ሰበር ሰሚ አቤቱታ አቅርበው አቤቱታቸው ተቀባይነት ሳያገኝ ቀርቷል፡፡

አመልካችም ይህ ውሣኔ የሕግ ስህተት አለበት በማለት እንዲታረምላቸው አቤቱታ ለሰበር ችሎት አቅርበዋል፡፡ ይህ ችሎትም ተጠሪ የይርጋ ጥያቄ አንስተዋል ወይ? ካነሱ በየፍ/ቤቶቹ ሳይታይ መታለፉ አግባብ ነው ወይ? ተጠሪስ ያቀረቡት ማስረጃ ባለቤትነትን ለማስረዳት ሊቀርብ የሚችል ነው ወይ? የሚሉትን ነጥቦች ለማጣራት አቤቱታው ለሰበር ችሎት እንዲቀርብ አድርጓል፡፡ ተጠሪም ቀርበው ክርክራቸውን በጽሁፍ አቅርበዋል፡፡ ችሎቱም መዝገቡን እንደሚከተለው መርምሯል፡፡

ከፍ ሲል እንደተባለው ተጠሪ በአወዳይ ከተማ ቤት ሠርተው ለአባታቸው ሰጥተው መሬዳቸውን ገልፀው አባታቸው በ1978 ዓ.ም ሲሞቱ አመልካች ቤቱን ይዘው መቆየታቸውንና ቤቱንም ለመልቀቅ ፈቃደኛ ስላለሆኑ እንዲለቁላቸው ክስ መስርተዋል፡፡ አመልካችም ቤቱን ባለቤታቸው በ1969 ዓ.ም የሠሩት መሆኑን ገልፀው ቤቱን ለ38 ዓመታት ይዘው እይኖሩበት በመሆኑ ተጠሪ አሁን ሊጠይቋቸው እንደማይገባ ተከራክረዋል፡፡ አመልካች በዚህ ክርክራቸው በግልጽ ክሱ በይርጋ ቀሪ ነው በማለት አይግለፁ እንጂ ቤቱን ለ38 አመታት ይዘው እየኖሩበት በመሆኑ አሁን ክስ ሊቀርብባቸው የማይችል መሆኑን መግለፃቸው ክሱ በይርጋ ቀሪ ነው በማለት መከራከራቸውን ያመለክታል፡፡ አመልካች ቤቱን ለ38 አመታት ይዘው በመቆየታቸው የገለፁትን ፍሬ ነገር ተጠሪ አላስተባበሉም፡፡ በመሆኑም የሥር ፍ/ቤቶች ወደ ፍሬ ጉዳዩ ከመግባታቸው በፊት በአመልካች በኩል የቀረበውን የይርጋ መቃወሚያ መርምረው ተገቢውን ውሣኔ ሊሰጡ ይገባ ነበር፡፡ የፍ/ሥ/ሥ/ሕ/ቁ. 244/1/ ይመለከታል፡፡

