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THE UNITED NATIONS WATERCOURSES CONVENTION FROM THE ETHIOPIAN CONTEXT: BETTER TO JOIN OR STAY OUT?

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Abstract

The 1997 Watercourses Convention is the first and the only worldwide instrument enacted under the auspice of the United Nations as far as the non-navigational uses of international watercourses is concerned. Although the Convention has entered in to force in 2014 after seventeen years of its adoption, many watercourse states are still hesitant to join the Convention. Given the divergent views of the respective countries towards the provisions of the Convention coupled with the existing tension and lack of genuine trust among downstream vis-à-vis upstream blocks, none of the Nile riparian states are currently parties to the Convention. The article is thus aimed to examine whether joining to or staying out from the Convention provides a better-off position for Ethiopia particularly in its relation with the two downstream Countries-Egypt and Sudan. Owing to the confusing and downstream favored provisions of the Convention coupled with the Egyptians' long lasting adherence to historic right based argument, the article asserted that the move to join the Convention might be expensive for Ethiopia which may force it to pay unnecessary bills for the advantages of the two downstream countries. Therefore, I argue that it is better for Ethiopia to stay out from the Convention and the complexities thereto while expecting at least 'a half and a loaf' from the application of the customary international water law regime, if there is any.

Keywords: equitable use, framework convention, Nile basin, riparian, significant harm, watercourses

I. INTRODUCTION

The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses [hereinafter the UN Watercourses Convention (UNWCC) or the Convention] entered into force on 17 August 2014, following a long and complex journey.[1] The delay of the Convention's entry in to force and the reluctance of many countries to join it indicate the existence of divergent views among riparian countries towards the benefits they can derive out of it.[2] As a result, countries decided their better-off position by calculating cost-benefits of being party to the Convention or staying out of it. In this regard, the Nile riparian states including Ethiopia, Egypt and Sudan are not parties to the Convention.[3]

This article examines whether joining to or staying out from the UN Watercourses Convention is a better off position for Ethiopia in the context of Nile. To this effect, the article

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[1] Salman M.A. Salman, *Entry in to Force of the UN Watercourses Convention: Why should it Matter?* 31:1 INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT 4, 4 (2015).

[2] *Id*. at 5.

[3] *Id*. at 11.

examines the pros and cons of applying the Convention in the Nile River basin and its possible impacts on Ethiopia's interest. Whether the Convention favors the upstream Ethiopia or the downstream- Egypt and Sudan would be assessed depending up on the content and limitations of the Convention coupled with the legal framework of the Nile, the positions of riparian states, and the level of cooperation among Nile riparians.

The first section describes the lengthy and turbulent road to the UN Watercourses Convention. It particularly, presents the voting patterns made for the adoption of the Convention by the Working Group (commonly referred the UNGA's Sixth or Legal Committee) and then by the General Assembly with a view to examine how far the positions of riparian states were shaped by their geographical stand in the respective river basins as upstream, downstream or midstream states. It also briefly examines whether the Convention indeed entered into force under the acceptance of "watercourses states" for real by taking into consideration the existence of states that have ratified the Convention while having no apparent interest in the utilization of the "international watercourses" as covered in the meaning of the Convention. Section two presents the nature and scope of the Convention and the implication thereof with respect to its enforcement and acceptability. Section three presents the main controversial provisions of the Convention and the views of upstream and downstream riparian thereto as a background for the subsequent discussions. Section four examines whether the Convention really matters in the Nile River basin in general considering the divergent views of the riparian states towards the utilization of the Nile water. Section five analyzes the Convention's provisions in the Ethiopian context and answers the question 'whether we are better off as a non- party state or not'. Section six briefly presents the advantages and beneficial application of the Convention. Finally, the paper offers a concluding remark.

II. THE TURBULENT ROAD TOWARDS UNWCC AND BEYOND: ISSUES TO BE RAISED

The problems of the sharing, management and protection of international rivers did not bear the attention of the international community before the late 1950s mainly due to the fact that disputes over shared resources were rare.[4] It had also been asserted that there were no international customary rules that could be perceived in this area of law.[5] However, with the emergence of "new disputes in certain basins"[6], the issue of examining the question of the non-navigational uses of international watercourses became the exclusive realm of non-governmental efforts or States until late 1950's when the United Nations decided to examine the issue and referred the matter to the International Law Commission (ILC) in 1970 with the task of studying the law on the subject for codification and progressive development.[7]

Earlier than ILC, with a view to find acceptable rules of international law and solve the divergent views held by the upper and downstream states thereto, the two scholarly Non-Governmental Organizations namely the Institute of International Law (IIL) and the

[4] *Id*. at 5

[5] Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of non –navigational Uses of International Watercourses Ten years on*, 18 COLO. J. INT'L ENVTL. L. & POL'Y, 337, 340 (2007).

[6] Charles B. Bourne, *The International Law Association's Contribution to The International Water Resource Law*, 36 NATURAL RESOURCES JOURNAL 155, 156 (1996). In this regard, for instance one can notice the international river disputes that have arisen after 1945 over Indus, Nile, Jordan and Columbia among the concerned riparian states.

[7] UNGA Resolution 2669 (XXV) of 8 December 1970. See also Helal, *supra* note 5, at 340.

International Law Association (ILA) had begun working on the law governing the utilization of international freshwater resource and adopted different resolutions and declarations.[8] However, the declarations and rules adopted by the two institutions are not all the same especially as to core principles to be used in determining the utilization of watercourses. As revealed in Madrid Declaration (1911) and Salzburg Resolution (1961), the works of the IIL emphasized on the obligation not to cause significant harm to other riparians even if the absolute prohibition of harm in the former declaration has been relaxed to some extent in the later resolution.[9] On the other hand, unlike the IIL resolutions, the ILA rules emphasized on the principle of equitable and reasonable utilization of shared watercourses as revealed in Dubrovnik statement (1956), the New York Resolution (1958) and largely in Helsinki Rules (1966).[10] Compared with others, the Helsinki rules were said to be the most comprehensive and widely referred rules until the adoption of the UN Watercourses Convention.[11]

Although such rules and resolutions were not binding per se, they generally influenced the ILC where it started its work in 1971. As the 1997 UN Watercourse Convention reflected the most important customary norms, it based largely on the ILA's work, particularly the Helsinki Rules, and to some extent on the work of the IIL.[12] In this regard, the Convention itself recognizes "the valuable contribution of international organizations, both governmental and non-governmental, to the codification and progressive development of international law in this field".[13]

However, it is important to note that the preparatory work of the UN Watercourses Convention by the ILC took more than two decades. The ILC adopted the final draft articles in 1994.[14] The draft articles were then considered by the UNGA's Sixth (Legal) Committee in 1996 and 1997, and finally adopted by the Assembly on May 21, 1997 by a vote of 103-3-27 (103 in favor, 3 against and 27 abstentions) with 33 States being absent.[15] Despite the fact that more than 100 states voted for the Convention in 1997, it entered into force after 17 years of its adoption on 17 August 2014, 90 days after the deposit of the 35th instrument of ratification by Vietnam.[16] This lengthy road to the Convention and its delay to enter in to force reveals the complexity of issues and the divergent views of riparian states towards its main provisions.

At this juncture it is important to observe the voting patterns made at the adoption of the final draft of the Convention in the Working Group and the adoption of the same by the General assembly in 1997. Although the Convention has been adopted by an overwhelming

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[8] Bourne, *supra* note 6, at 155-156.

[9] Salman, *supra* note 1, at 6.

[10] *Id.*

[11] Bourne, *supra* note 6, at 215-216. However, given the absence of a clear stance even as to the customary international law status of the subsequent UN Watercourses Convention, which largely inherits the Helsinki Rules with some modifications and additions of compromised languages, I believed that it is really difficult to confidently argue that the former Helsinki Rules has already achieved the status of customary international law.

[12] Salman, *supra* note 1, at 7.

[13] The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, UNGA Resolution A/RES/51/229, 36 ILM 700 (here after the UN Watercourses Convention), Paragraph ten of the preamble.

[14] Patricia Wouters, *An assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive rules Governing use Allocation*, 36 NATURAL RESOURCES JOURNAL 417, 421(1996).

[15] UNGA Resolution A/RES/51/229 of 21 May 1997. See also Helal, *supra* note 5, at 341.

[16] Salman, *supra* note 1, at 10. The entry into force of the Convention required the ratification, acceptance, approval or accession by 35 states (See the UN Watercourses Convection, *supra* note13, Art. 36).

majority of states due to the concessionary or compromising languages of its provisions, the negotiation process was largely turbulent and full of contentions. For example, the meaning and the relations between the equitable and reasonable utilization principle and the no harm rule, the status of existing agreements, the dispute settlement and notification provisions were among the most contentious provisions of the Convention throughout the negotiation process where a range of alternatives were proposed by different states.[17] However, during negotiations the positions of the national delegations were largely shaped by their perceptions of their country's geographic circumstances as upstream, downstream or 'midstream' (upstream and downstream with respect to different watercourses) states.[18]

According to the Working Group's rules of procedures, the Group first had to adopt the draft articles on an article-by-article basis. While doing this, most of the articles were adopted with little discussions and without a vote. However, a recorded vote was requested regarding the articles 3, 5-7, and 33 plus annex.[19] For the purpose of this article let us see only the voting patterns made with respect to Art 3, and Art 5-7.

Art 3 (Watercourses Agreements) was adopted by 36 states for, 3 against (Egypt, France and Turkey) and 21 abstaining. Here surprisingly Egypt, the strong advocate of the survival of existing watercourse agreements, voted against Art 3 while Ethiopia has abstained.[20] With respect to the package on Art 5 to 7, it was adopted by 38 states in favor, 4 against (China, France, Tanzania and Turkey), and 22 abstaining. Ethiopia and Egypt were among those countries that were abstained.[21] But amongst the states that voted in favor of the adoption of the package, the majority of them were downstream and midstream states showing that the instant provisions are either in favor of them or confusing in the manner that supports their position.[22] Moreover, given the significant numbers of abstentions coupled with the votes against, the votes made in favor for the adoption of the above two items of provisions was a modest score; which in turn shows the extents of the discard among states on these delicate issues.

Eventually, the final text of the Convention was adopted by the Working Group of the whole by a vote of 42 states for, 3 against and 18 abstentions while 130 states were absent. Amongst the Nile riparian States who participated in the voting, Ethiopia and Sudan voted in favor, while Egypt, Rwanda and Tanzania abstained.[23] From the above voting pattern one can

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[17] See generally, LUCIUS CAFLISH, *Regulation of the uses of International Watercourses*, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING conflicts 3, 9-16; SALMAN M.A SALMAN (ed.), PROCEEDINGS OF A WORLD BANK SEMINAR, World Bank Technical Paper, 0253-7494; No. 414, 1998.

[18] John Crook & Stephen C. McCaffrey, *The United Nations starts Work on a Watercourse Convention*, 91 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 371, 375, 1997. At this juncture, countries like Turkey, Ethiopia, India, China, France, Switzerland, Slovakia, Czech Republic and Spain were in upstream group; Netherlands, Portugal, Hungary, Egypt, Syria, Iraq, Bangladesh, Mexico and Greece were in downstream group; and Finland, Canada, USA, Germany, South Africa, Brazil and Israel were in midstream group. As a group of Countries with mixed-motive, the midstream group was the least uniform group (See Schroeder, *infra* note 19, at 29-30).

[19] Esther Schroeder, *The 1997 International Watercourses Convention-Background and Negotiation*, Working Paper on Management in Environmental planning (04/2002) ,at 32.

[20] CAFLISH, *supra* note 17, at 10-11. Here it is important to note that 103 states were absent during the adoption of the final draft of the Convention in the Working Group.

[21] Schroeder, *supra* note 19, at 33.

[22] *Id*, at 34.

[23] UN Doc. A/C.6/51/NUW /L.3Add.l/CRP.94; Sixth Committee Meeting No. 62, 4 April1997. See also PATRICIA WOUTERS, *The Legal Response to International Water Conflicts: The UN Watercourses Convention*

understand that Egypt had insisted in its position where it either voted against or abstained, while Ethiopia had voted in favor to the final draft of the Convention in the Working Group. Finally, after two decades of turbulent journey, the UN Watercourses Convention was adopted by the General Assembly on May 21, 1997 under the overwhelming majority of states. And, as mentioned above, the vote was 103 in favor, 3 against (Burundi[24], China and Turkey), 27 abstained[25] while 33 were absent.[26] Given the difficult, protracted and controversial history of its drafting, securing the support of such a solid majority of the UN Members, including a significant number of States sharing important international watercourses, was surprising.[27]

Nevertheless, it is important to examine the voting patterns with respect to upstream states vis-à-vis downstream or midstream states to understand which block voted largely in favor or against the adoption of the Convention, or abstained. Because this, to some extent, implies to whom the Convention favors at least in the perceptions of the then countries' representatives. Although the fact of securing large support from the side of the majority of downstream countries does not necessarily mean that the Convention is downstream favored, such fact would still have significance in determining whether the Convention is the one that ought to be ratified by upstream countries like Ethiopia particularly if the voting patterns made during the adoption of the Convention in 1997 and the subsequent ratifications for the entry into force of the same in 2014 coincided. Because this at least shows the 'comfort zone' nature of the Convention for the downstream and midstream states compared to the upstream once as revealed by their relative voting positions and the move to ratify the Convention then after. In addition, based on the circumstances of the case, other factors like the power balance, the level of trust and brotherhood among upstream and downstream states, the water abundance or scarcity in the basin as well as which block has already developed infrastructures on the water in question (the issue of existing uses) may influence the position that a given riparian state may take towards the Convention.

For example, upstream state having a hegemonic status and significant existing uses in the basin may opt to join the Convention even if in the normal course of things, the provisions of the Convention are said to be downstream favored. Similarly, if staying out would bring no change in the status quo, the weak upstream state with no substantial existing uses may still

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and Beyond, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICTS, 291, 314 (Salman & Boissonde Chaournes eds., 1999).

[24] The vote of Burundi was something of a surprise. This was because; first it did not participate in the negotiations. Second, the state's hydro-geography in the upper Nile basin will prevent their activities from affecting Egypt or Sudan. Accordingly, some asserted that "Burundi's position may owe more to political considerations than to hydro-geographic reality". See Stephen McCaffrey & Mpazi Sinjela, *The 1997 United Nations Convention on International Watercourses*, 92(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 94, 105 (1998).

[25] The abstained states: Andorra, Argentina, Azerbaijan, Bolivia, Bulgaria, Colombia, Cuba, Equator, Egypt, Ethiopia, France, Ghana, Guatemala, India, Israel, Mali, Mongolia, Pakistan, Panama, Paraguay, Peru, Rwanda, Spain, Tanzania, Uzbekistan.

[26] UNGA Resolution A/RES/51/229, *supra* note 15. See also Helal, *supra* note 5, at 341; and Schroeder, *supra note* 19, at 33. In this regard, the absent States were Afghanistan, Bahamas, Barbados, Belize, Benin, Bhutan, Cape Verde, Comoros, Democratic People's Republic of Korea, Dominican Republic, El Salvador, Eritrea, Fiji, Guinea, Lebanon, Mauritania, Myanmar, Niger, Nigeria, Palau, Saint Kitts &Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Solomon Islands, Sri Lanka, Swaziland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkmenistan, Uganda, Zaire, Zimbabwe.

[27] WOUTERS, *supra* note 23.

opt to vote in favor of the Convention just with a view to benefit from the little chance that the Convention accords to it, to use the same as a 'diplomatic instrument' of getting the heart of and financial support from the outside world, and thereby indirectly make the long-lasting prohibitive acts of the downstream hegemony to be condemned by the international community.

On the other hand, a downstream state having substantial existing uses with a hegemonic status in the basin may still opt not to join the Convention with a view to make the 'status quo' unaltered even in a slight degree although the Convention is still said to be downstream favored. In this regard, we can take for example the vote made against Art 3 (existing agreements) of the Convention by Egypt despite the fact that the provision is really in its favor; since it does not abolish the validity of 'existing agreements' where Egypt can benefit out of them. As will be discussed latter, Egypt's vote against Art 3 in particular and its abstention to the Convention and the subsequent hesitation to ratify the same in general does not mean that the Convention is not downstream favored. Rather, the positions of some downstream countries like Egypt is emanated from the overwhelming desire to have more and to make the status quo untouched. The saying of Gandhi can better express such kind of positions- "[T]here is enough for everyone's need. There is never enough for everyone's greed".[28]

Therefore, as one can understand from the aforementioned discussions the riparian states' placement in the basin may not be a sole determinant factor to hold the position for or against the Convention. Even there may be a situation where a country's position may owe more to political consideration than hydro-geographic reality. However, such instances are exceptional cases which may not undermine the value of using the strong nexus between the geographical position of states and their respective voting positions as a basis to determine or at least predict to which block the Convention seems favored.

In this regard, the overall observation of the voting pattern reveals that the Convention was supported mainly by downstream and midstream states while many upstream states were either voted against or abstained. For instance, all of the three States (Burundi, Turkey and China) that voted against the Convention are upper riparian for the Nile, Tigris-Euphrates, and Mekong Rivers respectively. Moreover, amongst the 27 states that abstained during the adoption of the Convention, a significant numbers of countries were upper riparian.[29] On the other hand, many of the major states which were the core of the downstream and midstream blocks voted in favor of the Convention.[30] These all shows how the downstream and midstream states had largely perceived that the Convention is in favor of them which seem right as the subsequent discussions reveals.

When coming to the Nile Basin, the above geographical position-based argument seems weak. Amongst the Nile riparian states, Ethiopia, Egypt, Tanzania and Rwanda abstained; Eritrea, Uganda, Zaire (DRC) were absent; Sudan and Kenya voted in favor while Burundi

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[28] As quoted in H.I.F. SAEIJI & M.J. VAN BERKEL, *The Global Water Crisis: The Major Issue of the Twenty first Century, a Growing and Explosive Problem*, in THE SCARCITY OF WATER, EMERGING LEGAL AND POLICY RESPONSES 121, 122 (Edward H.P. Brans et al, Eds., 1997).

[29] For example, Ethiopia, France, India, Spain, Rwanda and Tanzania.

[30] For example, Netherland, Portugal, Hungary, Syria, Bangladesh, Mexico and Greece from downstream block; and Finland, Canada, USA, Germany, South Africa, and Brazil from midstream block.

voted against.[31] Here the vote by Kenya in favor of the Convention as an upstream state and the abstention by Egypt as a downstream state during the adoption of the Convention may cast doubt on the above assertion that the main provisions are downstream favored. However, as argued above, the abstention of Egypt for example seems largely emanated from its strong desire to make the status quo untouched based on the long lasting "the drop of water argument", rather than not believing in the fact that the main provisions of the Convention are at least on average downstream favored. In this regard, the consistent vote in favor of the adoption of the Convention by Sudan during the Working Group as well as during the final adoption by the General Assembly in 1997 partly shows that the Sudanese initially perceived the Convention as favoring downstream. Particularly, as a midstream country, the then Sudan's position seems to take advantages of its position both as upstream state for Egypt and downstream state for others and thereby secure advantages of both sides that the Convention may confer while taking in mind its dominant water utilization in the basin at a distant second in one hand and the hegemonic status of the most downstream State-Egypt in the other hand.

Regarding the then position of Kenya, it may be derived by its relative position as downstream state for the upper White Nile basin. Or the state's hydro-geography in the upper Nile basin will prevent their activities from affecting Egypt or Sudan since it is the Blue Nile that contributes much for the Nile water to which Kenya has no concern. Despite its support in 1997, however, Kenya has reserved from ratifying the Convention and currently none of the Nile riparian states are parties to the Convention.

Nevertheless, the non-party status of the Nile riparian states to the Convention still shows the little acceptance of the Convention in the eyes of the Nile basin. Moreover, one can point out that in all major basins with conflicts, where such a Convention is expected to be applied on, at least one country voted against the Convention, abstained or were absent.[32] This shows how the major watercourses sates were in ambivalence particularly as to the contribution of the Convention to the resolution of disputes over the use of such international rivers like the Danube, Ganges, Jordan, Nile, Mekong or the Euphrates.[33]

Having said these on the adoption of the Convention and the voting patterns thereof, a question may arise on the issue of its ratification. As mentioned earlier, despite the adoption of the Convention by a solid majority numbers of states in 1997, it took seventeen years to enter into force showing that those who voted for its adoption did not show the same interest for its entry into force.[34] However, as we can understand from the lists of the countries that have ratified the Convention vis-à-vis their position in 1997;[35] the majority of them are still

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[31] Aaron T. Wolf, *Criteria for equitable allocations: the heart of international water conflict*, 23 NATURAL RESOURCE FORUM 3, 5 (1999). Here it should be noted that even if Sudan and Kenya voted in favor of the Convention in 1997, they have not yet joined the Convention. And currently no Nile riparian state is party to the Convention.

[32] Schroeder, *supra* note 19, at 22

[33] Aaron.T. Wolf, *Conflict and cooperation along international waterways*, 1 WATER POLICY 249, 252 (1998); Ellen Hey, The *Watercourses Convention: To what extent does it provide a basis for regulating uses of international watercourses?* 7(3) REVIEWS OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 290, 297-300 (1998).

[34] Amongst more than 100 states that had voted in favor of the Convention, only about 25 states ratified the Convention, and almost all of them are downstream or midstream countries.

[35] Parties to the Convention includes Finland, Norway, Hungary, Sweden, the Netherlands, Portugal, Germany, Spain, Greece, France, Denmark, Luxemburg, Italy, Monte Negro, the UK, Ireland , South Africa,

remaining consistent with their previous position which is particularly true for downstream and midstream states. Thus, from the distribution of states that have ratified the Convention, one can point out that the majority of them are either downstream or midstream states showing again the Convention's provisions are comfortable with them compared to the upstream states.

However, it should be noted that all of the current parties to the Convention are not those who had given their support to its adoption in 1997. Certain countries that were absent or abstained in 1997 have also ratified the Convention.[36] This is may be either due to the change in their previous stand and understandings towards the provisions of the Convention or the change in their knowledge as to the nature of the 'watercourses' they shared with other countries or on some other motive.[37]

Similarly, the same reason of changes in countries' perceptions after 1997 justifies for the countries' failure, who had previously supported for its adoption, to go for ratification. For instance, in the Working Group both upstream and downstream states had voted for the compromising language of Art 7 of the Convention, because both camps had developed their own but different versions of understanding. At this juncture, Lucius Caflish for example noted:

> *The new formula [regarding the relationships of the two principles as reflected by the language of Art 7(2)] was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely that, that formula was strong enough to support the idea of such subordination.*[38]

However, these positive but different perceptions that had been developed by the two blocks during the adoption of the Convention in 1997 did not continue then after. Instead, second thoughts about the relationship between the two principles started surfacing in the minds of many states which latter contributed for the delays of the entry into force of the Convention.[39] This shows how the compromising languages of the Convention (as the case for the relationships between the two principles) has paved the way for divergent lines of arguments where only the powerful would often benefit out of this uncertainty. Such kind of uncertainty and absence of clarity on the main principles of the Convention would erode the confidence of weak riparian states (particularly those found in basins characterized by asymmetric power relation and water utilization patterns like Nile) to equally compete and enforce their interests compared to the basin's hegemony acting with its full material, ideational and bargaining powers. As will be discussed later, the large opportunity of the hegemonies (Egypt and Sudan

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Namibia, Guinea Bissau, Burkina Faso, Nigeria, Niger, Benin, Chad, Cote d'Ivoire, Libya, Tunisia, Morocco, Syria, Lebanon, Palestine, Jordan, Iraq , Qatar, Uzbekistan and Vietnam.

[36] For example, Spain, France, Uzbekistan, Lebanon, Nigeria, Niger, Libya and Benin.

[37] For example, Libya was among the countries that had abstained in 1997 on the issue of groundwater; objecting the exclusionary rule of the Convention with respect to the 'confined groundwater or aquifer'. However, it joined the Convention latter. While explaining its reason for joining the Convention, Salman stated the changing of its perception regarding the nature of the ground water (i.e. the Nubian aquifer) it shared with other countries (e.g. Egypt) as a reason for its latter ratification. He further explained: "…Libya perceived the Nubian aquifer as a connected groundwater and joined the Convention, because she wants to be part of the Nile…' See Salman M.A. Salman (2015): Lecture given at University of Strathclyde, Glasgow, 22 May 2015, on the title '*Entry into force of the UN Watercourses Convention: Why should it matters?*" Available at Online Seminar www.ooskanews.com.

[38] CAFLISH, *supra* note 17, at 15.

[39] Salman, *supra* note 1, at 9.

in the Nile case) to benefit more from the compromising languages of the Convention coupled with many other downstream favored provisions of the same would make the move to join the Convention by countries like Ethiopia costly.

Coming back to the issue of ratification, it is important to address a question as to whether the entry in to force of the Convention has been succeeded under the ratification acts of 'interested' parties who are 'watercourse states' for real. It should be noted that some of the current parties to the Convention have neither trans-boundary surface water nor non-confined groundwater that shared with other countries. In other words, they have no apparent interest in the allocation and utilization of trans-boundary water resources putting the validity and entry into force of the Convention under a question mark. We can take for instance, Great Britain, Libya, Tunisia, Morocco and Qatar. Interestingly, Qatar and Libya have no surface water they share with other countries, and the ground water they share with other countries may not even be covered by the Convention since they are not connected with surface water.[40]

So the reason why parties who are nothing to do with trans-boundary watercourses joined the Convention may be either with another intention other than sharing of waters or to show simply their support to the idea and thereby contribute for the Convention's entry in to force. Owing to this fact, the writer believes that had it not been ratified by such parties who are nothing to do with international watercourses, the Convention would have not entered in to force or at least took more years.

Thus, the coming in to force of the Convention per se may not necessarily be considered as the reflections of watercourse states for real. The reluctant position of riparian states to sign and ratify or accede to the Convention reveals the riparian states' divergent view to its provisions and the interpretation thereto.[41] For instance, as mentioned above none of the Nile basin countries (of both upper riparian and lower riparian) are parties to the Convention with having different perceptions. Although some argued that such perceptions are inaccurate[42], the compromising languages of the Convention which are deliberately made with intent to facilitate its adoption have contributed for the existing areas of contentions. Some of the contentious provisions of the Convention are discussed latter.

III. SCOPE OF THE UNWCC: DO THEY HAVE ANY IMPLICATION ON THE ACCEPTABILITY OF THE CONVENTION?

UNWCC is "a framework instrument which sets forth general substantive and procedural provisions to be applied by all Parties irrespective of their specific geographical location, or position vis-à-vis other watercourse States, or level of development."[43] Therefore, as a framework Convention it does not address the peculiar feature of every trans-boundary watercourses.[44] Given the diverse characteristics of international watercourses and the interests thereto, the Convention only contains certain general rules that could serve as a basis

[40] Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Latter: Why Has its Entry in to Force Proven Difficult?* 32:1 INTERNATIONAL WATER RESOURCES ASSOCIATION, WATER INTERNATIONAL 1, 8 (2007).

[41] Salman, *supra* note 1, at 11.

[42] *Id.*

[43] WOUTERS, *supra* note 23, at 316.

[44] The framework nature of the Convention can be deduced from the provisions of the Convention itself. See The UN Watercourses Convention, supra note 13, Paragraph 5 of the Preamble and Art 3(3).

for negotiation, and leaves the details for the riparian states to complement in agreements by taking in to account the specific characteristics of the watercourse in question.[45] By doing so the Convention encourages parties to follow the general principles of the Convention in their specific agreements while still allowing the departure.[46]

Even if taking the 'framework approach' is widely described as a necessity for the watercourse Convention to reach in to consensus; it has also been criticized by many alleging that it provides little or no solution for basins with conflicts. Instead, it allows respective riparian states to engage in almost endless discussions over all the factors which might be considered.[47] This is especially true in a basin lacking genuine cooperative framework like Nile.[48] The Convention is adopted with the goal of ensuring the utilization, development, conservation, management and protection of international watercourses, and the promotion of their optimal and sustainable utilization for present and future generation.[49] To this effect, it incorporates different principles, but whose implementation primarily requires cooperation among riparian countries. That is why the Convention emphasized on the concept of cooperation; where it includes 15 references to the word and its derivatives.[50]

However, as mentioned above, a question may arise as to how such a 'framework Convention'; that only provides 'general guidelines' and whose implementation is heavily relied on the good will, cooperation and agreement of watercourse states; can indeed able to achieve its objectives. Accordingly, some scholars questioned the effect of the Watercourses Convention and its application to the resolution of disputes over the use of water in the river basins with conflict or susceptible to conflict where the relation among respective riparian states has been largely characterized by tension, lack of trust or genuine cooperation.[51]

Based on the framework and non-obligatory natures of the Convention's provisions, Hey for instance asserted that the Convention is designed in the manner that it neither furthers sustainable water use nor regulates the discretionary powers of watercourse states.[52] She argued that although the furtherance of cooperation and the attainment of sustainable water use thereto are acknowledged as the main goals that should be pursued by watercourse states, the Convention does not impose the concomitant legally binding obligations on its Parties.[53]

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[45] Salman, *supra* note 1, at 8.

[46] Takele Soboka, *Between Ambivalence and Necessity: Occlusions on the Path towards A Basin –Wide Treaty in the Nile Basin*, 20(3) COLO. J. INT'L ENVTL. L & POL'Y 291, 293(2008-2009).

[47] Peter Beaumont, *The 1997 UN Convention on the Law of Non-navigational uses of International Watercourses: Its Strengths and the Need for New Workable Guidelines*, 16(4) WATER RESOURCES DEVELOPMENT 475, 487(2000).

[48] As revealed in the past platform of negotiations in the Nile basin viz. Hydromet (1967), Udungu (1983) and Tecco Nile (1992), the negotiations were focused on technical matters which intentionally excludes the main issue of water allocation except the negotiations made for the Cooperative Framework Agreement (CFA) under the auspice of the Nile Basin Initiative (NBI). However, even the negotiations for the CFA failed to close the chapter of the colonial legacy and the downstream hegemony in the Nile basin due to the introduction of the non-legal concept- 'water security'- under Art 14 of the CFA by which the two downstream countries are aimed to protect their current uses and rights. See Agreement on the Nile River Basin Cooperative Framework, open for signature as of May 2010 (not yet entry into force), annex on Art 14(b) where Egypt and Sudan proposed a provision stipulating "not to adversely affect the water security and *current uses and rights* of any Nile basin state" (herein after CFA, 2010).

[49] The UN Watercourses Convention, *supra* note 13, paragraph 5 of the preamble.

[50] Salman, *supra* note 1, at .8

[51] Schroeder, *supra* note 19, at 21.

[52] Hey, *supra* note 33, at 297-299.

[53] *Id.* at 291-293.

She further asserted that it does not require states to protect basic human needs, nor that they develop integrated water policies or "provide minimum standards that watercourse states are to further develop through cooperation among themselves".[54] Similarly, Wolf supported this view by stating that "it [the Convention] provides few practical guidelines for allocations, the heart of most water conflicts".[55] Therefore, according to Hey and Wolf, the Convention is simply the collection of customary international law where it only specifies the fact that a number of general environmental law obligations apply to international watercourses; without imposing new obligations other than those which are already binding upon watercourse states by virtue of customary international law.[56]

However in the contrary, scholars like McCafrey and Tanzi supported the framework nature of the Convention and have the expectation that watercourse problems can be tackled in an integrated and coordinated manner through consultation and negotiation.[57] Although the writer of this article believe on negotiation, leaving everything to be determined by negotiations of parties would lead to infinite dialogue particularly given the scarcity of fresh water resources in many basins coupled with the Convention's wide room for parties' departure and absence of clear guidelines for negotiation.

Having said these with respect to the framework nature of the Convention, let us see the scope of the Convention. The scope of the Convention has been limited based on the types of uses of international watercourses (i.e. navigational and non-navigational uses) and the mode of their existence (i.e. surface water and ground water). Accordingly, the Convention's application is limited to "the uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters".[58] However, the exclusion of the navigational uses of international watercourses is not absolute[59] as the Convention applies to navigation in so far as other uses affect or is affected by navigation.[60]

Moreover, 'confined ground water'- a ground water which is not connected with surface water flowing to a common terminus- are excluded from the ambit of the Convention as revealed in the definition of 'watercourse'. The Convention defines the term 'watercourse' to include both 'surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus'.[61] And it is international if parts of the watercourses are situated in different States.[62] It is clear from these definitions that certain, but not all ground waters fall within the scope of the Convention. The definition includes only groundwater which is hydrologically related to surface water. It does

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[54] *Id.* at 291.

[55] Wolf, *supra* note 33.

[56] Hey, *supra* note 33, at 292.

[57] STEPHAN C. MCCAFFREY, *Water scarcity: Institutional and legal responses*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 52, 56 (Brans, Edward H.P. et al. eds, 1997), London, The Hague, Boston; and Attila Tanzi, *Codifying the minimum standards of the law of international watercourses: remarks on part one and a half*, 21(2) NATURAL RESOURCES FORUM 99, 116 (1997).

[58] The UN Watercourses Convention, *supra* note 13, Art. 1(1).

[59] Attila Tanzi, *The U.N. Convention on International Watercourses as a Framework for the avoidance and Settlement of Water law Dispute*, 11 LJIL 441, 446 (1998).

[60] *Id*. See also the UN Watercourses Convention; *supra* note 13, Art. 1 (2).

[61] *Id*. UN Watercourses Convention cited above, Art. 2(a).

[62] *Id*. Art. 2(b). Here it is important to note that the convention used the term 'international watercourses' than 'international rivers' where the former as the former includes lakes and groundwater, in addition to rivers.

not include trans-boundary aquifers (confined groundwater) that do not contribute water to, or receive water from, surface waters.[63] But, some argued that it is not entirely clear where exactly to draw the line between confined and non-confined ground waters and thereby identify those within the scope of the Convention from the uncovered once.[64] This may be due to the "scientific uncertainty" on the issue.

The exclusion of confined trans-boundary ground water, however, is pointed out as one of the most serious failings of the Convention[65] even if states are expected to be guided by the principles of the Convention as revealed in the ILC's recommendation and the draft article on trans-boundary Aquifers.[66] There were also states which failed to sign the Convention due to this fact. On the other hand, the inclusion of non-confined groundwater in the Convention was also cited as a reason for the abstentions of certain states to vote in favor of the Convention.[67] Therefore, one can observe limitations with respect to the nature and scope of the Convention.

IV. THE CONTROVERSIAL PROVISIONS OF THE CONVENTION

The UN Watercourses Convention is a general framework agreement that contains thirty-seven articles,[68] which are divided into seven parts. In addition to those introductory provisions dealing about the scope of its application, the main areas that the Convention addresses include watercourses agreements;[69] general principles like equitable and reasonable utilization[70] and the obligation not to cause harm; [71] notification for planned measures;[72] protection, preservation and management;[73] and dispute settlement.[74] With a view to provide a background for subsequent discussions, this section focused on those controversial articles dealing with the relationships of the Convention to existing agreements, the principle of equitable and reasonable utilization and no significant harm rule and the relation thereof, and finally the notification procedures.

A) The Status of Existing Agreements

The relationship of the Convention to agreements concerning specific watercourses is dealt with in Articles 3 and 4 of the Convention with respect to existing agreements, future agreements relating to the entire watercourse and partial water agreements.[75] The Convention generally encourages states sharing watercourses to enter into agreements that apply and adjust the provisions of the Convention to the particular characteristics of the watercourse

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[63] Stephan C. McCaffrey, *The International Law Commission adopts draft Article on Trans-boundary Aquifers*, 103 AMER. J. INT'L L. 272, 283-284 (2009). See also Salman, *supra* note 1, at 8.

[64] Christian Bahrman and Raya M. Stephan, *The UN Watercourses Convention and the Draft Article on Trans-boundary Aquifers: the way a head*, UNESCO-UNEP Conference, Paris, 6-8 December 2010, International Conference 'Trans-boundary Aquifers: Challenges and New Direction' (ISARM, 2010) at 4.

[65] Tanzi, *supra* note 59, at 451.

[66] McCaffrey S., *supra* note 63, at 281-282.

[67] STEPHAN C. MCCAFFREY, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICTS 17, 18 (1997)

[68] In addition to the main 37 articles, the Convention annexed fourteen articles on Arbitration.

[69] The UN Watercourses Convention, *supra* note 13, Art 3 & 4.

[70] *Id.* Art. 5 & 6.

[71] *Id.* Art. 7

[72] *Id.* Art. 11-19.

[73] *Id*. Art. 20-26.

[74] *Id*. Art. 33.

[75] *Id.* see generally Art 3 & 4.

concerned.[76] Given the framework nature of the Convention, encouraging parties to enter in to specific watercourse agreements seems logical and expected. But the way that Art 3 of the Convention dealt with the status of existing agreements is particularly controversial.

Unlike other provisions of the Convention, the debate and the positions of states on the validity or otherwise of existing agreements was not conditioned by the geographical considerations (upper riparian vis-à-vis lower riparian) but, rather by the question of who was well served by the existing agreements.[77]Some participants in the Working Group (notably Portugal and Ethiopia)argued that at least some provisions of the new Convention should be regarded as rules of '*jus cogens*',[78] and thus pleaded for the lapse of all existing watercourse agreements that contradicts with such rules.[79] Particularly, Ethiopia wanted Article 3 to require existing watercourse agreements be harmonized with the Convention.[80] In contrast, other states (Egypt, France and Switzerland) insisted that existing watercourse agreements should be left unaffected by the new Convention.[81] Eventually, the text of Article 3 was revised by the Working Group and put to a vote before being adopted by 36 votes for, with 3 against (Egypt, France, and Turkey) and 21 abstentions.[82]

The provision preserves the validity of existing watercourse agreements, but adds that Parties "may, where necessary, consider harmonizing such agreements with the basic principles of the Convention."[83] From this provision one can understand that the Convention neither invalidated the existing agreements nor mandatorily required parties to harmonize it with the basic principles of the Convention. Moreover, the above compromise is virtually without substance because firstly, from the language used in Article 3(2), it is clear that there will be no "harmonization", or amendment of existing agreements without the consent of all States Parties to them. Secondly, the 'basic principles' with which such agreements may be harmonized are not defined under the Convention. Therefore, the issue of harmonization as well as determining how and with which principles the existing agreements shall be harmonized is totally left to the states concerned, and can only be accomplished by agreement. That is why Caflish noted that "Article 3(2) does not go beyond stating the obvious, namely, that existing agreements may be amended with the consent of all the States Parties to them."[84]

As a result, riparian states that already have agreements in place like Egypt and Sudan, believe that the Convention has not fully recognized those agreements because it suggests that the parties may consider harmonizing such agreements with the principles of the Convention. On the other hand, riparian states that have been left out of existing agreements like Ethiopia believe that the Convention should have subjected those agreements to the provisions of the Convention, and should have required inclusion of all riparians in the said agreement.[85]

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[76] *Id.* Art. 3 (3).

[77] CAFLISH, *supra* note 17, at 10.

[78] See VIENNA CONVENTION ON THE LAW OF TREATIES (1969), Art. 64.

[79] CAFLISH, *supra* note 17, at 10.

[80] Verbatim record, 99th plenary meeting, UN GA, 21 May 1997, UN Doc. A/51/PV.99, 9-10, cited in: *MCCAFFREY, Supra* note *67, at* 18.

[81] CAFLISH, *supra* note 17, at 10.

[82] *Id.*

[83] The UN Watercourses Convention, *supra* note 13, Art. 3(1) & (2).

[84] CAFLISH, *supra* note 17, at 10.

[85] Salman, *supra* note 1, at 12.

Regarding the reason why the Convention opt not to require mandatory harmonization, McCaffrey raised the issue of its impracticability stating that "given the vast number and variety of existing agreements, such a requirement would have been impractical."[86] But, he further states that the absence of such requirements in the Convention does not mean that the principles reflected in the Convention will be without significance in the 'interpretation' of existing agreements.[87] However, the writer of this article believes that even if the requirement of such harmonization would be difficult in practice and in return reduce its acceptance, it is not impossible. Rather it is a must as far as uniform and rule-based international regime is required to be established for the fair use and administration of trans-boundary water resources. Otherwise a party having a hegemonic status in the basin with respect to the 'material power', 'bargaining power' and 'ideational power' will always be the winner by using the same as an instrument to influence and prevent weaker co-riparian from developing hydraulic works in their own territory; which is not fair.