በተያዘው ጉዳይ ተጠሪ ቤቱን ለአባታቸው ትቼው ሄጃለሁ የሚሉት በ1969 ዓ.ም ነው፡፡ አባታቸው ከዚህ አለም በሞት የተለዩት በ1978 ዓ.ም ነው፡፡ በመሆኑም ተጠሪ ቤቱን ለአባቴ ሰጥቼ ሄጃለሁ ካሉበት ከ1969 ዓ.ም ጀምሮ ክስ እስከተመሰረተበት እስከ 1997 ዓ.ም ድረስ 27 ዓመት ያለፈው ነው፡፡ ተጠሪ ቤቱን ለአባታቸው በአደራ ሰጥተው ለመሬዳቸው በሥር ፍ/ቤት የተረጋገጠ ፍሬ ነገር የለም፡፡ ነገር ግን ይህ ተረጋግጧል ቢባል እንኳን አባታቸው በ1978 ዓ.ም ከዚህ ዓለም በሞት ከተለዩ አንስቶ ክስ እስከቀረበበት ጊዜ ድረስ 17 ዓመታት አልፈዋል፡፡ በመሆኑም ተጠሪ ቤታቸው ያለአግባብ በሌላ ሰው ተይዟል በማለት ክስ ማቅረብ የሚችሉት እስከመቼ ነው? የሚለው ነጥብ መታየት ይኖርበታል፡፡ በመሠረቱ ጉዳዩን በቀጥታ የሚመለከት በሕግ ተለይቶ የተቀመጠ የይርጋ ድንጋጌ በሌለ ጊዜ ተፈፃሚነት የሚኖረው በጠቅላላ የውል ሕግ ድንጋጌ ነው፡፡ ምክንያቱም ምንም እንኳን ግንኙነቱ ከውል የመነጨ ባይሆንም ስለውሎች በጠቅላላው የተነገሩት ድንጋጌዎች እንደሚፈጸሙባቸው የፍ/ሕ/ቁ. 1677/1/ ያመለክታል፡፡ በዚህም መሠረት አንድ ሰው መብቱን መጠየቅ ካለበት ጊዜ ጀምሮ በ10 ዓመት ውስጥ ካልጠየቀ መብቱ በይርጋ ቀሪ መሆኑን የፍ/ሕ/ቁ. 1845 ይገልፃል፡፡ በተያዘው ጉዳይም ተጠሪ ቤቱ ያለአግባብ በአመልካች ተይዟል ካሉበት ከ1978 ዓ.ም ጀምሮ ክስ እስከቀረበበት እስከ 1997 ዓ.ም ድረስ 17 ዓመታት ያለፉ በመሆኑ የተጠሪ መብት በይርጋ ቀሪ ሆኗል፡፡ አመልካች ከሥር ጀምሮ ቤቱን ለብዙ ዓመታት ይዘው እየተጠቀሙ የቆዩ በመሆኑ ክሱ ውድቅ ሊደረግ እንደሚገባ ተከራክረው እያለ ፍ/ቤቶቹ ይህንን የአመልካችን የይርጋ ክርክር ሳያስተናግዱ በማለፍ በፍሬ ጉዳዩ ላይ ውሣኔ መስጠታቸው መሠረታዊ የሕግ ስህተት መፈፀሙን ያመለክታል፡፡

ው ሣ ኔ

1. የኦሮሚያ ጠቅላይ ፍ/ቤት በመ/ቁ. 39769 በ29/02/2000 ዓ.ም የሰጠው ውሣኔ እንዲሁም የኦሮሚያ ጠቅላይ ፍ/ቤት ሰበር ችሎት በ/ቁ 57751 በ20/3/2000 የሰጠው ትእዛዝ በተጨማሪ በምስ/ሐረርጌ ዞን ከፍተኛ ፍ/ቤት በመ/ቁ. 01899 በ08/07/98 የሰጠው ውሣኔ ተሽሯል፡፡
2. አመልካች ቤት ለመረከብ ያቀረቡት ጥያቄ ክስ በይርጋ ቀሪ ሆኗል፡፡ ...

MIZAN LAW REVIEW

ST. MARY'S UNIVERSITY COLLEGE

FACULTY OF LAW

Cultural Problems in Research and Publications

Source: *Reform Document on Legal Education and Training in Ethiopia (June 2006) § 2.4.1/A*

1. Lack of research, reading, and writing culture
   - Complacence with our work merely as teachers.
   - No sense of urgency about the need to engage in research and turn up research products.
   - No '*publish or perish*' attitude.
   - No attempt to work beyond the positive laws.
2. Lack of Institutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. Lack of team spirit for Research and Publications
   a) Among staff members;
   b) Between staff and students;
   c) Lack of collaboration among institutions.
4. Lack of innovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. Lack of tradition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
7. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

Mission of law schools

Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

Address:
Mizan Law Review
St. Mary's University College, Faculty of Law
P. O. Box: 1211 (or 18490), Addis Ababa, Ethiopia
Email: Mizan<smc@ethionet.et>

"We plan each issue as if it were a new book."

Printed by Berhanena Selam Printing Enterprise