B) The Principle of Equitable and Reasonable Utilization and the "No Significant harm" Rule

The second and the most controversial provisions of the Convention are Articles 5 and 7, dealing respectively with the principle of equitable utilization and the obligation not to cause significant harm.[88] Art 5 sets out the fundamental rights and duties of states concerning the utilization of international watercourses by providing for the equitable and reasonable utilization of the watercourse by riparian states. This obligation is to be pursued with a view to attaining optimal and sustainable utilization 'consistent with adequate protection of the watercourse'.[89]

According to this principle, a state must use an international watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing the watercourse. But this balance of equitability can be achieved through cooperation and information sharing among riparian states.[90] To this effect, the Convention provides the general obligation to cooperate[91] and required riparian states to exchange data and information concerning the condition of the watercourse on a regular basis.[92] That is why paragraph two of article 5 clearly provides a duty for participation between riparian states when using an international river. Therefore, the article includes both the right to utilize and the duty to cooperate.

The Convention also provides non-exhaustive lists of factors that should be taken in to consideration in determining the equitability and reasonableness of water utilization among riparian states.[93] Although, as will be discussed latter, the practical applications of the factors under Art 6 and attaching weight thereto are often difficult, those factors are needed to be

[86] MCCAFFREY, *supra* note 67, at 18
[87] *Id*.
[88] Tanzi, *supra* note 59, at 453-454.
[89] UN Watercourses Convention, *supra* note 13, Art 5(1).
[90] MCCAFFREY, *supra* note 67, at 19.
[91] UN Watercourses Convention, *supra* note 13, Art 8.
[92] *Id*. Ar.t 9.
[93] *Id*. Art. 6(1).

weighed and balanced in every concrete situation without giving priority to any such factors over the others.[94]

On the other hand, Art 7 provides the obligation of riparian states not to cause significant harm under two paragraphs. While the first paragraph incorporates the 'no-harm rule'[95], the second paragraph implies that a reasonable use may still cause significant harm to another watercourse state although all appropriate measures had been taken.[96] The provision on the no harm rule was actually the most controversial one from the very first (1991) ILC draft version of the article;[97] to the 1994 version[98], and which still continued in the final version of the Convention. It was discussed very controversially in the Working Group seeking the amendment of the draft article.[99] In this regard, the question whether the adjective 'significant' and the obligation of due diligence in the first paragraph (of the 1994 draft article) should be deleted; the issue of the introduction of another obligation of 'all appropriate measures' in the article's second paragraph; and the question as to which of the two articles 5 and 7 should be superior if they come into conflict were among the most contentious points during the negotiations which in deed entails modifications. In contrast, the issue of compensation was hardly discussed and not changed by the Working Group.[100]

Above all, the issue whether equitable utilization should prevail over the 'no-harm' obligation or vice-versa was the most controversial and hotly debated one.[101] In this regard, upstream riparian states favor the equitable utilization principle because it gives them greater flexibility in developing new upstream uses, particularly where the watercourses are being used intensely in downstream states. Downstream states, on the other hand, preferred the no harm rule of Art 7 because it affords greater protection to their established uses.[102] For example, with respect to the 1994 ILC's draft version of Article 7, the downstream countries as well as many 'intermediary' States supported, while the upstream countries including Ethiopia opposed it.[103]

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[94] Arcari, Maurizio, *The draft articles on the law of international watercourses adopted by the International Law Commission: an overview and some remarks on selected issues*, 21(3) NATURAL RESOURCES FORUM 170, 172-175(1997).

[95] The UN Watercourse Convention, *supra* note 13, Art 7(1).

[96] *Id.* Art 7(2).

[97] Article 7 in the ILC 1991 Draft Articles provided: 'Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.' And many argued that in the 1991, the 'no appreciable harm' (Article 7) had been presented as the cornerstone provision of the entire document. See WOUTERS, *supra* note 23, at 307.

[98] Article 7 of the 1994 ILC Draft Articles read: "1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States. 2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering harm over: (a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6; (b) the question of ad hoc adjustments to *its* utilization, designed to eliminate or mitigate any such harm caused, and, where appropriate, the question of compensation." Despite the changes made in 1994 version, however, the provision could still be interpreted as endorsing the 'no-significant harm' rule as the primary obligation. See Wouter, supra note 14, 417.

[99] Tanzi, *supra* note 57, at114.

[100] Schroeder, *supra* note 19, at 43.

[101] MCCAFFREY, *supra* note 67, at 21-22.

[102] Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVT. REV. 269, 284. See also STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, at 307 (Oxford University Press) (2007).

[103] CAFLISH, s*upra* note 17, at 14.

However, after a lengthy debate by the Working Group, a compromise regarding the relationship between the two principles was reached where the new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation, "having due regard to articles 5 and 6."[104] Regarding the voting pattern in the working group, the 'package deal' (represented by Articles 5 to 7) was accepted by 38 votes to 4 (China, France, Tanzania, Turkey), with 22 abstentions.[105] Even if the compromise language facilitated approval of the Convention, some upper riparians still consider the Convention as biased in favor of lower riparians because of its specific and separate mention of the obligation not to cause harm. On the other hand, a number of downstream states such as Egypt concerned that the Convention favors upstream riparians because it subordinates the no harm rule to the principle of equitable and reasonable utilization[106].Although some argue that such controversies are the results of misconception[107], the relationships between the two principles are said to be unclear under the Convention making the inherent tension to continue among the upstream and downstream riparians.[108]

Therefore, the writer believe that it is better either to adopt the equitable and reasonable utilization principle alone or limiting the application of the no harm principle to environmental damaging activities rather than water allocation issues while providing effective compliance mechanisms, financial or otherwise, that could deter parties as well as non-parties to refrain from non-compliance activities. In this regard, it is possible to take lessons from different Multilateral Environmental Agreements (MEAs) that restrict or ban trade with non-parties unless upon their *de facto* compliance with the requirements of the agreements.[109] To this effect, for example the Watercourses Convection may use trade restrictive measures on products or services (e.g. agricultural products or hydroelectric power) produced using the watercourses in question for irrigation or hydroelectric generation although this proposal may face challenges from the GATT/WTO system that advocates free trade. Moreover, the proposal would be ineffective if the riparian state in question is determined to use the water resource only for domestic purposes.

C) The Notification Procedures of the Convention

The third controversial point is the notification process designed for planned measures under Part III of the Convention.[110]Under nine articles, the Convention provides a set of procedures to be followed in relation to new activity in one state that may have a significant adverse effect on other states sharing an international watercourse. This 'obligation to provide prior

[104] Salman, *supra* note 1, at 9.

[105] For more regarding the negotiations on Art 5&7, See generally Schroeder, *supra* note 19, at 39-47.

[106] Salman, *supra* note 1, at 11.

[107] *Id.*

[108] Ryan Stoa, *The United Nations Watercourses Convention on the Dawn of Entry In to Force*, 47 VAND. J.TRANSNAT'L L 1321, 1324-1325 (2014).

[109] Regarding the MEAs allowing trade with non- parties as an exception and up on their *de fact* compliance, see 1973 CITES Convention, Article X ("Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party."); 1987 Montreal Protocol, Article 4. See, e.g. Paragraph 1 ("Within one year of the entry into force of this Protocol, each Party shall ban the import of controlled substances from any State not party to this Protocol"); 1989 Basel Convention, Article 4(5) and 11.

[110] The UN Watercourses Convention, *supra* note 13, Art. 11-19.

notification of such changes was accepted as a part of the Convention by most delegations.'[111]However, it is important to note that Ethiopia, Rwanda and Turkey voted against Part III of the Convention believing that the provisions gave veto power to downstream riparians.[112]

Under the Convention, the planning state is required to give notice if the planned measures are predicted to have "significant adverse effect" up on the other watercourse states concerned. In other words, if the planned project is less likely to have a significant adverse effect on the other watercourse state, the planning state is not bound to give notice although there is still a room where the former state may request the latter to apply the normal notification procedures[113].But it should be noted that determining whether the planning state has a duty to give notice or not may be debatable, because it depends on the question whether the planned activity has a significant adverse effect or not which is often subjective and depends on the manner that the Environmental Impact Assessment (EIA) study has been conducted by the planning state.

Unlike many 'Multilateral Environmental Agreements',[114] the UN Watercourses Convention does not expressly require the planning state to conduct EIA, albeit the issue is impliedly referred under Art 12. Moreover, the Convention neither provides the criteria and procedures for determining whether an activity is likely to have significant adverse environmental impacts nor leave the issue to be set by "joint commissions" where the contested states are guided up on.[115]Rather, the Convention left the issue totally to the concerned watercourse states where they may negotiate on the possible effects of planned measures on the conditions of an international watercourse[116]which ultimately required parties to determine whether the planned measures are consistent with the provision of Art 5 or/and 7, which is difficult to be agreed up on as will be discussed latter.[117]

But in the situation where the planned measures may have adverse effect on the other watercourse state, the planning state shall give notice. In doing so, the notifying state is required to deliver the necessary data and information including the results of environmental impact assessment to the notified states[118]. Those states are then given six months to respond. But the six-month period put in place to reply for notifications may also be extended to another six months if the notified state faced 'special difficulty' in evaluating the planned measures. But during such period for reply, the notifying state shall not implement or permit the implementation of the planned measures without the consent of the notified States.[119]If the

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[111] MCCAFFREY, *supra* note 67, at 23.

[112] *Id.*

[113] The UN Watercourses Convention, *supra* note 13, Art. 12 Cum. Art. 18(2).

[114] For example, see the Rio Declaration(1992), Principle 17; the United Nations Framework Convention on Climate Change (UNFCCC)(1992), Art 4(1)(f); and the Convention on Biological Diversity (CBD), Art 14. Moreover, there is also EIA specific International Agreement viz. the 'Convention on EIA in Trans-boundary Context' (Espoo Convention, 1991).

[115] At this juncture it is important to note that, the CFA provides an explicit and separate provision for "Environmental impact assessment and audits". See CFA; *supra* note 48, Art. 9.

[116] The UN Watercourses Convention, *supra* note 13, Art 11

[117] Here, the majority of the provisions dealing about planned measures (Part III) referred to Art 5 and 7(i.e. the equitable and reasonable principle and the no harm rule) and required watercourse states to enter in to consultation and negotiation up on the issue.

[118] The UN Watercourses Convention, *supra* note 13, Art 12.

[119] *Id.* Art. 13 Cum Art 14(b).

notified states still object to the planned use, the concerned states shall enter into consultation 'with a view to arriving at an equitable resolution of the situation.'[120]Here again, the notifying State shall refrain from implementing or permitting the implementation of the planned measures during the course of the consultations and negotiations, for a period of six months unless otherwise agreed[121]. Therefore, this entire process could take twelve months or longer.

Due to such lengthy procedures, upper riparian states perceived that the notification process under the Convention favors downstream riparian and provides them with 'a veto power' over projects and programs of upstream riparian.[122]But many argued that the perception of upstream countries in this regard is inaccurate which is based on a false notion that "only upstream riparian can cause harm to downstream riparian".[123]Actually, no veto power is provided for in Part III of the Convention. However, it should be noted that the said provisions have at least a temporary suspensive effect upon the implementation of measures by the planning state.[124]

With respect to the above assertion, the writer of this article also believe that the Convention does not explicitly limit notification to downstream riparians or grant any state a veto power over the projects and programmes of other riparian states. Rather it requires notification of all riparians, both downstream as well as upstream.[125] This means in the eyes of the Convention upstream states can also be 'harmed' by activities of downstream states. However, I believe that the kind of harm that could be caused by the activities of downstream riparians for which they are required to notify upstream riparians is largely limited to those impacts relating to 'water quality changes' (for example, those activities introducing evasive/alien species to the watercourses, be it plant or fish varieties, whose environmental impacts can spread even upward towards the jurisdiction of upstream riparians); rather than 'water quantity changes'. This is actually true in most basins where water infrastructures have already been developed by downstream riparians without giving any notification to upstream riparians like what happened in the Nile basin. On the other hand, it is obvious that the downstream riparians can be harmed by the physical impacts of both the water quality and quantity changes caused by upstream uses since the water is flowing down. Thus, from this perspective the notification provisions of the Convention are more disadvantageous for upstream riparians and their impacts may go beyond delaying upstream projects although they do not go to the extent of giving a 'veto power' to downstream riparians.

Nevertheless, some argued that the upstream riparians can be harmed by the potential foreclosure of their future use of water caused by the prior use and the claiming of rights by downstream riparians, so that the formers can also benefit out of the notification procedures.[126]However, this seems an abstract notion since the upstream riparians, in the

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[120] *Id* Art. 15 Cum 17(1).

[121] *Id* Art. 17(3).

[122] Salman, *supra* note 1, at 11.

[123] *Id.*

[124] The UN Watercourses Convention, *supra* note 13, Arts. 13, 17 & 18.

[125] In this regard it is important to note that the World Bank Policy for Projects on International Waterways requires notification of all riparians, both downstream as well as upstream, underscoring the fact that harm is actually a two-way matter. See Salman M.A. Salman, *The World Bank Policy for Projects on International Waterways-an Historical and Legal analysis* (2009), as cited in Salman, *supra* note 1.

[126] See generally Salman M.A. Salman, D*ownstream riparians can also harm upstream riparians: The Concept of foreclosure of future uses*, 35(4) WATER INTERNATIONAL 350, 350-364 (2010).

majority of instances, are already harmed by the existing water constructions and prior uses of downstream riparians, which cannot be rectified by the notification procedures of the Convention, unless such downstream uses are forced to be reduced proportionally. But the option of reducing downstream existing uses for the equitable utilization of the water by upstream riparians seems unlikely to occur in practice. Therefore, I believe that except the environmental or water quality change related harms, the above instances of harm caused by downstream states under 'the concept of foreclosure of future uses' seems uncovered under the notification procedures of the Convention. Because the Convention requires notification in case a 'project may have significant adverse effect upon other watercourse States'. This means, the notification procedures of the Convention can apply either by downstream or upstream states when there are new project developments. Thus, except the case of new project development downstream, the notification provisions of the Convention are less likely to be invoked against downstream states that often tried to retrieve the status quo- their existing uses- rather than developing new projects.

V. THE UNWCC IN THE CONTEXT OF THE NILE BASIN: DOES IT REALLY MATTERS?

It is important to note that the main principles laid down in the Convention, especially those concerning equitable utilization, prevention of significant harm and prior notification of planned measures are basically codification of customary international law.[127] Moreover, the Convention has had a remarkable record of influence since its conclusion in 1997 as reflected in different judicial decisions and treaty negotiations.[128]Therefore, given its sphere of influence and customary international law status, the main principles of the Convention may be regarded as binding on all states whether they are parties or not.[129]In this regard, since the Nile basin countries including Ethiopia cannot escape from the application of the Convention's principles by being out of it, one may argue that it would be better to join the Convention which has been endorsed by a number of international entities and financial institutions like the World Bank.[130]

However, the fact that certain principles of the Convention are the codification versions of customary international water law does not necessarily mean that staying out from the Convention makes no difference. In other words, the effects of being party to the Convention for a given state may not be similar with the effects of the applications of the Convention in the name of customary international water law. This is because first, the problem is not mainly about the acceptability or otherwise of the Convention's Principles, but the problem is the way those Principles are interpreted and applied on the ground by riparian states. The principle of equitable and reasonable utilization for instance may have different meanings for Ethiopia and Egypt even if both agreed on the equitable utilization of the Nile water as a principle which in turn makes its practical application difficult.[131]

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[127] Stephen McCaffrey, *The U.N. Watercourses Convention: Retrospect and Prospect*, 21 PAC. MC GEORGE GLOBAL BUS. & DEV. L.J. 165, 167 (2008).

[128] Tanzi, *supra* note 59, at 443-444. See also *id*, at 170-171. For instance, the ICJ endorsed the Convention in September 1997, in the Gabcikovo-Nagymaros case, only four months after it was adopted by the UNGA. Moreover, as to negotiations, the Convention has played a role in the negotiation of treaties such as the 2000 SADC (Southern African Development Community) Revised Protocol.

[129] Salman, *supra* note 1, at 14.

[130] *Id.* at 13-14 (for more information about the impact and relevance of the Convention).

[131] Carroll, *supra* note 102, at 288.

As will be discussed later, the problematic application of the Convention's Principles mainly emanates from its compromising texts which paved the way for the existence of different types of interpretations by downstream and upstream countries. Second, the writer believes that all of the provisions of the Convention are not also the reflection of customary international water law. Even if the ILC mainly drafted the Convention based on the collections of customary international law, the ILC's work was not linear where different approaches were tested and some were rejected with a view to compromise different interests.[132]

Moreover, to determine whether the Convention really matters in Nile basin, it is important to examine its role in enhancing future cooperation in the region. Actually, the Nile states could theoretically consider negotiating a regional agreement under the auspices of the Convention since the Convention provides for the negotiation and adoption of regional watercourse agreements[133] and establishes a general obligation to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of international watercourses."[134] However, there are several barriers to using the Convention as a basis for a Nile agreement.[135]As mentioned earlier, most significantly, not all Nile states have supported the Convention during its adoption. Only Kenya and Sudan voted to adopt the Convention in the U.N. General Assembly. And more importantly none of the Nile riparian countries currently signed or ratified the Convention since its adoption.[136]

Thus, given the non-party status of the Nile states and their divergent views with respect to the fundamental provisions of the Convention; particularly regarding the status of existing agreements and the relationships between the two principles (i.e. equitable and reasonable principle, and no significant harm principle) coupled with the Convention's compromising and confusing languages thereto, it seems less likely for Nile river basin states to reach into consensus and come up with all-inclusive regional agreement under the framework of the Convention.[137] Even, if they stand to use the Convention as the basis for their agreement, under the current conditions they either failed to reach into agreement or as mentioned earlier, the hegemonies-Egypt and Sudan- would take the advantages of the uncertainty that often emanates from the compromised languages of the Convention since the other weak co-riparian cannot fairly compete and able to enforce their line of argument on equal footing.

Prior to the negotiation of a Nile agreement under the auspices of the Convention, the writer therefore believes that the Nile states first must come to a common understanding of the hydro- geography of the Nile and develop comparable institutional and legal frameworks for handling water resource matters on equal footing. Unless Nile states lay this foundation, a new Nile agreement will fail because of genuine and perceived inequities among riparian states and lack of capability to enforce the agreement. If countries do not have a shared view of the problems afflicting the Nile or the capability to implement management measures, they will

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[132] McCaffrey, *supra* note 126, at 166.

[133] The UN Watercourses Convention, *supra* note 13, Art. 3 & 4.

[134] *Id.* Art. 8.

[135] Carroll, *supra* note 102, at 283.

[136] Takele Seboka, *Between Ambivalence and Necessity in the Nile Basin: Occlusions on the Path towards a Nile Basin Treaty*, 2(2) MIZAN LAW REV. 201, 224-225 (2008).

[137] Carrol, *supra* note 102, at 287.

not be able to reach agreement or comply with the agreement that they create.[138]Hence the time for laying such foundations for genuine cooperation seems a long time dream in the Nile basin.

This has been tested in practice during the negotiation process on the Nile River Basin Cooperative Framework Agreement (CFA) which incorporates the provisions of the Convention on equitable and reasonable utilization,[139] the obligation not to cause significant harm,[140] as well as on cooperation[141] and exchange of data and information,[142]but rejected by the two downstream countries- Egypt and Sudan - claiming the protection for current uses and rights[143] in the name of "water security".[144]Here it is important to note that, had they accept the equitable and reasonable utilization principle as stipulated in the CFA, they would not come up with the concept of 'water security' to ruin the applicability of the principle, which still benefit them more.

However, as mentioned earlier the negative positions of the two downstream states do not often emanate from the fact that the provisions of the Convention are not, at least on average, downstream favored in the context of Nile. Rather their position is largely stemmed from the strong desire to make the status quo untouched. Therefore, in the situation where the two downstream countries, Egypt and Sudan, still hangs on "historic rights" coupled with the problematic practical application of the Convention's principles, it is difficult to argue that the existing Watercourses Convention would in fact matters in bringing the Nile basin countries in to genuine cooperative framework and thereby play a major part in the resolution of water allocation in the basin.[145]

Although the question 'so what should be done to envisage a new legal framework and governance scheme for the Nile' is beyond the scope of this article, the writer believes that for effective future negotiations what matter is whether all relevant stakeholders are provided with the facilities to participate fully and effectively in the compacting of a new governance scheme for the Nile. In the first place the colonially-imposed Nile River Agreements must be set aside since they did not take into consideration the interests of most of the upper riparian states. However, while rejecting the colonially-imposed Nile River Agreements, it is equally important to note that any attempts to negotiate an agreement without the participation of Egypt will be ineffective, leading only to increased conflict. In this regard, it is important to note that had the CFA entered in to force with the only ratifications of the upper riparian states while excluding Egypt and Sudan, it could not bring sustainable solution.

Therefore, trying to resolve the problem under a coordinated and all-inclusive multilateral approach shall always be considered as the first and the only option. However, it is important to change the negotiation fora with respect to the stakeholders to be participated in any future negotiations. Accordingly, I urge any Nile negotiation, whether it takes the UNWCC as the

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[138] *Id.* at 271.

[139] See CFA, *supra* note 48, Art. 3(4) & Art. 4; Cum. the UN Watercourses Convention, *supra* note 13, Art. 5 & 6.

[140] See Art. 3(5) & Art 5 of CFA Cum. Art 7 of the Convention.

[141] See Art. 3(1) of CFA Cum. Art 8 of the Convention.

[142] See Art. 3(8)(10), Art. 7 and Art 8 of CFA Cum. Art. 9 of Convention.

[143] Stoa, *supra* note 108, at 1325.

[144] See CFA, *supra* note 48, annex on Art 14(b).

[145] Takele, *supra* note 136, at 224.

basis or not, must include all the Nile River Basin riparian states where the national representations include not just each country's elites (i.e., political and economic leaders) but also the local communities whose livelihoods are dependent on and intertwined with the Nile. Moreover, it should include the developed industrial countries (which have a substantial economic presence in the Basin) as well as the multilateral organizations that support development efforts in this region. In doing so a sustainable governance scheme for the Nile must fully and effectively define the rights and obligations of the various stakeholders, making certain that those who partake in and benefit from the exploitation of the river's varied forms of wealth also contribute fully to its upkeep.[146]

VI. IS JOINING TO OR STAYING OUT FROM THE UNWCC WOULD BE A BETTER POLICY ADVICE IN THE ETHIOPIAN CONTEXT?

Given the divergent views and interpretations of the Convention's provisions, the position of riparian states to join it or not would ultimately depends upon the lens they used to observe the provisions of the Convention vis-à-vis the positions of other competing riparian states. As mentioned earlier, the geographical position where along a watershed a riparian state is situated (i.e. as upstream or downstream riparian), the existence or otherwise of genuine cooperative framework, the amount of trust and confidence among riparian, and the overall characteristics of the basin may determine the position of a given riparian state "to join to or abstain from" the UN Watercourses Convention.

Therefore, the question whether we are better off as non-party to the Convention or not should be examined based on the impacts that the Convention may impose on the interest of Ethiopia in the context of the Blue Nile in particular and the problems of the application of the Convention to the existing legal framework of the Nile basin in general. However, this does not mean that the issue shall be examined only in the context of the Blue Nile (Abbay) since most of the other major river basins of Ethiopia are also trans-boundary in nature.[147]However, among the trans-boundary rivers Ethiopia shares with other riparian states, the Blue Nile is the most important and poses many allocation challenges[148]at least due to two reasons; 1) it generates the lion share of the trans-boundary run-off from Ethiopia contributing 86% the Nile flow; and 2) it has been the long-lasting source of tension particularly with the two downstream states-Egypt and Sudan. For this reason, the article preferred to examine the issue largely from the context of Blue Nile and the two downstream riparian states since the other

[146] For a comprehensive discussion on proposals for a new framework, see Mwangi S. Kimenyi and John Mukum Mbaku, *Toward a Consensual and Sustainable Allocation of the Nile River Waters*, Draft Working Paper, August 2010.

[147] In this regard it is important to note that Ethiopia is upstream of all its trans-boundary rivers with more than 75% of the water resources flowing into neighboring countries. And no rivers flow into Ethiopia from neighboring countries. The Baro-Akobo, Abbay, Mereb and Tekezze drain into the Nile system; Wabi-Shebelle and Genale-Dawa discharge into the Indian Ocean after cutting through Somalia; part of the Dawa river forms a border with Kenya;. The Omo-Ghibe flows into Lake Rudolf or Turkana. Accordingly, some argue that this in itself is a major constraint on water resources development of the country since it requires negotiations with those countries sharing the water resources regarding water allocation and management of such trans-boundary rivers. See Imeru Tamrat, *Policy and Legal Framework for Water Resources Management in Ethiopia*, a paper presented at International Conference on Water Management in Federal and Federal Type Countries, at 4. See also generally FEKAHMED NEGASH, NATURE AND FEATURE OF ETHIOPIAN BASINS, Proceedings of National Water Forum, Addis Ababa (2004).

[148] Fekahmed Negash, *Managing Water for Inclusive and Sustainable Growth in Ethiopia: Key Challenges and Priorities*, European Report on Development; Confronting Scarcity: Managing Water, energy and land for inclusive and sustainable growth, at 25 (2012).

river basins do not generate significant trans-boundary run-off and are not yet the sources of controversy.

The status of existing agreements, the relationship between the principle of equitable and reasonable utilization, and no significant harm, and the notification of planned measures are among the main issues of controversies and the unfinished business in the Nile basin.[149] Accordingly, pros and cons of joining the watercourses Convention in the context of Ethiopia would be assessed under different scenarios by taking in to consider the gaps of the Convention and the practical problems of applying the Convention's principles.

A. Failure to Demand the Establishment of Joint Commission to Enforce the Principle of Equitable and Reasonable Utilization

Although the Convention obligates parties to cooperate for various purposes,[150]it does not provide any guidance on how countries should do so[151] and the enforcement mechanisms thereof. Particularly, it does not require the establishment of joint watercourse institution for the purpose of performing various functions, including: determining equitable allocations; managing international watercourses; settling disputes.[152] Rather it simply provides that parties 'may' use joint mechanisms or commissions for the purpose of facilitating cooperation, managing the shared resource and settling disputes[153] without requiring their establishment. From this we can understand that the Convention is weak in demanding collective actions.

Especially, the establishment of joint Commissions would have a great role to effectively implement the cornerstone principle of the Convention and thereby adaptively manage an international watercourse with changing conditions.[154] In the absence of genuine cooperative framework, quantitative water allocations and flexible treaty regime, the principle of equitable and reasonable utilization would be an abstract notion with no or little implementation.[155] To provide such imperatives for the effective implementation of the principle, joint institutions should be established with the authority to respond to changing conditions.[156]Although, the Convention provides obligations of regular exchange of date and information[157] and prior notification of planned measures[158] as a mechanism to keep the equitability balance in the uses of the water by one riparian state vis-à-vis the other riparian states, this system does not necessarily work well without a joint mechanism.[159]

The Convention provides non-exhaustive lists of factors that should be taken in to consideration in ensuring the equitable utilization of the international watercourse.[160]As it will

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[149] Magdy Hefny and Salah El-Din Amer, *Egypt and the Nile Basin*, 67 Special Feature Article, AQUAT. SCI. 42, 45 (2005).

[150] Here it is important to note that, the UN Watercourses Convention underscores the concept of cooperation, and includes 15 references to the word and its derivatives. See Salman, *supra* note 1, at 8.

[151] Carroll, *supra* note 102, at 291.

[152] McCaffrey, *supra* note 127, at 166.

[153] The UN Watercourse Convention, *supra* note 13, Art. 8(2), Art. 24 & Art. 32(2).

[154] McCaffrey, *supra* note 127, at 168.

[155] Helal, *supra* note 5, at 345. See also generally Wolf; *supra* note 31, at 3-30.

[156] Stephan McCaffrey, *The need for flexibility in fresh Water treaty Regimes*, 27 NATURAL RESOURCE FORUM 156, 160 (2003).

[157] The UN Watercourses Convention, *supra* note 13, Art. 9.

[158] *Id*. Art. 11-19.

[159] McCaffrey, *supra* note 127, at 168.

[160] The UN Watercourses Convention, *supra* note 13, Art. 6(1).

be discussed later, however, it may be difficult for riparian states to reach agreement on what combination of factors constitutes equitable utilization, which are often subject to different interpretations. In order to settle such potential disputes, requiring the establishment of joint Commission mandated to provide guiding rules and procedures on which riparian states are bound to observe is necessary for the effective implementation of the equitable and reasonable utilization principle. Despite this need, however the Convention simply required watercourse states to 'enter into consultations in a spirit of cooperation' in applying Art 5 and 6, when the need arise.[161]

In this regard, the CFA for example required Nile Basin States to 'observe the rules and procedures established by the Nile River Basin Commission for the effective implementation of equitable and reasonable utilization'[162], even if the Commission is not yet established due to the failure of the agreement to enter into force. The writer believes that the two downstream Countries-Egypt and Sudan- already known that, even before the commencement of the negotiations, they will not compromise on the so called 'current uses and rights' argument. They pretend as if they accepted the equitable and reasonable principle and make the negotiations to continue just to buy time as part of the "discursive hegemony" and "stalling tactics".[163]That is why they intentionally postponed the establishment of the Nile River Basin Commission and made the same conditional up on the adoption of the CFA; because they know that they will never be party to the Agreement.

Therefore, in the situation where the Watercourses Convention do not require the establishment of joint commission to facilitate cooperation and laying a foundation for the effective implementation of the cardinal principle of the Convention, the negotiations among riparian states would ultimately be a zero sum game where only the powerful is determined to win. Moreover, given the non-mandatory natures of the dispute settlement methods, except the "fact finding Commission", the riparian states' attempt to settle the issue of "equitable utilization" via the dispute settlement procedures of the Convention[164] will be cumbersome. This is especially true in the Nile basin where there have been "much more discordance, unilateralism, mutual insecurity and suspicion rather than trust and cooperation."[165]Although the problem of having an effective dispute settlement mechanism is common to all MEAs, it is better to take lesson from the WTO Dispute Settlement System (DSS) where the decisions of the panel and the appellate body are binding with mandatory and exclusive jurisdiction.[166]

So given the fact that the application of the principle of equitable utilization is heavily reposes on the amount of confidence among riparians,[167] the Ethiopia's move to join the Convention will not add anything in the status quo and able to change the long lasting positions of Egypt and Sudan on the Nile River as revealed in the CFA negotiations.

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[161] *Id.* Art. 6(2).

[162] CFA, *supra* note 48, Art. 4(6).

[163] For more information on hydro hegemony's tactics and strategies see generally Zeitoun M. and Warner J. (2006), *Hydro-hegemony framework for analysis of trans-boundary water conflicts*, 8 WATER POLICY 435, (2006).

[164] The UN Watercourses Convention, *supra* note 13, Art. 33.

[165] Takele, *supra* note 136, at 203.

[166] For a detailed discussion of the WTO DSS, See Chapter 3, WTO Dispute Settlement P. VAN DEN BOSSCHE & ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 3rd ed. (CAMBRIDGE UNIVERSITY PRESS, 2013). See also Bossche and Gahti (2013), Use of the WTO Dispute Settlement System by LDCs and LICs, TRAPCA, at 9-11, 20.

[167] Takele, supra note 136, at 217.

B. The Paradox Between the Two Basic Principles of the Convention

The interplay between the two principles-the equitable and reasonable principle and the no harm rule- and their application in disputes between the conflicting uses of riparian States is the central tenet of the law of the non-navigational uses of international watercourses. It is, therefore, inevitable that these two principles and their scope and content have been, and remain, the subject of impassioned debate between riparian states as they attempt to apportion the waters of international watercourses.[168] In the following sub sections, the limitations of the Convention in relation with the two principles and the difficulty to implement them will be discussed in the context of Nile River while determining whether joining or staying out is a better position for Ethiopia.

1. The lack of clarity as to the relationships between the principle of equitable and reasonable utilization and the rule of "no significant harm"

Before discussing the two cardinal principles of the UN Watercourses, it is important to highlight the two extreme doctrines – the "doctrine of absolute sovereignty" and the "doctrine of territorial integrity"- which have been claimed regularly by riparians in negotiations often depending on where along a watershed they are situated.[169]The doctrine of absolute sovereignty is often claimed by an upstream riparian arguing that a State has absolute rights to water flowing through its territory. This doctrine allows upstream states a complete freedom of action with regard to that segment of international watercourses irrespective of any prejudice it might entail in other downstream countries. Conversely, the doctrine of absolute integrity maintains that the upstream state may not do anything that might affect the natural flow of the water in to downstream state.[170] Up on this doctrine, the lower riparian states have been attempted to secure their "historic rights" as acquired through seniority of use.[171]As Takele noted '[t]he positions of Nile riparian have also been, at least in theory, locked in these irreconcilable doctrines'[172]

But since such doctrines are not acceptable in the contemporary international water law and leaves very little room for negotiations, the doctrine of equitable utilization has "originated as a middle position of reasonableness between the two extremes of the absolute territorial sovereignty assertions of upstream states and absolute territorial integrity claims of downstream states."[173]With a view to reconcile the two extreme doctrines, the principle of equitable and reasonable utilization has been incorporated as a cardinal principle in the UN Watercourses Convention, but not alone.[174] Rather, it has been incorporated along with another concept- "the obligation not to cause significant harm"[175], while without setting a clear priority between the two.[176] This combination of Principles without a clear line of demarcation makes the implementation of the two Principles to be inherently in tension and

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[168] Helal, *supra* note 5, at 339.
[169] Wolf, *supra* note 31, at 5.
[170] Takele, *supra* note 136, at 212-213.
[171] Wolf, *supra* note 31, at 6.
[172] Takele, *supra* note 136, at 214.
[173] Albert E. Utton, *Which rule should prevail in International Waters: That of Reasonableness or that of No Harm?* 36 NATURAL RESOURCES JOURNAL 665, 638 (1996).
[174] The UN Watercourses Convention, *supra* note 13, Art 5 and 6.
[175] *Id*. Art. 7.
[176] Wolf, *supra* note 31, at 6-7.

thereby allow the inherent doctrinal conflicts between upstream and downstream riparian to continue. As a result, the Convention failed to establish meaningful rules for states in conflict over water resources.[177]To this connection, Wolf noted that,

> *Although the UN Convention has important components towards fostering peaceful relations, it is somewhat vague and even contradictory in its guidelines for the process of allocating international water resources. The document advises 'reasonable and equitable' use, and offers a series of considerations, which ought to be taken into account. But it also institutionalizes an inherent conflict between the 'rights based' positions of the upstream riparian-the principle of equitable use, sometimes argued in lieu of absolute sovereignty - and the downstream riparian - the obligation not to cause significant harm, a refined protection of historic rights.*[178]

Similarly, Utton while commenting the compromising languages of the draft article of Art 5 and 7, observed a direct clash between the established doctrine of equitable utilization and the rule of no significant harm.[179]The attempt to accommodate the two doctrines having different origins (as the doctrine of equitable utilization is for allocation of water quantity whereas the no significant harm is for the protection of water quality) would make the concept of reasonableness and the equitable consideration of all factors to be lost.[180] That is why it has been argued that the Convention created the collusion between the rules of water quantity and water quality. With a view to reconcile the two principles and thereby demarcate their areas of application, Utton proposed the rearrangement of the 'no harm' rule provision in the way to be applied in relation to water quality rather than quantity issue. Thus, the equitable and reasonable principle would clearly apply in water allocation disputes[181] unless the equitable utilization created water quality problem in which case the use that cause significant pollution/harm shall be deemed unreasonable.[182]

When we put the trigger in to the Nile basin, there is nowhere that the Watercourses Convention's "limitations are more apparent than in the geopolitical asperity of the Nile River Basin".[183] As one of the Convention's limitation, the lack of clarity as to the relationship between the principles of equitable and reasonable utilization and no significant harm hindered the Nile basin countries to reach in to agreement. And it was one of the major issues that proved highly contentious during the whole process of CFA negotiations.

This is because, Egypt and Sudan do not merely assert their rights under the colonial and post-colonial treaties (the 1929 and 1959 agreements); they reinforce those rights by invoking the principle of no significant harm's prohibition on adverse impacts to their allocations. On the other hand, upstream states including Ethiopia are increasingly assertive of their rights to an equitable and reasonable utilization of the Nile River's water resources. Unable to resolve the inherent tensions between the two principles, the states have resorted to creating an

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[177] Stoa, *supra* note 108, at 1324.
[178] Wolf, *supra* note 31, at 14-15.
[179] Utton, *supra* note 173, at 636.
[180] *Id*. at 635.
[181] *Id*. at 639-640.
[182] Bourne, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, 35 CAN. Y.B. INT'L L. 214, 215-216 (1997).
[183] Stoa, *supra* note 108, at 1324.

entirely new legal principle-water security.[184] But the definition of water security is disputed and leaves the Nile River Basin without a cooperative management agreement.[185]

Therefore, given the competition between the two cardinal principles and the absence of clear supremacy of the equitable and reasonable principle in the Convention, the move to join the Convention would be more disadvantageous for Ethiopia than the two downstream states-Egypt and Sudan. This is because in the context of the Nile basin, where the water is already fully used by Egypt and Sudan, Ethiopia's new use would almost inevitably result in the reduction of the quantity of the water that flows downstream and thereby bring 'significant harm' on downstream states even if its use is 'reasonable' and 'equitable'.[186]

In summary, due to the Convention's limitation, the riparian states do not agree as to the instances where the no harm rule could apply with respect to the principle of equitable utilization. Ethiopia believes that a Nile water allocation should be based on the principle of equitable utilization, and that the no harm principle should only operate when a state has exceeded its equitable or reasonable use. Egypt, on the other hand, believes that each country has the right to the uninterrupted flow of the river through its territory; any measure that changes the status quo flow is causing significant harm.[187]Thus, as mentioned earlier the application of the equitable utilization and no harm principles will pit upstream and downstream states against each other. And this would be advantageous for the most downstream country Egypt where it can use its ideational and bargaining power to influence the process of negotiations.

2. The Principle of Equitable and Reasonable Utilization: the difficulty to determine "equitable utilization"

In addition to the lack of clarity as to the interplay between the two cardinal Principles, the equitable and reasonable utilization principle by itself is a vague one with many possible interpretations. Vague and relative terms of the Convention like 'equitable', 'reasonable', 'optimal', and 'sustainable' are difficult to determine. Defining such concepts are intentionally vague both for reasons of legal interpretation and for political expediency which are creating ambiguity in the application of the principle.[188]

It is agreed that the practical application of an equitable and reasonable apportionment of an international watercourse requires the examination of all the relevant conditions of the watercourse and its riparian States.[189]To this effect, Art 6 of the Convention lays out a non-exhaustive list of factors that are relevant to determine what is equitable and reasonable in the course of utilizing an international watercourse or when negotiating or entering in to an agreement on an international watercourse.[190] However, there is no hierarchy among these

[184] CFA, *supra* note 48, Art. 14.
[185] Stoa, *supra* note 108, at 1325.
[186] Takele, *supra* note 136, at 222.
[187] Carroll, *supra* note 102, at 290.
[188] Wolf, *supra* note 31, at 7.
[189] Helal, *supra* note 5, at 347.
[190] UN Watercourses Convention, *supra* note 13, Art. 6 (1). Although the factors are non- exhaustive, the said sub-article of the Convention listed out seven factors : (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) the social and economic needs of the watercourse states concerned; (c) the population dependent on the watercourse in the watercourse state; (d) the effects of the use or uses of the watercourse in one watercourse state on other watercourse states; (e) existing and potential uses of the

components of 'reasonable use'. The applicable factors, which include the existing and potential uses of the watercourse, have no inherent weight. They are to be balanced according to their relative importance in a given situation where "all relevant factors are to be considered together and a conclusion reached on the basis of the whole".[191] In addition to the aforementioned article, Art 10 of the Convention says that, "in the absence of agreement or custom to the contrary, no use enjoys inherent priority over other uses", and that "in the event of a conflict between uses, (it shall be resolved) with special regard being given to the requirements of vital human needs".[192] Thus, except 'vital human needs', no use (hydroelectric power, irrigation, navigation etc) enjoys priority over the other use.

However, the application of those factors in determining the equitability or otherwise of the water use is difficult for different reasons. First, the Convention neither gave priority for certain factors nor attaches any weight to those factors. Thus, even if states may consider many factors under Art 6, it may be difficult to reach agreement on what combination of factors constitutes equal utilization. Second, Article 6 does not indicate whether states should consider the number of factors or the strength of the factors implicated.[193]

Moreover, the scopes of certain factors are not clear and so that they are open to different interpretations.[194] For example, the "social and economic needs of the Watercourse States", as one relevant factor is not clear as to whether it connotes the degree of the economic dependence on the watercourse or the relative economic development of the watercourse state. However, many scholars argued that the factor should not be construed to imply the stage of economic development which can further be collaborated by the fact that a criteria referring to the stage of economic development of watercourse States in one of the reports was deleted in the final version of the Convention.[195] Similarly in the "population dependent factor"[196], whether the degree of dependence of the population or the size of the population or both should be the relevant factor in equitable and reasonable apportionment is not clear.[197] Moreover, regarding "availability of alternatives, of comparable value" factor, the text is not clear whether such alternatives should be water-based or not. However, the ILC noted that such alternatives need not be water-based. But the substitute options should be of generally comparable feasibility, practicability and cost-effectiveness.[198]But the term "Comparable value" is still ambiguous. The Convention does not specify how this term should be used.[199]So in the situation where clear definitions and scopes of the relevant factors have not been clearly stipulated in the Convention, the same factor can easily be formulated to support either side in the same debate.

Therefore, it would be difficult for Nile riparian states to reach in to agreement as to what combination of factors constitutes equal utilization. Although disputes over the application of

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watercourse; (f) conservation, protection, development and economy of the water resources of the watercourse and the cost of measures taken to that effect; and (g) the availability of alternatives, of comparable value, to a particular planned or existing use.

[191] *Id*. Art. 6(3).

[192] *Id*. Art 10.

[193] Caroll, *supra* note 102, at 288.

[194] Helal, *supra* note 5, at 349.

[195] *Id*. at 350.

[196] The UN Watercourses Convention, *supra* note 13, Art. 6(1)(c)

[197] Helal, *supra* note 5, at 351.

[198] *Id.* at 352.

[199] Carroll, *supra* note 102, at 289.

Articles 5 and 6 are supposed to be answered under the Convention's dispute settlement provisions, such a process could be cumbersome.[200] Thus, given the ideational and bargaining power of Egypt, it is doubtful that Ethiopia will benefit from the equitable and reasonable utilization principle whose application is often vague and subject to different interpretations.

3. The relevant factors to determine equitable utilization: To whom they favored in the context of Nile?

As mentioned earlier, under the Convention's calculation of equitable utilization, it is complex to measure and quantify the weight that should be attached to a given individual factor and thereby reach in to genuine conclusions on the basis of the whole. Accordingly, Ethiopia and Egypt for example may have different views of what constitutes utilization in an "equitable and reasonable manner". And they may arrive in to different conclusions while using the same factors as bases of their calculation. For instance the fact that both existing and potential uses are incorporated as determining factors with no priority[201] allowed both Egypt and Ethiopia to make arguments in favor of them. However, as will be discussed, the totality of factors seems to give more protection to existing uses and thereby favored Egypt and Sudan than Ethiopia.

Egypt, which uses the greatest amount of Nile water, may consider its utilization equitable because it has no other source of water. In fact, Egypt argued during the Working Group negotiations that availability of other water sources should be a factor for determining equitable utilization under Article 6 although its proposal was not accepted.[202]However, still the factor, "the availability of alternatives, of comparable value, to a particular planned and existing use"[203]seems to favor Egypt. Since Egypt has no other source of water other than Nile, it can use this factor to consolidate the argument that it has no other projects available of 'comparable value' than Ethiopia. Egypt also might consider its use equitable because it was the first to make use of the Nile waters. It could use the "existing or potential use" factor[204] to support that argument. Here, even if Ethiopia can also use this factor on the basis of "potential use", the weight of this factor may be offset by Art 6(1) (d)'s factor which consider "the effects of the use or uses of the watercourses in one Watercourse State on other watercourse States". This is because Egypt and Sudan already have developments on Nile River so that any new developments by Ethiopia will affect their existing uses. And it is usually the upstream state that cause harm to the downstream although as some argued the downstream riparian can also cause harm to upstream by foreclosing the future uses of the upstream.[205]In this regard, Ethiopia could argue under Article 6(d) that 'the effects' of Egypt's 'use' on the amount of water that Ethiopia may use is inequitable. But compared to Egypt, Ethiopia's argument on this factor will not make a significant change on the total weight. In addition, Egypt might argue that "the population dependent on the watercourse" factor weighs in favor of protecting uses that its population has been dependent on over time.[206] Finally, it may argue

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[200] The UN Watercourses Convention, *supra* note 13, Art. 33.
[201] *Id*. See Art 6(1)(e)(f) Cum Art 6(3) and Art 10.
[202] MCCAFFREY, *supra* note 102, at 306.
[203] The UN Watercourses Convention, *supra* note 13, Art 6(1)(g).
[204] *Id*. Art. 6(1) (e).
[205] Salman, *supra* note 1, at 12.
[206] The UN Watercourses Convention, *supra* note 13, Art. 6(1) (c).

that it is using water equitably because it has advanced systems for "conservation" and "economy of use" given its technological advancement.[207]

The second Article 6 factor, "the social and economic needs of the watercourse states concerned," seems favorable to Ethiopia and other Nile states that have a lower per capita income than Egypt.[208]But as discussed above, many argued that this factor is dealing about the economic dependence on the watercourse rather than the stage of economic development of the watercourse state.[209] And this cast doubt as to whether the factor indeed favors Ethiopia. Above all, the Convention does not list out certain factors under Art 6 as relevant factors that could rather add value for Ethiopia. For instance, the contribution of water from each watercourse state, and the extent and proportion of the drainage area in the territory of each watercourse state are not listed as relevant factors for determining equitable utilization under Article 6 of the Convention. Had such factors been expressly listed in the Convention, they could be construed in favor of Ethiopia since it contributed 86% of the Nile water and has large basin area next to Sudan.

Actually, the lists of factors are illustrative so that riparian states may agree to add other relevant factor depending up on the unique features of the basin.[210] But, this does not mean that there is no difference between the listed and non-listed factors. Because, once the factor is listed, it would be relevant for determining equitable utilization unless it is totally irrelevant in the basin. In the contrary, however riparian states need to agree to add additional factors other than those listed under Art 6 of the Convention.

At the Working Group level, India sought to include "the contribution of water from each watercourse state" as a factor in the Convention, but the Working Group declined to include it.[211]Ethiopia, however, could argue that its significant contribution must be considered as a 'relevant' 'hydrographic' or 'hydrological' factor.[212] But, the exclusion of the aforementioned factor by the Working Group affects the weight it could rather have in determining equitable utilization. And obviously Egypt and Sudan may use the rejection of this factor by the Working Group to amplify the irrelevancy of the above factor in determining equitable utilization and thereby consolidate their argument while exploiting the benefits derived from other factors. Thus, the exclusion of such determinant factors puts Ethiopia in a disadvantageous position.

Nevertheless, one may argue that it is because of the inclusion of "hydrological factors" that the issue of "water contribution" was finally left out. However, the writer of this article disagrees with this assertion on the belief that "the water contribution" factor should be included as an independent factor given the large place it ought to have among other "hydrological factors". The Helsinki Rules, for instance, (which is said to be the basis of the Watercourses Convention) explicitly referred to the 'water contribution factor' by saying: "[T]he hydrology of the basin, including in *particular the contribution of water by each basin*

[207] *Id*. Art. 6(1) (f).
[208] *Id*. Art. 6(1)(b).
[209] Helal, *supra* note 5, at 350.
[210] For instance, the two factors have been added to CFA text. See CFA, *supra* note 48, Art 4(2)(h) and (i).
[211] Helal, *supra* note 5, at 349.
[212] The UN Watercourses Convention, *supra* note 13, Art 6(1)(a).

State;"[213] showing the large place the water contribution factor should have within the 'hydrological factors' category. Thus, the inclusion of the 'hydrological factor' cannot justify the failure to recognize the 'water contribution' factor as an independent factor unless the exclusion is aimed to get the voice of the downstream riparian states and leaving the issue a point of contention.

In summary beside the difficulty to apply the principle of equitable and reasonable utilization, the majority of the equitability determining factors seems inclined to favor Egypt and Sudan than Ethiopia.

4. The application of the 'No harm rule'

Besides the principle of equitable and reasonable utilization of international watercourses, the obligation not to cause significant harm to other watercourse States is the second fundamental pillar of the law of non-navigational uses of international watercourses. However, like that of equitable and reasonable principle, the no harm rule which provides that states 'take all appropriate measures to prevent the causing of significant harm'[214] is also difficult to apply.

First, the Convention defines neither the term 'harm' nor 'significant harm'. Second, if 'harm' is caused, Article 7(2) provides that a watercourse state 'take all appropriate measures' to eliminate or mitigate the harm. But, it will be hard to determine what action is adequate to satisfy the duty of 'all appropriate measures'. In addition, a watercourse state may pay compensation 'where appropriate' if it has caused significant harm to another watercourse state. Again, there will be disagreement about when compensation is 'appropriate'. That is why McCaffrey described the final result of negotiations of Art 7 as a "basket of Halloween candy: there is something in it for everyone. No matter whether you are from the equitable utilization or the no-harm school, you can claim at least partial victory."[215]

The Convention does not provide adequate guidance, for example as to whether the use of more water by Ethiopia constitutes harm to Egypt? Or does 'harm' only refer to serious pollution of the waters that would in turn affect a downstream state? Although the Convention does not absolutely prohibit causing significant harm,[216] the 'equitable and reasonable utilization' of the Nile water by Ethiopia still may cause significant harm to Egypt and Sudan. Thus, in the situation where harm is inevitable to downstream existing uses by new developments of Ethiopia, Egypt may demand compensation under Art 7(2) even if Ethiopia's utilization is equitable and reasonable. If this is so, it would be unfair for Ethiopia to join the Convention.

C. The Way the Convention Dealt with Existing Agreements

The existing Nile legal framework is uncertain for a number of reasons. Most importantly, the colonial and post-colonial era agreements are either invalid or their validity is in question. Egypt and Sudan insists on their validity, whereas other Nile states, following either the clean

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[213] *The Helsinki Rules on the Uses of the Waters of International Rivers* is adopted by the International Law Association at the 52nd conference, held at Helsinki in August 1966. Report of the Committee on the Uses of the Waters of International Rivers (London, International Law Association, 1967); Art V(II)(2).

[214] The UN Watercourses Convention, *supra* note 13, Art. 7(1).

[215] MCCAFFREY, *supra* note 67, at 22.

[216] *Id.*

state or Nyerere concepts of state succession, have denounced them.[217]Although some argued that colonial agreements as well as post-colonial bilateral agreements between Egypt and Sudan over the Nile have no legal effect whatsoever,[218] they continue to hinder fresh negotiations and agreements up on the equitable utilization of the Nile.[219]As observed during the negotiations on CFA, Egypt and Sudan maintain that the framework should include a clause that reads: "[n]ot adversely affect the water security of current uses and rights of any other Nile Basin states."[220] The water security of current uses and rights referred to here is the uses established under the 1929 and 1959 treaties between Egypt and Sudan.[221]

Nevertheless, as mentioned earlier the UNWCC neither invalidates the existing agreements nor required their harmonization with its basic principles. In other words, parties are simply encouraged, but not obligated, to harmonize existing agreements with the basic principles of the Convention.[222]And this may affect the interest of Ethiopia.

Since the two Nile agreements (i.e. the 1929 and 1959) are bilateral in their nature, Ethiopia may argue that they bind only the parties to them- Egypt and Sudan. Thus, if Ethiopia became party to the Convention (along with Egypt and Sudan), its rights under the Convention may not be affected in this regard, because Ethiopia was not party to such agreements.[223]Moreover, unlike the White Nile riparian countries, Ethiopia has never been under colonization except the temporary occupation by Italy. Thus, the argument of Egypt and Sudan regarding the validity of 1929 agreement on the basis of "state succession" would not work in the Ethiopian context.

However, it is important to examine whether Egypt and Sudan may take advantage over Ethiopia regarding the 1902 and 1993 agreements since Ethiopia signed those agreements as an independent sovereign state with colonial Britain and Egypt respectively. Actually, Ethiopia cannot raise 'the clean state' doctrine to renounce their validity. But particularly, with respect to the 1902 treaty, it seems that Ethiopia has a legitimate defense. Article III of the Treaty stipulated: "not to construct or allow to be constructed any work across the Blue Nile, Lake Tana, or the Sobat, which would arrest the flow of their waters except in agreement with His Britannic Majesty's Government and the Government of Sudan".[224]Based on this treaty, Sudan insists that Ethiopia may not begin Nile water projects without the consent of Britain and Sudan. Ethiopia, however renounced this agreement, inter alia invoking the Egyptian and Sudanese practice of denouncing unequal treaties signed by Britain on their behalf if they no longer reflect their development needs.[225]

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[217] Osott O. McKenzie, *Egypt's Choice: From the Nile Basin Treaty to the Cooperative Framework Agreement, an International Legal Analysis*, 21 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 571, 586-587(2012).

[218] See generally Girma Amare, *Nile Issue: The imperative Need for Negotiation on the Utilization of Nile Waters*, 2(6) EIIPD Occasional papers (1997).

[219] Takele, *supra* note 136, at 208.

[220] CFA, *supra* note 48, Annex on Art. 14(b).

[221] Takele, *supra* note 136, at 209.

[222] The UN Watercourses Convention, *supra* note 13, Art. 3(2).

[223] *Id.* Art. 3(6).

[224] Treaties between Great Britain and Ethiopia, and between Great Britain, Italy, and Ethiopia, relative to the Frontiers between the Anglo-Egyptian Soudan, Ethiopia, and Erythræa (railway to connect the Soudan with Uganda) Addis Ababa, May 15,1902, Art. III.

[225] Joseph W. Dellapena, *Rivers as Legal Structures: The Examples of the Jordan and the Nile*, 36 NATURAL RESOURCES JOURNAL 217, 243(1996). See also Caroll, *supra* note 102, at 279.

Moreover, Ethiopia has renounced this agreement on the view that the Emperor signed the Treaty as the result of a mistranslation between the English and the Amharic version of the Treaty which is considered as 'error of fact'.[226]According to the Amharic version, 'arrest' had been translated into 'stop', that is, as long as Menilk did not stop the waters, the agreement did not prevent him from utilizing and diverting Blue Nile water which seems playing with words.[227]And such error of "a fact or situation" may also render the Treaty void, as per Article 48 of the Vienna Convention on the Law of Treaties (1969) which mostly codified customary treaty rules.

However, whatever rebutting arguments may be, it seems that Egypt may take advantage of the 1993 Framework agreement for General Cooperation between Egypt and Ethiopia as far as the UNWCC does not affect existing agreements. Article 5 of the agreement states: "Each party shall refrain from engaging in any activity related to the Nile waters that may cause *appreciable harm* to the interests of the other party."[228] As we can understand from the provision, it incorporates only the 'no harm rule'. There is no mention of equitable and reasonable utilization. Therefore, in the situation where the relationships between the two principles are controversial under the Convention, Egypt may use the 1993 agreement to argue that Ethiopia has accepted the primacy of no harm rule over the equitable and reasonable utilization principle.

However, here the question may arise as to whether the 1993 framework agreement for general cooperation between Egypt and Ethiopia is a treaty with a binding effect or not. Of course, it is clear that as the status of the agreement differs, so does the influence and the effect it renders. The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith (i.e. *pacta sunt servanda)* irrespective of whatever name the agreement is captioned. Otherwise, there is no reason for countries to enter into such obligations with each other.[229] As stipulated under Art 2 of the Vienna Convention on the Law of Treaties, a treaty is defined as: 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' However, this does not mean that every agreement in written form is a treaty and binding on the parties thereto. It is essential that the parties intend to create legal relations as between themselves by means of their agreement. Thus, it is the 'intention not to create a binding arrangement' governed by international law which marks the difference between treaties and informal international instruments. In this regard, memoranda of understanding and exchange of notes for example are not as such legally binding.[230]

Here, it is important to note that the 1993 agreement is neither a memoranda of understanding nor exchange of note. Rather, it is the agreement entered between heads of state/government of the two countries having 'full powers' for the purpose of concluding the

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[226] Zeray Yihdego, *The Blue Nile dam Controversy in the eyes of International law*, GWF Discussion Paper 1325, University of Aberdeen, United Kingdom, Global Water Forum, Canberra, Australia (2013), available at: http://www.globalwaterforum.org/2013/06/18/the-blue-nile-dam-controversy-in-the-eyes-of-international-law/ (accessed on 23 December 2015).

[227] *Id.*

[228] Framework for General Cooperation between Arab Republic of Egypt and Ethiopia, July 1, 1993, Art. 5.

[229] MALCOM N. SHAW, INTERNATIONAL LAW, (6th ed., Cambridge University Press, 2008), at 903-4.

[230] *Id.* at 906.

treaty in accordance with Art 7 of the Vienna Convention. However, it may still raise a question as to whether it is just a declaration of intension or a binding treaty. At this juncture, while illustrating the need to make a difference between a treaty and other non-binding international agreements, the well-known international law scholar Malcom Shaw noted:

> *"…many agreements between states are merely statements of commonly held principles or objectives and are not intended to establish binding obligations. For instance, a declaration by a number of states in support of a particular political aim may in many cases be without legal (though not political) significance, as the states may regard it as a policy matter and not as setting up juridical relations between themselves. To see whether a particular agreement is intended to create legal relations, all the facts of the situation have to be examined carefully."*[231]

Given the framework nature of the 1993 agreement laying a background for future negotiations, one may argue that the agreement is too early to be called a treaty and result in a binding effect on parties. This, however, further requires the examination of the intent of the parties as seen in the language and context of the document concerned, the circumstances of its conclusion and the explanations given by the parties.[232] The texts of the agreement mainly focused on identifying the focus areas of cooperation for future negotiations which are actually broad in scope including other areas of cooperation in addition to the issue of Nile. However, the writer of this article believes that Art 5 of the agreement is the core and the most important provision of the agreement that reflects the intension of the parties to be bound by the wordings of the provision. The wording of the provision that clearly innumerate the commitment to which the parties are consented coupled with the focus of Art 6 on future consultation and cooperation of 'projects that would enhance the volume of flow and reduce the loss of Nile waters' shows how the agreement is concluded by Egypt only for the sake of Art 5 with a view to make it binding in future negotiations.

Thus, I believe that the 1993 agreement is a treaty but having a nature of framework agreement which calls for further negotiations and specific agreements on the use of the Nile waters. Nevertheless, future agreements could not be reached by the two states; they cannot deviate from the general objective of the Agreement and its provision of Art 5 that provides specific commitment particularly on Ethiopia. Moreover, even if the agreement was not ratified by Ethiopia, the act of signature of an international agreement, such as the 1993 agreement, by a member state creates an international obligation of good faith to refrain from acts designed to frustrate the objectives of the agreement.[233] Moreover, even if the 1993 Agreement may be regarded as a mere declaration of intention and thereby is not legally binding, it may have still a legal consequence as the circumstances of the case, for example as an aid to the interpretation of some other treaty - may be the UNWCC. As confirmed from other cases, there are even instances where the memorandum of understanding were not declared by tribunals as legally irrelevant (as the circumstances of the case) although they are not source of independent legal rights.[234]

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[231] *Id.* at 905.

[232] See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 290, 296 (1977).

[233] See the Vienna Convention on the Law of Treaties, *supra* note 78, Art. 18. See also Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent*, 34 VANDERBILT JOURNAL OF TRANSNATIONAL LAW, 283 (2001).

[234] SHAW, *supra* note 229, at 906.

D. The Notification Procedures of the Convention

The notification requirement of the Convention for planned measures actually applies for both upstream and downstream riparians. However, the detailed notification provisions of the Convention, as mentioned earlier, seem disadvantageous for upstream countries like Ethiopia. This is because in most river basins including Nile, major hydraulic works have already been developed unilaterally and without consultation by downstream riparian. And the attention of those riparians inevitably turned to protecting the flow of water on which these facilities depended.[235]Therefore, the detailed notification provisions of the Convention may at least delay the developmental activities of Ethiopia.

The issue was also a point of controversy during CFA negotiations where the two downstream countries – Egypt and Sudan-proposed detailed provisions in terms of exchange of information concerning planned measures similar to what was provided in the UN Watercourses Convention. But having such detailed procedures on notification procedures would have been tantamount to giving veto power to the downstream countries; the proposal was opposed by Ethiopia.[236] And finally parties agreed such information exchange and notification of measures to be made through the Nile basin Commission once it is established under the CFA.[237]

VII. ADVANTAGES AND BENEFICIAL APPLICATION OF THE CONVENTION

In contrast to the difficulties with the practical application of Articles 5, 6, and 7, and other related gaps of the Convention, the environmental management section of the Convention would be useful if it were applied to the Nile region. Part IV of the 1997 Convention is generally dedicated to "Protection, Preservation and Management" of international watercourses.[238]For example, Article 21, which obligates watercourse states to consult with each other for the prevention, reduction, and control of pollution, suggests that states set joint water quality objectives and criteria, devise techniques and practices to address pollution from point and non-point sources, and establish lists of substances that may not be added to the watercourse. Accordingly, Nile states could agree to utilize these factors in the development of a Nile water quality agreement.

Generally, the articles relating to the protection of the ecosystems of international watercourses provide "an important starting point, and reflect minimum international standards below which states may not fall, indicating the basis upon which states can further their efforts to achieve cooperative arrangements with their neighbors in the use of shared freshwater resources."[239]

In addition to the mutual benefits that could be derived from the green provisions of the Convention, being party to the Convention may increase the bargaining power of Ethiopia in the Nile basin. Since the Convention is endorsed and acknowledged by donor countries and

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[235] Delapena, *supra* note 225, at 239.

[236] Imeru Tamrat, *International Water law and its implications in the context of the Nile basin and the Ethiopian Renaissance Dam*, 10 WONBER, Alemayew Haile Memorial Foundation Bulletin 99, 116 (10th Half-Year) (2012).

[237] CFA, *supra* note 48, Art 8.

[238] The UN Watercourses Convention, *supra* note 13, Part IV, Art. 20-26.

[239] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, (2nd ed. 2003), at 468.

financial institutions[240], joining the Convention may pave the way to get financial assistance or loan so that it can construct mega projects with in short period of time. This would be true however if the hydro hegemonies - Sudan and Egypt- remained as non-party states. But from the overall assessment, the disadvantages of joining the Convention overweight than its benefits in the context of Ethiopia.

VIII. CONCLUDING REMARKS

The article examines the provisions of the UN Watercourse Convention in the Ethiopian context and determines whether joining to or staying out is a better off advice. To this effect the provisions are analyzed by taking in to consider the existing legal frameworks and positions of the two downstream countries- Egypt and Sudan.

The article reveals the difficulty to apply the Convention's provisions and how they favored downstream countries- Egypt and Sudan. First, the relationship between the equitable and reasonable utilization principle and "no harm rule" is not clear. Moreover, the practical applications of the two principles are difficult and subject to different interpretations. Although the Convention listed out non-exhaustive factors to determine equitable utilization, the task of weighting those factors is difficult. Due to the lack of clarity of certain factors, the same factor can also be construed to support both sides in the same debate. Similarly, the practical applications of the no harm rule would be difficult. Terms like 'significant harm' and 'appropriate measures' are vague and open for interpretations. In such conditions, if Ethiopia joins the Convention, it would be at disadvantageous position where it may be forced to pay unnecessary bills for the advantages of the two downstream countries, Egypt and Sudan.

Despite the difficulty to apply the equitable and reasonable utilization principle, many of the individual factors used to determine equitability seems to favor Egypt. The detailed notification procedures and the way the Convention deal with the status of existing agreements cumulatively affect the interest of Ethiopia. Although Ethiopia and other Nile basin states would benefit from the environmental protection provisions of the Convention, the disadvantage of joining weighted in the context of Ethiopia. Thus, given the gaps of the Convention coupled with Egypt's adherence to historic right based argument, it is better for Ethiopia to stay out from the Convention and its complexities while expecting at least 'a half and a loaf' from the application of the customary international water law regime. But it should be noted that the application of customary international water law regime is not still free from controversies. Nevertheless, Ethiopia would definitely get a better half from the complexities of customary international law rather than the complexities of the Convention where parties are at least required in principle to adhere to the wordings and texts of the Convention; which often contains confusing and downstream favored provisions.

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[240] Salman, *supra* note 1, at 11-14.

THE NEED TO ESTABLISH A WORKABLE, MODERN AND INSTITUTIONALIZED COMMERCIAL ARBITRATION IN ETHIOPIA

Alemayehu Yismaw Demamu*

Abstract

Ethiopia overhauled its arbitration laws with the enactment of the Civil Code and Civil Procedure Code as of 1960 and 1965 respectively. It also puts these laws in to practice on commercial disputes for more than half a century. However, these arbitration laws are sketchy and do not cope with the emerging modern laws and practices in international commercial arbitration. As a result, Ethiopia is not gifted with workable, modernized and institutionalized commercial arbitration. It stands to the rear of commercial arbitration which is underpinned in diverse legal systems, used widely by many participants and acknowledged as relevant dispute resolution, particularly on commercial matters in many jurisdictions. Commercial arbitration serves justice, satisfies the interest of business bodies, and more importantly, places significant impact on the economy of a country. Thus, the government and other stakeholders need to work and change the situation. This article attempts to shed lights on the contribution of effective and institutionalized commercial arbitration for the economy of Ethiopia.

Keywords: Arbitration, Commercial arbitration, Commercial dispute, Economy, Ethiopia, institutionalized

I. INTRODUCTION

In this modern world, people have their own perspectives, their own interests, their own resources, their own aspiration and their own fears. To pull off these all demands, they run in to each other. There are also times that they feel others are conniving on them or are hurting them and budge against these persons. So, disagreements and disputes are always inevitable in modern life. But, the incredible one that we see in our world is the variety of ways, experiences and approaches each of us follow to deal with disputes.

No one experiences good memory from disputes. Disputes impede eristics from works they would like to engage; twist eristics to sit with persons they hate; take eristics' money, time, energy and health; bring frustration; threat eristics's identities and emotions; and disputes may be threat for general order and welfare. They badly need resolutions - the ultimate goal of every one.

People also follow variety of approaches to deal with disputes. People wish to live in harmony with their neighbors, friends and other associates. Particularly the business communities, more than anyone else, prefer to take on their works without any interruption. Business communities want to handle their dispute quickly. They fight their disputes through different approaches which they believe is most effective. They may try to resolve their issues by themselves or if not succeeded, may call up on the powers of the state (court) as there are differences between individuals. Of these dispute resolution mechanisms, some are agreeable,

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some others are irascible, the rest may be coworker weepy or hyper rational. Besides, all of the available resolution processes neither create equality nor bring same benefit for all.[1] It is, therefore, interesting to see if commercial[2] arbitration, one of the settlement mechanisms, is efficient and bringing something good in Ethiopia.

Commercial arbitration[3] is not studied well in Ethiopia so far. This may partly be because of few commercial disputes or may be masked by conducts within the confines of ordinary court system, informal or customary resolution mechanisms. Besides, it's strictly limited exposure to scrutiny and lack of institutionalized, modernized and strong institutions on the area heighten the intellectual problem. Lack of awareness among the business community, short of strong enterprises added to the existing legal frameworks which reflect the features of 1960's do not have fewer roles in accompanying the situation.

Now, the landscape is dramatically transformed. Commercial disputes are often of a quite different order of magnitude. Different materials, sources and information on the area can be easily accessed and have been significantly improved. The business community and scholars expanded their awareness and began to look beyond their parochial and personal experiences and analyses on how countries with different legal and cultural backgrounds perform commercial arbitration. Concerned bodies and stakeholders become ready to dissect and criticize what is going on in commercial arbitration. Different skilled arbitrators with different legal and forensic backgrounds are being created. Many business communities eye commercial arbitration institutions as potential destinations for their disputes.

More importantly, having effective, well-run and institutionalized commercial arbitration, as opposed to litigation in national courts, can contribute to the aspirations and needs of Ethiopia and its nationals, whilst at the same time satisfying the expectations of international investors and traders for profit, security and stability, and ensuring fairness and justice to both disputant parties. All these and other factors necessitate studies on commercial arbitration in Ethiopia.

Hence, the article is organized as follows. The paper, under section II, deals about the inexorableness of institutionalized commercial arbitration in Ethiopia. It, for that matter, addresses different grounds and justifications which show the essentiality of establishing commercial arbitration in the country. Section III is about the present situation of commercial arbitration in Ethiopia. It analyses the existing arbitration legal frameworks in light with the existing circumstances of the country and modern international standards in globe. Further, it considers the challenges and shortcomings that prevent the establishment of more institutionalized commercial arbitration in the country. The paper, further, under section IV

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[1] MICHAEL L. MOFFIT & ROBERT C. BORDONE, THE HANDBOOK OF DISPUTE RESOLUTION 10 (1st ed., John Wiley & Sons Inc. 2005)

[2] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (here after UNICTRAL model law), 21 June 1985, U.N.doc.A/40/17. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Accessed on July, 2015.Article 1(1) defines the term 'commercial' to include, but are not limited to, any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passenger s by air, sea, rail or road.

[3] In this article 'commercial arbitration' is used to mean any institutionalized private forum which is legally established, entertains and handles disputes arise from commercial matters.

specifies the ways out from the existing problems and setting up efficient institutionalized commercial arbitration in Ethiopia. It, thus, considers the existing circumstance in the country, arbitration laws of recognized international commercial arbitration centers, the experiences under various jurisdictions and widely used standards of international instruments. Section V is reserved to the contribution of institutionalized commercial arbitration for economic development in Ethiopia. Under this part, the economic benefits that the country would gain from different perspective is addressed by considering the lessons of some countries which host reputed commercial arbitration centers. Finally, concluding remarks are made under section VI.

II. THE INEXORABLENESS OF INSTITUTIONALIZED COMMERCIAL ARBITRATION IN ETHIOPIA

Commercial arbitration is becoming increasingly important in the justice system of any country. Studies conducted in many countries have shown that, compared to formal court systems, using commercial arbitration to resolve business disputes is speedy, cost effective and widens access to justice.[4] Nations are backing their arbitration system with proper legal framework, founding strong and institutionalized institutions and creating greater awareness of stakeholders on its advantages, disadvantages and its link with formal courts. But, this is not in Ethiopia. Above all, the business people are indebted to face ups and downs, to close their doors, to waste their resources and time running for justice. Setting up modernized and institutionalized commercial arbitration in the country is inexorable. That is because:

First, the FDRE Constitution stipulates that "everyone has the right to bring a justifiable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."[5] Hither, we may question whether commercial arbitration institutions do have judicial power. The relevant provisions of the Civil Code and the Civil Procedure Code indicate that commercial arbitration does receive recognition and competency to entertain justifiable matters.[6] Moreover, Article 34(5) of the FDRE Constitution also recognizes the possibility of adjudicating disputes relating to personal matters such as commercial disputes in accordance with religious or customary laws, with the consent of the parties. Thus, religious communities in Ethiopia can set up and offer private commercial arbitration forum. Christians and Muslims communities in Ethiopia do have their own internal dispute resolution mechanisms. Christians offers commercial dispute resolution service involving thousands and millions birr following biblical principles through their individual volunteers, professional or certified Christian arbitrators. The same is true for Muslim communities. The Muslim communities do have a tradition of encouraging peaceful resolution of conflicts, particularly commercial disputes, following Islamic law, or Shari 'a. This is not unique in Ethiopia. It is

[4] Lord Chancellor's Department (UK), Justice as the Right Price, A Consultation Paper (1998). Available at www.open.gov.uk/lcd/consult.civ-just/fast/htm. Accessed on July, 2015

[5] FDRE CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETTE, 1st Year No.1, 1995, Art 37(1). Article 33 of the UN Charter also states disputant parties should settle any dispute which endangers international peace and order by, inter alia, arbitration. This is particularly relevant in this globalized world where an increased numbers of mega blocks and mega-markets as well as transactions between nationals and commercial entities are experienced. So, it is reasonable to predict that Ethiopia will definitely be witnessing an unprecedented explosion of gigantic proportions in commercial arbitration.

[6] Civil Code of The Empire of Ethiopia, Proclamation No. 165/1960, NEGARIT GAZETA, 19th Year No.2 (herein after called the Civil Code) and Civil Procedure Code of The Empire of Ethiopia, Decree No. 52/1965, NEGARIT GAZETA, 25th year No.3, (herein after called Civil Procedure Code)

common for religious communities in the globe too. Judaism, Christianity, and Islam all offer institutionalized commercial arbitration service.[7]

At the same footage, in Ethiopia, customary dispute resolution which is governed by customary law is a prevailing practice. There are lots of customary laws, rules, methods and procedures which are diversified and largely unwritten, but save the life of many business communities.[8] Customary law is the organic or living law[9] of the indigenous business people of Ethiopia. It controls the lives and transaction of the community.[10] This is also a practice exercised elsewhere. For instance, the Alternative Dispute Resolution Act of Ghana, 2010 has a provision for customary law arbitration.[11] So, the Ethiopian Constitution has laid down a real basis for individuals to establish institutionalized commercial arbitration which works according to religious or customary law in the country.

Second, in Ethiopia, modern public courts are serving the people since 1940's. They are the main source of justice in the country for all these days. However, they are inefficient and do not perform to the level expected.[12] They are problem-fraught. The justice system in Ethiopia is girded by sundry problems. Public courts do face congestions and backlogs, are not accessible and responsive for poor, do follow strict procedures, are time consuming and costly, are unpredictable and uncertain, do conduct trial in public, are not independent, and are corrupted.[13] Public courts do not also provide a win-win solution and obviate animosity or enmity between the parties. A study commissioned by Federal Ethics and Anti-Corruption Commission also evidenced that public courts lost the trust and confidence of the people of Ethiopia.[14] So, setting up an efficient commercial arbitration, as an alternative forum to the dysfunctional public justice system is not an option. It is inevitable indeed.

Third, Ethiopia's economy is growing fast. It has scored an average of two digits growth since 2003/04 G.C.[15] This has also been confirmed by international financial institutions

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[7] Caryan Litt Wolf, *Faith-Based Arbitration: Friends or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM LAW REVIEW 427, 438, 439, 440(2006)." In the United States of America there are a number of faith based commercial arbitration institutions. Judaism, for instance, has had its own system of self-government for thousands of years, across many geographic locations. Jews always had an adjudication system, based on the Bible and the Talmud, and, from the time Jews were under the control of foreign, secular leadership, they conducted their own courts. Those of the Christian faith also have private arbitration procedures. Hundreds of Christian denominations and organizations offer dispute resolution services. Although less organized and widespread than Jewish and Christian dispute resolution services, Islamic organizations also offer mediation and arbitration services."

[8] The World Bank, Ethiopia: Legal and Judicial Sector Assessment, 38 (2004). Available at http://documents.worldbank.org/curated/en/931471468771097227/Ethiopia-legal-and-judicial-sector-assessment

[9] AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT, at 117 (Cambridge University Press, 2001).

[10] *Id.*

[11] The Alternative Dispute Resolution Act of Ghana, 2010. Available at http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh036en.pdf. Accessed on May 9, 2016

[12] ELIAS N. STEBEK & MURADO ABDO (eds.), LAW AND DEVELOPMENT AND LEGAL PLURALISM IN ETHIOPIA, Proceedings of the National Conference on Law and Development: Legal Pluralism, Traditional Justice Systems and the Role of Legal Actors in Ethiopia Addis Ababa, 15-17 November 2012, (Justice and Legal System Research Institute, 2013).

[13] *Id*. See also The World Bank, *Ethiopia: Equipping the Judicial System to Serve Justice.* World Bank Group 2009. Available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:22355015~menuPK:3266877~pagePK:51236175~piPK:437394~theSitePK:73154,00.html. Accessed on March 4, 2016).

[14] Kilimanjaro International Corporation Limited, Ethiopia Second Perception Survey, 50-53 (2013).

[15] Mthuli Ncube, Charles Leyeka Lufumpa and Leonce Ndikumana, *Ethiopia's Economic Growth Performance: Current Situation and Challenges*, ECONOMIC BRIEF, 2010, at 1.

including IMF and World Bank.[16] Following this, a number of international and multinational giant business enterprises opted Ethiopia to be their destination. The country's Foreign Direct Investment (FDI) also reached US$ 953 million in 2014 G.C.[17] It is incredible progress for the country known for drought and famine. However, this growth continues as far as the country establishes, *inter alia,* efficient, modernized and institutionalized commercial arbitration centers that complement the public justice system. Ethiopia needs to have a justice system which attracts and meets the interests of investors. It should scrutinize its laws and arbitration centers and make them compatible with the current situation of the country and the globe. An integral private justice system helps the economy of Ethiopia and institutional commercial arbitration is the ultimate beneficial.

Fourth, Ethiopia lived blanking out the world and blanked out by the world so far. However, that situation has changed now and Ethiopia opens its doors and invites investors to come and invest in the country. It enters into bilateral and multilateral investment agreements and signs other international treaties.[18] These modern treaties and agreements set, as custom, arbitration as default dispute resolution mechanism.[19] Besides, the state or its nationals and companies are participating in international commercial transactions in which disputes are inevitable. But, the truth is that no one is eager to appear before the jurisdiction of foreign courts. States or its agencies, nationals and companies always see arbitration centers as a breathing space to settle their disputes. Arbitration centers are frequently used and are proved to be effective in resolving investment and commercial disputes.[20] They do also have

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[16] See IMF Country Report No.14/303, The Federal Republic of Ethiopia: 2015 Article IV Consultation-press release; Staff Report; and Statement by The Executive Director for The Federal Republic of Ethiopia, September, 2015. Available at https://www.imf.org/external/pubs/ft/scr/2015/cr15300.pdf (Accessed on February, 2016). World Bank has also the same standing. See further information at http://www.worldbank.org/en/country/ethiopia/publication/ethiopia-economic-update-laying-the-foundation-for-achieving-middle-income-status (Accessed On February, 2016).

[17] Abdi Tsegaye, *Ethiopia: Africa's Third Largest Recipient of Foreign Direct Investment*, ADDIS FORTUNE, June. 2014, at 1.

[18] Ethiopia, for instance, signed a number of bilateral agreements with countries like Algeria, Austria, china, Denmark, Egypt and other countries. In fact there are agreements signed, but not in force yet like the agreement with Equatorial Guinea, India, Nigeria, etc. see http://investmentpolicyhub.unctad.org/IIA/CountryBits/67. (Accessed on February, 2016).

[19] ALBERT K. FIADJOE, ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE, preface (2004). Protocol 9 of the Caribbean Community and Common Market (CARICOM), the WTO, the Free Trade Area of the Americas (FTAA) and Law of the Sea convention also made arbitration the default system for contentious proceedings. These all treaties show us how much arbitration becomes prestigious in the eyes of the world. However, commercial arbitration is now facing different challenges. For instance, the European Commission is in its way to establish Investment Court System to settle investor-state disputes replacing the existing Investor-to-State Dispute Settlement (ISDS) mechanism which is often associated with international arbitration under the rules of ICSID. See European Commission, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations 1(Brussels, 16 September 2015). Accessed on September 20, 2016. Available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm. In the same form, in the past years, there was strong opposition from developing countries on using international commercial arbitration as a means of settling investment disputes. That opposition from developing countries, in fact, has shown decreased in recent years. Despite this, studies show that international commercial arbitration has still incorporated "conceptual and institutional bias against developing countries." See R. Rajesh Babu, *International Commercial Arbitration and Developing Countries,* AALCO QUARTERLY BULLETIN 4, 386-387 (2006).

[20] Sunday E. N. Ebaye, *The Relevancy of Arbitration in International Relations*, 1 BASIC RESEARCH JOURNAL OF SOCIAL AND POLITICAL SCIENCE 51, 53 (2012).

significant role in keeping national prestige, preserving good business, inter-personal and international relations.[21]

Therefore, setting up of private institutionalized commercial arbitration in Ethiopia is inexorable. It is necessary and does not need time. It gets rid of many problems of the people of Ethiopia, particularly persons in the commerce.

III. PRESENT SITUATION OF COMMERCIAL ARBITRATION IN ETHIOPIA

In Ethiopia, there are only two institutionalized commercial arbitration centers: Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute and Bahir Dar University Arbitration Center. As a result, the business community is facing ups and downs to settle their matters. The country could not also get benefits expected from the sector. There are several problems which can be mentioned for the service to be limited and showed not progress.

A. Legal Framework for Commercial Arbitration is Sketchy and Non-comprehensive

Ethiopia, indeed, has laws on arbitration under the 1960 Civil Code and 1965 Civil Procedure Code. The codes, unlike compromise and conciliation, laid more provisions for arbitration. They laid foundation for arbitration to be utilized widely in the country.[22] However, as discussed below, these arbitration laws are sketchy and non-comprehensive.

The Civil Code, under its Article 3325(1) states that arbitrator "undertakes to settle the dispute in accordance with the principles of law." Although this provision does not explicitly specify, it seems indirectly that an arbitrator should settle disputes using the basic principles of natural justice. That means an arbitrator must conduct a fair and an impartial trial and afford full and equal opportunity to both parties. He/she shall hear testimonies and give equal chance for parties to produce their evidences, argue and cross-examine witnesses. But, if fairness and impartiality is required, this arbitration law should expressly state the fundamental requirements of arbitration proceedings as it is relevant to avoid any doubt on it. That does not mean that the phrase 'natural justice' should be written in the document as it is possible to state in a different form like the UNCITRAL model law.[23] However, when we see the Ethiopian context, one can find only few provisions which deal about arbitration proceeding. The Civil Procedure Code which deals with arbitrations proceeding requires arbitral tribunal to follow almost similar procedures what civil court would follow during its proceeding.[24] The Civil Procedure Code under Article 317 (2) also states arbitral tribunals to hear parties and their evidence and decide in accordance to law. But, this is a general principle as the parties can agree that arbitrator should be able to follow a proceeding different form Civil Procedure Code and able to decide on another basis.[25] This brings in difficulty. First, it is uncertain to determine whether an arbitrator is bound by the express terms of the parties and, if so how he/she is to be held to them. Second, it is hard to determine whether the arbitrator can simply ignore public policy and give effect to contract of parties, for instance, if the agreements

[21] *Id*, at 55.

[22] Shipi M. Gowok, *Alternative Dispute Resolution in Ethiopia - A Legal Framework*, 2 AFRICAN RESEARCH REVIEW 265, 275 (2008).

[23] See UNCITRAL model law, Art 18 and 24.

[24] Civil Procedure Code, Art 317(1).

[25] *Id*, Art 317(2).

involve criminal nature or against public moral. Finally, it is also a clear contradiction of the substantive law and cannot be tenable.[26]

The Civil Code requires parties to enter into arbitration agreement either in the form of an arbitration submission (*actede compromise*)[27] or arbitration clause (*clause compromissoire*).[28] Arbitration submission thus far, does not bring any intricacy in the country. But, there are uncertainties relating to the latter one. There are qualms on whether an arbitration clause is separable from the contract in which it is placed in, whether the validity of the main contract affects the validity of an arbitration clause or whether the outcome of an arbitration clause has footing on the main contract. However, several jurisdictions do have answer for these concerns through doctrine of separability. The doctrine of separability is adopted in different jurisdictions and legal orders including in UNCITRAL model law.[29] The doctrine of separability avows that an arbitration clause has independent existence of the main contract in which it is placed.[30] It keeps an arbitration clause from being affected by the main contract and empowers arbitrators to handle any dispute that arises from the main contract. However, this doctrine is not recognized in Ethiopia. Both the 1960 Civil Code and 1965 of the Civil Procedure Code are silent on this principle. One may also argue that the doctrine of *competence-competence*[31] is adopted in Ethiopia pursuant to Article 3330(1) & (2) of the Civil Code. But, one's impression will be blurred when reading sub (3) of the same Article that prevents the arbitrators from sitting to decide the validity of the arbitration agreement. Prof. Tilhaun Teshome also mentioned the vagueness of this sub article as compared to sub (1) and (2) and stated that it does not transmit the real intention of the legislature.[32] The doctrine of *competence-competence* is not, thus, adopted in its full-fledged conception. Article 3329 of the Civil Code also requires provisions of the arbitral submission concerning the jurisdiction of arbitrators to be interpreted restrictively. However, this method of interpretation is outdated; rather, it is liberal approach which is followed in most jurisdictions and adopted under Article 16(1) of UNCITRAL model law.[33]

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[26] ALLEN ROBERT SEDLER, ETHIOPIA CIVIL PROCEDURE, at 387 (Oxford University Press, 1968).

[27] CIVIL CODE, Art.3328. In arbitration, a compromise is a separate agreement entered in to by disputant parties to submit to arbitrators with regard to a dispute already at hand at the time of concluding the contract.

[28] *Id*. In arbitration, compromissoire is a clause in a contract entered in to by disputant parties to resolve disputes which may arise in the future relating to the underlying contract containing the cause.

[29] UNCITRAL model law, Art 16(1).

[30] John Zadkovich, *Divergence and Comity Among the Doctrines of Separability and Competence-Competence*, 12 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 1, 1 (2008)

[31] The term 'competence-competence' is taken from German word 'Kompetenz-Kompetenz' which is known in French jurisprudence as 'compétence de la compétence'. In each case the phrase refers to the tribunal's jurisdiction to decide its jurisdiction. It is a general principle in international commercial arbitration that empowers a tribunal to make a determination as to its own jurisdiction when the validity or scope of the agreement to arbitrate is in doubt. However, the fact that a tribunal can determine its own jurisdiction does not give it exclusive power to do so and certainly does not prevent an enforcing court that is not at the seat of the arbitration from re-examining the tribunal's jurisdiction.

[32] Tilahun Teshome, *The Legal Regime Governing Arbitration in Ethiopia: A synopsis*, 1 ETHIOPIAN BAR REVIEW 125, 137 (2007).

[33] Solomon Emiru Gerese, Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960, 55-56 (March 30, 2009) (LLM Thesis, CEU University) This Liberal approach allows arbitration agreements to be interpreted liberally. It presumes that there is a valid arbitration agreement or the arbitrators do have valid jurisdiction on the subject matter, so that it works every dispute to be resolved in favor of arbitration. See also Shagrdi Manaye, *Excess of Authority by Arbitrators as a Defense to Recognition and Enforcement of an Award under Article V(1) of the New York Convention*, March 29, 2010, LLM Thesis, CEU University.

The Civil Procedure Code on arbitration also stipulates that parties may give up their right to appeal.[34] However, this brings debate among scholars. Some say that the right to appeal in arbitration should not be limited contractually by the parties because: i) it is against Article 20(6) of the Constitution, Proclamation No 454/2005 and 25/96 which make out the right and ii) it is also against the public policy and confines the parties' right to due process of law.[35] In contrast, others argue for the validity of arbitration finality clause. They recognize the discretion of parties to exclude appeal against arbitral award because it suits party's autonomy (contractual freedom of parties).[36] It also seems that there is inconsistency among the decisions of the Federal Supreme Court Cassation Division. In the case between *National Motors Corporation Vs General Business Development*,[37] the Cassation Division held that the award of the arbitration council will not be appealed before the cassation division if the litigant parties agree to settle their disputes through arbitration and make the award final. Whereas, on the same dispute between *National Mineral Corporation Vs Danny Drilling Plc*,[38] the cassation division decided that the right to appeal may not be subjected to limitation by the contract and courts should entertain appeals.

The Civil Procedure Code lays down a domestic arbitration award to be enforced like any ordinary judgment after an application by the winning party for the homologation of the award and its execution.[39] But, the Civil Procedure Code fails to specify the form and content of the application, the meaning of homologation, the standards for homologation, and the procedures to be followed.[40] It creates mystification among lawyers, courts, arbitrators and practitioners. The Civil Procedure Code is not as clear as, for instance, Quebec Civil Procedure Code[41] and the UNCITRAL model law.[42]

The quandary is not restricted to the enforcement of domestic awards but also on execution of foreign arbitral awards. The Civil Procedure Code fails to specify the meaning as well as the methods that should be employed to distinguish foreign arbitral awards from domestic. Besides, Article 461(1) of the same code specifies the requirements for recognition and enforcement of foreign arbitral awards and it, under sub Article (2), demands to employ the standards on 'foreign judgments' to 'arbitral awards' by analogy. Of these requirements, reciprocity is conflict-ridden. It subjects foreign arbitral awards to be executed only when the award rendering country is willing to execute judgments delivered by Ethiopian courts. More to the point, reciprocity gets application barley as Ethiopian foreign policy requires prior arrangement such as judicial agreement and Ethiopia does have this agreement with only

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[34] Civil Procedure Code, Art 350(2).

[35] Michael Teshome, Appeal and Arbitration under Ethiopian Arbitration Law. Available at http://www.abyssinialaw.com/blog-posts/item/1536-appeal-and-arbitration-under-ethiopian-arbitration-law. Accessed on June, 2015.

[36] *Id.*

[37] *National Motors Corporation Vs General Business Development*, FEDERAL SUPREME COURT, File No 21849 (unpublished).

[38] *National Mineral Corporation plc Vs Danny Drilling plc*, FED. SUPREME COURT, CASSATION DIV., File No 42239 (the case was decided on November 09, 2010 GC or on Tikimt 29, 2003 EC).

[39] Civil Procedure Code, Art 319(2).The word Homologation is taken from the verb *homologate*, meaning to approve or confirm officially. Homologation is the process of approving an arbitral award by the concerned body for it meets the necessary requirements.

[40] Birhanu Beyene, The Homologation of Domestic Arbitral Awards in Ethiopia, at 1. Available at http://ssrn.com/abstract=2191500. Accessed on July, 2015.

[41] Quebec Code of Civil Procedure, Art 946.

[42] UNCITRAL Model Law, Art 35 and 36.

limited countries.[43] This situation places the interests of Ethiopian business community in grave and victimizes innocent individuals as it narrows the enforcement of foreign arbitral awards to which Ethiopians are party within the country. Unlikely, there are many bilateral, multilateral and international agreements which relax or reject the doctrine of reciprocity.[44] The New York Convention (1958) and the UNCITRAL model law also do not recognize reciprocity.[45]

Both the Civil Code and Civil Procedure Code also permit courts to interfere in commercial arbitration more than the modest. In fact, public courts should encourage and provide support to commercial arbitration in some crucial matters since there are times where courts involvement is vital. But, the intervention should be healthy, and respect the autonomy of commercial arbitration and the consent of parties. It shall be modest and minimal[46] as those adopted in most jurisdictions and UNCITRAL model law. However, in Ethiopia, public courts interfere early in the arbitration proceedings, exercise wider judicial review power on awards and apply firm requirements in recognition and execution of foreign arbitral awards.[47] As a result, they are cramping our nationals, foreign nationals and our economy too.

Moreover, in Ethiopia, arbitration laws have no doctrines and standards comparable with modern international commercial practice. They are non-comprehensive. They do not go with the pace of today's more complex domestic as well as international commercial transactions, disputes and settlement mechanisms. As a result, they failed to become the choice of the business community.[48] In fact, an attempt to modernize it was made with the enactment of the 1960 Civil Code and 1965 Civil Procedure Code. However, the laws have not been revised since its enactment; and are expressed and shine the spirit of 1960s. They are not, for instance, comparable with arbitration rules and practice of known international and regional commercial arbitration institutions such as International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and Cairo Regional Center for International Commercial Arbitration (CRCICA).[49] They also

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[43] Available at www.mfa.gov.et/pressMore.php?pg=56. Visited on Friday, September 25, 2015. Both Ethiopia and Djibouti consented to cooperate on judicial matters in 2013. See also http://hornaffairs.com/en/2012/05/26/ethiopia-and-sudans-extradition-treaty/ Visited on Friday, September 25, 2015. The Ministry of Justice of Ethiopia and the Republic of the Sudan's Minister of Justice signed an Extradition Treaty and an Agreed Minute on their Joint Legal Affairs on May 16th, 2012 in Addis Ababa.

[44] Tecle Hagose, *Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia*, 5 MIZAN LAW REVIEW 105, 122 (2011).

[45] United Nations, United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (here after the New York Convention), 1958.

[46] Weixia Gu, *Judicial Review Over Arbitration in China: Assessing the Extent of the Latest Pro Arbitration Move by the Supreme People's Court in the People's Republic of China*, 27 WISCONSIN INTERNATIONAL LAW JOURNAL 221, 225-231 (2009).

[47] Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration,* 4 MIZAN LAW REVIEW 297, 333 (2010).

[48] Bezzawork Shimelash, *The Formation, Content and Effect of an Arbitral Submission under Ethiopian Law*, 17 JOURNAL OF ETHIOPIAN LAW 69, 69 (1194).

[49] The arbitration laws enshrined in the 1960 Civil Code Ethiopia leaves much to be desired with respect to the doctrine of separability, the doctrine of competence-competence, and the rule of interpretation of doubtful and unclear arbitration clauses. Whereas, the institutional arbitration rules of International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA) and Cairo Regional Center for International Commercial Arbitration (CRCICA) recognize these all doctrines and liberal rule of interpretation. For instance, the arbitration rules of ICC under Article 6, LCIA under Article (2), AAA under Article 7 (b) and the CRCICA under Article 23(1) recognize the doctrine of separability. All these institutional rules also grant arbitrators broad power to consider and decide challenges to their own jurisdiction

lag behind when compared with Germany, England, Netherlands and France systems which have modernized arbitration laws.[50] On top of all, Ethiopian arbitration laws do not fit with UNCITRAL model law which has international legal texts that address international commercial dispute resolution; non-legislative texts that include rules for conduct of arbitration proceedings; and notes on organizing and conducting arbitral proceedings. As a result, Ethiopia is facing difficulty in international commercial practice. UNCITRAL Model Law has principles and standards which are acceptable to nations having different legal systems and levels of economic and social development. It is a model law which tries to harmonize and modernize domestic and international law to enhance predictability in cross-border commercial transactions.[51] Ethiopia also failed to ratify the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and the International Center for the Settlement of Investment Disputes (ICSID).[52] This creates fear for foreign nationals to come and invest in the country as they may not want to give their hand for local courts. It brings difficulty into the field. As a result, the country's overall transactions, particularly its international business transactions are affected.[53]

B. Commercial Arbitration is not Institutionalized

In Ethiopia, Commercial arbitration is not institutionalized too.[54] Several *raison d'être* can be mentioned for this problem. First, the past as well as the existing governments are very reluctant in encouraging private bodies to work on institutional alternative dispute resolution

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(do recognize the doctrine of competence- competence) as we can see from Article 6 of ICC, Article 23 (1) OF LCIA, Article 7(a) AAA and Article 23(1) of CRCICA. These institutional rules also recognize liberal rule of interpretation.

[50] Germany, England, Netherlands and France have their own specific arbitration law which is different from Ethiopia where arbitration statues scattered here and there under the civil code and civil procedure code. Moreover, these countries do have legislations which formalized the authority and jurisdiction of private arbitration mechanisms which is not the case in Ethiopia. They signed the New York Convention and easy to recognize and enforce foreign arbitral awards within their country. They do also have arbitration laws which are comparable to UNCITRAL model law and as a result, updated concepts like the doctrine of competence-competence, separablity, and homologation are incorporated in their arbitration statues. Their courts also give wide respect for arbitral tribunal and may not intervene frequently. When we the situation in Ethiopia, it is not, in any case, comparable with arbitration laws of these countries. There are lots of issues which are not settled yet and need more work to reach that level of modernized arbitration system. See, for instance, England Arbitration Act s.31; Germany ZPO S 1040(2); Netherlands CCP Article 1052(2).

[51] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Accessed on July, 2015.

[52] The main purpose of New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. It guarantees the enforcement of an award given in Ethiopian to be enforced elsewhere in other member states and vice versa. The convention, for that matter, specifies grounds for enforcing foreign arbitral awards in the country. Unfortunately, Ethiopia did not ratify this convention. Further, the grounds which are specified in the domestic laws on same issue are obsolete. For instance, the requirement of reciprocity, which has a political motive than arbitration purpose, requires prior judicial agreement and Ethiopia has few so far. Moreover, the relevance of the New York Convention is demonstrated as more than 149 countries have adopted it.

[53] Booz Allen Hamilton, *Reinforcing Ethiopia's International Trade Law Framework for a Stronger Business Environment: A Case for the Ratification of the New York Convention and The Convention on International Sale Goods*, 18 (United States Agency for International Development (USAID), 2008).

[54] In this submission, the term 'institutionalized' is used to mean an entity which has a character of institution or is incorporated into a structured and usually well-established system. In Ethiopia, thus, commercial arbitration is not institutionalized. It is not established as normal practice. Commercial arbitration has not become an established custom or an accepted part of the structure of a large organization or society because of having existed for so long.

(ADR). They do not establish appropriate institutional and legal frameworks to properly establish and regulate the conduct of institutions administering commercial arbitration. In fact, there are laws which encourage private bodies to work on this area. The imperial order No 90/1947 provided for private bodies to put into effect arbitration institutions on commercial and industrial disputes.[55] The existing Civil Code and Civil Procedure Code also lay down commercial disputes to be entertained on institutional or ad-hoc basis. The Chamber of Commerce and Sectoral Association Establishment Proclamation No 341/2003, as well, mandated all the Chambers of Commerce and Sectoral Associations of the country to carry out arbitration on commercial disputes. However, none of these chambers except Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA) through its Arbitration Institute entertain commercial disputes.[56]

This may be attributed to various factors. Chamber/business associations do lack business association mentality or culture, expertise and resources.[57] The business community is no longer interested to form or be a membership of associations; Chamber/business associations are not self-initiated and demand driven; do serve government policies and ideologies rather than representing the real interests and views of members, do not have effective communication and internal engagement with their members; and their governance system is not transparent.[58] The government also does not provide necessary support. It does not enact comprehensive and inclusive laws which do not put others in legal limbo, acknowledge the right of associations to advocate on the behalf of their members, and keep business associations engage in the policy debate.[59]

In addition to Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute, recently, Bahir Dar University through its Arbitration Center starts providing arbitration service. Besides, these two centers, there is no any other commercial arbitration institution in Ethiopia. Indeed, there had been Ethiopian Arbitration and Conciliation Center (EACC) established by group of Ethiopian lawyers. But it dissolved since the enactment of the Charities and Societies Proclamation.[60] This all have showed that the state and its institutions

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[55] Yohannis Woldegebriel, Current Status of Alternative Dispute Resolution in Ethiopia, at 3. Available at http://www.addischamber.com/file/ICT/20140812/Current%20Status%20of%20Alternative%20Dispute%20Resolutions.docx/ Accessed on May 11, 2016.

[56] AACCSA Arbitration Institute was established in 2002 as an autonomous organ but part of the AACCSA with the support of Netherlands embassy in Ethiopia and it is the only institution which provides arbitration service on commercial disputes to the vast of the business community of Ethiopia. AACCSA was initially established by imperial order No 90/1947. This order mandated a private body to exercise institutional arbitration on commercial and industrial disputes and as a result, AACCSA AI was established. This order was also enacted at the time when there was no arbitration law and hence, disputed and legal gaps for conduct were settled through customary practices. The Civil Code, Civil Procedure Code and other legislation enacted later do have the same position on relevancy of institutionalized commercial arbitration in resolving commercial disputes.

[57] Bacry *Yusuf, Admit Zerihun & Shumet Chanie, Situation Analysis of Business and Sectoral Associations in Ethiopia*, 89-91 (Addis Ababa Chamber of Commerce and Sectoral Association, 2009).

[58] *Id.*

[59] *Id.*

[60] The Charities and Societies Proclamation No.621/2009 requires organizations to register in one of these three categories: Ethiopian Charities or Societies, Ethiopian Resident Charities or Societies, or Foreign Charities. The proclamation under its Article 14(2) (m) and (n) allows Ethiopian Charities or Societies to engage in the promotion of conflict resolution or reconciliation and the efficiency of the justice and law enforcement activities. However, the proclamation under its Article 2(2) defines as Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, wholly controlled by Ethiopians and generate income from Ethiopia or they are Ethiopian charities or societies if they use not more than ten percent of their funds which is

are not committed to take pro commercial dispute resolution measures. Their role, thus far, to establish a formal commercial arbitration system is minimal.

Second, economic constraints are also a problem in setting up institutional commercial arbitration in Ethiopia. Institutionalized commercial arbitration needs sustainable financial source from members, business community and its services in the country. Thus, it is challenging in Ethiopia where one third of its people are not able to meet their basic needs. Moreover, private individuals who have the capacity are not committed to establish and engage in institutionalized commercial arbitration as they do have little awareness and fear to succeed. It is also hard to find individuals who are eager to be a member and support commercial arbitration centers paying membership fee. Commercial arbitration institutions are also prohibited from receiving foreign aid which is the case of Ethiopian Arbitration and Conciliation Center (EACC). The business community does not have also any trend to take disputes before commercial arbitrators and thereby be a permanent source of income for commercial arbitration institutions in the country.[61]

Third, in Ethiopia, the business community does have lower level awareness of codified laws. As a result, they are prone for informal, customary and traditional dispute resolution mechanisms. They are settling their commercial disputes informally in church or mosque compounds, in homes of respected persons or arbitrators or disputant parties, in hotels and hotels rooms, in court rooms and under trees where it is hard to conduct hearing, take testimony of experts or lay witnesses, record sounds, keep the confidentiality of the matter and perform other proceedings easily.[62] This informal trend, thus, tied the people from seeing and establishing institutionalized commercial arbitration as sound alternative in the country.

Fourth, the legal framework of arbitration is not helpful to establish institutional commercial arbitration too. Indeed, Ethiopia does have arbitration laws which lay solid foundation for commercial dispute resolution since 1960s. However, these arbitration laws are scattered here and there in the Civil Code and Civil Procedure Code, are sketchy and non-comprehensive. They are quiescent for several decades. Moreover, the country does not have any specific arbitration law yet. It does not have comprehensive legislation which formalizes the authority and jurisdiction of private commercial arbitration institutions as well as address ambiguous and controversial issues like the arbitrability of administrative contracts and appealability (enforceability) of arbitral awards. Besides, the country does not sign the New York Convention. So, the legal environment is not promising and attractive for private individuals to do business on commercial dispute. We also know that the government or its own entities as well as the business community have moved out to foreign private arbitration forums fearing the unsoundness of the system in the country.[63]

Fifth, institutionalized commercial arbitration indeed requires skilled human resource. However, staffing commercial arbitration centers with educated and qualified arbitrators would not be easy in Ethiopia so far. Lawyers lack commercial acumen to better understand commercial transaction; do not have full-fledged knowledge on updated techniques and

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received from foreign sources. However, Ethiopian Arbitration and Conciliation Center (EACC) received most of its budgets from foreign sources and as a result, could not satisfy the required standards and stopped working.

[61] Booz Allen Hamilton, *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, at 70 (United States Agency for International Development (USAID, 2007).

[62] Yohannis, *supra* note 55, at 4-5

[63] Bezzawork, *supra* note 48, at 69

principles of commercial arbitration; and be short of foreign experience to accurately understand the system and settle commercial disputes.[64] There is no practical training which aims to increase professionalism and create best commercial lawyer.

Finally, in Ethiopia, public courts are empowered to enforce valid arbitral awards. However, there are tangible deficiencies in executing arbitral awards as there are congestions, long delays, lack of understandings on facts of commercial disputes, corruptions, lack of resources and others in public courts.[65] As a result, public courts do not guarantee quick review, recognition and enforcement of arbitral awards. Moreover, they do not give necessary legitimacy for arbitral tribunals and intervene more than necessary. So, the business community may not get any benefit of taking disputes before institutional commercial arbitration; rather than paying service fee and incurring other expenditures. That situation retards institutionalized commercial arbitration from being established in the country.

IV. SETTING UP INSTITUTIONALIZED COMMERCIAL ARBITRATION IN ETHIOPIA

In the preceding section, I mentioned that the existing commercial arbitration system in Ethiopia is less capable to work efficaciously on commercial disputes to meet the interests of the business community. It is not institutional and then not a patronage of feasible and comprehensive legal frameworks, the government and its institutions. However, it is ineluctable to setting up private institutional commercial arbitration in the country as private individuals have simple and straightforward approach to resolve disputes. In today's globalized world, the business communities, along with legal experts and visionaries across the world, have started changing the dispute resolution landscape to accommodate these growing needs by introducing less formal procedures for dispute resolution.[66] This adept practice should effulgence in Ethiopia outright. But, it needs the encouragement and support of different stakeholders.

The government should take the front in enhancing the existing situation. It should let its previous tralatitious scheme to go and set out a new era with pro private commercial arbitration stance. It needs to sweep up comprehensive plans, policies and legislation which encourage its agencies and the people to use private justice system. It should develop an atmosphere which is feasible for private bodies to engage in an institutional commercial arbitration. Above all, the government should update its arbitration laws and put them at the same level of the globalized world.

In today's world, the UNCITRAL model law and the New York Convention on Recognition and Enforcement of Foreign Arbitral Award (1958) are pillars in commercial arbitration.[67] The UNCITRAL model law is a law for harmonization of arbitral proceedings. As a result, the UN General Assembly recommended member states to give due consideration to the model law and come up with their own comparable legislation.[68] Many countries and

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[64] Hamilton, *supra* note 53, at 66.

[65] ELIAS & MURADO, *supra* note 12.

[66] The World Bank Group, *Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers*, at 1 (2011)

[67] Adedoyin Rhodes-Vivour, Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform, at 6. Available at http://www.nigerianlawguru.com/articles/arbitration/ARBITRATION%20%26%20A.D.R.pdf. Accessed on July, 2015.

[68] UN General Assembly Resolution 40/72, 112, U.N. Doc. A/RES/40/72 (December, 11 1985).

most arbitration institutions also adopted their own legislation on the basis of UNCITRAL model law.[69] The New York Convention also makes the recognition and enforcement of foreign arbitral awards easy by obliging member states to execute it without revision subject to limited exceptions.[70] There are also other international conventions which are pertinent to commercial arbitration.[71] Likewise, there are various international institutions[72] which administer arbitration proceedings, offer training or support in some or the other way, and do have their own institutional rules to guide and assist parties in the conduct of the proceedings. So, the government of Ethiopia should enact laws comparable to the UNCITRAL model law, sign and ratify the New York and other relevant international commercial conventions, and learn the arbitration rules and best decisions of known international arbitration institutions. It should revise its arbitration laws and come up with legislations which help to meet the vision of becoming lower middle income country by 2025.[73] However, the laws should not pass the limits of the basic principles enshrined in the constitution and laws of the country and should reflect the values, customs and beliefs of the people of the country.[74]

The government should strain the setting up of institutional commercial arbitration more understandable and simple in the country. It needs to enunciate, *inter alia*, the manner that institutional commercial arbitration should be formed, registered,[75] administered,[76] or supervised and the subject matters it should deal with.[77] The government should also build

[69] R. Rajesh Babu, *International Commercial Arbitration and the Developing Countries*, 4 AALCO BULLETIN 385, 389 (2006).

[70] New York Convention, Arts 2 & 5.

[71] There are international treaties which make commercial arbitration workable and effective. For instance, the European Convention on International Commercial Arbitration (1961), the Washington (ICSID) convention (1965), Moscow Convention (1972), the Panama convention (1975), the OHADA Treaty (1993) and the North American Free Trade Agreement of 1994 (NAFTA) enhance the practicability of commercial arbitration across the globe.

[72] Likewise, there are also famous international, regional and national commercial arbitration centers such as Lagos Regional Centre for International Commercial Arbitration, International Court of Arbitration, International Chamber of Commerce (ICC), the International Centre of Dispute Resolution (ICDR), the American Arbitrators Association (AAA), the Chinese International Economic and Trade Arbitration Commission (CIETAC), the Chartered Institute of Arbitrators (CIArb) and the Centre for Effective Dispute Resolution (CEDR). The statues, practices and decisions of these institutions heighten the quality and prestige of commercial arbitration across the globe.

[73] National Planning Commission, *The Federal Democratic Republic of Ethiopia The Second Growth and Transformation Plan (GTP-II)* 2015/16-2019/20) 16 (2015, Addis Ababa).

[74] Maazhymanot Worku, *Key Points on International and National Alternative Dispute Resolution Mechanisms.* Available at http://www.abyssinialaw.com/root/our-blog/entry/70-adr. visited on March 29, 2013.

[75] There are two arguments in Ethiopia whether private institutional commercial arbitration should establish under the name of business organizations or charities and societies. If commercial arbitration is made to register as business organization, it needs to follow all the elements and procedures of business organization specified under the 1960 Commercial Code. On the other hand, the Charities and Societies Proclamation No.621/2009 allow Ethiopian charities and societies to engage in advocacy activities in the country. Thus, institutional commercial arbitration may have the possibility to be registered as charities and societies. The government, thus, shall make it clear in its arbitration laws.

[76] There are nations which do have clear stance on the issue and establish a separate body responsible for supervisions of commercial arbitration centers. For instance, china arbitration law requires that all arbitrations in the country to be administered by people republic of china arbitration institution. See also Mayer Brown, international arbitration perspectives 12 (Winter 2009/2010).

[77] China makes some of its commercial arbitration institutions to work on commercial disputes which involve domestic element and foreign element. According to china, there is foreign element where one or both parties in the dispute are foreign persons or a company or organization domiciled in a foreign country, where the subject matter of the dispute is located in a foreign country or where the facts that establish, change or terminate the

structural frameworks that enable private commercial arbitration institutions to be molded up to local level, organize forums that facilitate training, discussion, experience sharing and set up networks that provides a platform for commercial arbitration centers to work together on their common interests.

Finally, the government should maintain the sustainability of institutional commercial arbitration centers. It should produce sufficient human resources and keep up their capacity. It needs to prepare conferences, workshops, and trainings on updated versions of commercial arbitration for arbitrators, lawyers, practitioners and the general public with its own budget or with the support of international institutions, universities or NGOs. Likewise, the government should support private commercial arbitration institutions, for instance, by funding them till they are good enough to support themselves.[78]

The judicial system do have also solid role in setting up workable, modernized and institutionalized private commercial arbitration in the country. Disputes themselves may not originate in courts. However, they may make their way to courts for different reasons[79] and at different level of proceedings[80] either as matter of statutory or inherent powers of courts. Thus, courts' intervention in commercial arbitration is inevitable and is "a fact of life as prevalent as the weather."[81] This is indeed beneficial and crucial for overall efficacy of the process as well. But, courts should keep their intervention modest and consistent with the interests of the parties. They should restrict their extended roles and assume only minimum intervention which is a norm in various national, international and institutional commercial arbitration laws.[82]

Courts should also ease the execution of awards through empowering the successful party to bring enforcement action and prohibiting the loser to challenge the award except in limited conditions and within a limited period of time.[83] They need to set up frameworks which dissect malevolent parties who utilize court intervention to delay or frustrate arbitral

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contract between the parties occur outside of the country. See also Mayer Brown, international arbitration perspectives 12 (Winter 2009/2010).

[78] There nations which support private commercial arbitration centers. For instance, Singapore's arbitration community has received government support since the mid-2000s. See the Singapore International Arbitration Centre (http://www.siac.org.sg/), a non-profit dedicated to the growth of international arbitration activity in Singapore initially funded at its inception in 1991 and continually supported by the government. Sydney's arbitration community also receives government support. See the Australian International Disputes Centre (http://www.sydneyarbitration.com/), which was founded in 2010 with the assistance of the Australian government and the state of New South Wales.

[79] Disputes may make their way to courts for resolution for different reasons. Most of the time, it happens in the appointment process of arbitrators or the arbitration award involves illegality, fraud, incapacity or is against public interest.

[80] It is inevitable that courts should intervene in different stages of commercial arbitration proceedings. Basically, there are four stages: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage. However, the intervention should be minimal and in accordance with law. Besides, it should be supportive and make commercial arbitration more effective.

[81] Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?* 24 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, at 490.

[82] Unlike Ethiopian arbitration laws which require extensive court involvement in commercial arbitration proceedings, relevant international commercial instruments state the role of courts to be restrictive. The New York Convention under its Articles II, III and V specify the role of courts to be in support for the arbitral process and recognition and enforcement of arbitration agreements and awards but nothing else. Article 5 of the UNCITRAL Model Law also provides courts to intervene as provided in this law only.

[83] See UNCITRAL Model Law- Art 35 and 36.

proceedings and other activities watering down the advantages of commercial arbitration. They should disentangle themselves from erroneous interpretations and applications and enable local as well as foreign investors to settle their commercial disputes in Ethiopia.

There are also functions expected from the institutions themselves. Commercial arbitration centers should work to keep themselves strong, modernized and institutionalized. They need to ensure their sustainability which is the most difficult but an indispensable aspect in terms of both human and financial resources. Commercial arbitration institutions need to build themselves with arbitrators who do have adequate knowledge and skill of the contemporary commercial dispute resolution mechanisms. They need also to prepare trainings, workshops and other experience sharing forums timely for arbitrators. They need, as well, to stage up their image by appointing arbitrators who are confidential, act impartially and comply with other required ethical standards.

Commercial arbitration institutions, likewise, should have their own sustainable financial resources. This is crucial, particularly in Ethiopia where private commercial arbitration centers are not funded by the government and may not receive any foreign aid exceeding ten percent of their budget. They should determine and work on areas which are their sources of income. They should prepare a schedule of fees on the basis of the fee payable to arbitrators, cost of venue, overhead, and services they render. Importantly, the cost should be substantially less than the costs that would be incurred in following the normal route of litigation to resolve the dispute. Besides, commercial arbitration institutions may secure additional revenue by offering training courses[84] or collecting fees from its members where an association of third party neutrals administers the proceedings.[85] They may also boost their earnings by creating public awareness, particularly for commercial parties. Public awareness campaign encourages the demands for commercial arbitration. For instance, the Cairo Regional Center for International Commercial Arbitration (CRCICA) employs this approach.[86]

Commercial arbitration institutions, aside from building their sustainability, should bring the optimum efficiency and effectiveness of their operation by monitoring and evaluating their performance through gathering feedback from clients or third party neutrals and implementing data management system. Commercial arbitration institutions should be grateful also for women both in including them in the arbitration staff and addressing their problems.[87]

Finally, there are also stakeholders whose contributions are not undermined in establishing strong and institutionalized commercial arbitration. Arbitrators should undertake

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[84] Institutional commercial arbitration may secure its revenue by offering training courses to judges, practitioners, business forums, and the like. However, appropriate care should be taken with regard to courses given to professional trainees and to laymen as part of an awareness campaign and/or general skills development for members of the public. This is because the trainee may choose to attend the entire course or only part of that. For instance, in Morocco, CIMAT offers 10-day training courses. Then, it charges 10,000 dirhams for the entire course from each trainee. In Pakistan, KCDR also charges between 10,000 and 12,000 rupees per day of training provided. It charges 15,000 to 20,000 rupees for a two-day training hours.

[85] The fees which are collected from members may be utilized to cover part of costs of running the institution. For example, in Morocco, CIMAT charges an annual fee of approximately $125 from its members and, in Pakistan, KCDR charges its annual members 50,000 rupees and its life members 300,000 rupees.

[86] The Cairo Regional Center for International Commercial Arbitration (CRCICA) increases its revenue by creating public awareness about the benefits of arbitration. For that matter, in collaboration with different bodies, it prepares conferences, seminars and other training programs and issues journals.

[87] Deborah Rothman, Gender Diversity in Arbitrator Selection, DISPUTE RESOLUTION MAGAZINE, Vol 18, No 3, 25 (2012).

an ongoing process of continuous professional development. They should attend training workshops, conduct self-assessments and record successful and unsuccessful ADR processes in learning journals. The business community should also create awareness of the benefits of arbitration throughout the business community, sponsor different activities of the institutions and create other viable atmosphere.

Law schools of the country should also work more to produce good arbitrators.[88] Indeed, all law schools incorporated an ADR course in their curriculum. But, it is hard to say it is enough. Rather, they should give considerable attention to ADR courses as the existing trend is more prone to court litigation and courses which are related to ADR are neglected. They have to expand the depth and breadth of courses to prepare graduates for practice in international commercial arbitration forums. They have to establish business networks with the business community, arbitration centers and the government and thereby enable students gain additional experience.

V. THE CONTRIBUTION OF INSTITUTIONALIZED COMMERCIAL ARBITRATION FOR ECONOMIC DEVELOPMENT OF ETHIOPIA

A well-run and functional commercial arbitration brings progresses on diverse perspectives, particularly on the economic sector. Different jurisdictions of this ever globalized world are the prime witnesses as they made, with commercial arbitration, their economy to shine and progress further. There are also wide potentials that effective, well-run and institutionalized commercial arbitration system may benefit the economy in Ethiopia too. These are vindicated below:

First, institutionalized commercial arbitration shall promote investment in Ethiopia.[89] Institutionalized commercial arbitration attracts foreign direct investment and encourages high level of participation of local investors in the country. It is a preferred option to assure for foreign and local investors of their investment in the country.[90] Besides, institutionalized commercial arbitration system forms healthy working environment, builds competitive environment and enhances the confidence of investors in the country's system. It draws invisible earnings that are quite valuable and establishes a new economic order, i.e. an improved investment climate which is essential to the economic growth of Ethiopia and eradication of poverty in the country.[91]

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[88] Gowok, *supra note 22*, at 280.

[89] The World Bank Group, Investing across Boarders: Indicators of Foreign Direct Investment Regulation in 87 Economies, 54-65(200), in 2010, the World Bank's investing across Borders (IAB) works and reports on indicators enhancing foreign direct investment (FDI) in 87 countries. Of these indicators, commercial arbitration mentioned as vital which ease investing in foreign country. Commercial arbitration reflects the strength of local legal frameworks for the rules of arbitration, ease of process and the extent of judicial assistance of arbitration which again determine the strength of commercial arbitration in the country and indirectly support foreign direct investment.

[90] See Richard E. Messick, *Judicial Reform and Economic Developments: A survey of the Issues*, 14 THE WORLD BANK RESEARCH OBSERVER 117, (February 1999). Like Ethiopia, the judiciary branch of the government becomes the problem of many nations of the globe, particularly for the business community. In a survey conducted in 69 countries and 3,600 firms, more than70 percent of the respondents mentioned unpredictable judiciary as a major problem in their business operations. The report also showed that the overall confidence the business community does have on the institutions of government, including the judicial system, correlated with the level of investment and measures of economic performance.

[91] Institutional commercial arbitration enhances the confidence of investors in the country's system. It brings new investment climate and economic order. For instance, the World Bank Development in 2005 mentioned

Second, institutionalized commercial arbitration, if properly conducted and managed, shall facilitate the smooth functioning of international commercial relations of Ethiopia.[92] In the international trade, the state or its agencies and nationals enter into contractual agreement with foreign nationals and governments. However, most foreign business partners enter into international commercial transactions with Ethiopian correspondents only when they are convinced that there is effective, impartial and predictable commercial dispute resolution system in the country. If there is not, they lack confidence to transact and deal out agreements which involve huge capital.[93] Particularly, foreign business correspondents are not fascinated to appear before courts because of "national ideologies, systems of thinking, and methods of conducting business or partiality of judges."[94] This intricacy reaches soaring when the transaction is between state or its agencies and private parties.[95] But, workable and institutionalized commercial arbitration has an answer. It brings all business bodies[96] to the same footing and boost confidence to transact, deal and work together. It, thus, will straighten international trade and investment in Ethiopia, thereby resulting in an efficient exploitation and allocation of global resources.

Third, institutionalized commercial arbitration will move up the wellbeing of disputant parties and the welfare of the society of Ethiopia.[97] In commerce, disputes are inevitable. But, parties should deal with them appositely and boost their businesses feasibility and profitability. Workable, modern and institutionalized commercial arbitration provides a proper forum for parties to manage their disputes. Its proceedings are held in a private and confidential atmosphere.[98] Its outcome is satisfactory and makes commercial disputant parties to maintain their business relationship.[99] Furthermore, effective and institutionalized commercial arbitration involves simple and flexible procedures, employs laws different from courts, assesses performances with high quality, and avoids further ligations.[100] It, thus, helps disputant parties to incur lower resolution cost, to lower their risk of attending further disputes on the same matter and to change their behavior and work for mutual benefits.[101] Likewise, it helps disputant parties to foretell the outcome of their case at court trial and thereby reduces the number of disputes which could appear before courts and saves resources.[102] It makes the

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China's experience on commercial arbitration as fascinating. China worked on four key areas in its bid to bring its legal system in line with world standards and attract investment. And dispute resolution is one of the key areas.

[92] MOHAMMED BEDJAOUI, EURO ARAB ARBITRATION CONGRESS, at 217 (Kemicha ed., Lloyd's Press of London, 1991).

[93] William W. Park, *Private Adjudication and the Public Interests*, BROOKLYN JIL, (1986), at 629 & 640.

[94] ASOUZU, *supra* note 9, at 33-34.

[95] *Id*, at 34.

[96] Ordinary people often think commercial arbitration is a private process and meant to serve private parties. However, that is not true. In fact, commercial arbitration is a private process, but it is not meant only for private parties. It deals with an ever-growing degree and intensity with disputes between private parties, between private and state parties, and in some instances with disputes between state parties.

[97] Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 THE JOURNAL OF LEGAL STUDIES 1, 8 (1995).

[98] CLIVE M. SCHMITTHOFF & KENNETH R. SIMNONDO, INTERNATIONAL ECONOMICS AND TRADE LAW, at 171 (Leyden, A.W. Sijthoff, 1976).

[99] Law Reform Commission, Alternative Dispute Resolution: Mediation and Conciliation 144 (2010)

[100] Nikolay Natov, Effectiveness of International Commercial Arbitration, at 8-12. Available at www.ksu.lt/.../Effectiveness-of-International-Commercial-Arbitration.pdf. Accessed on July, 2015.

[101] Shavell, *supra* note 97, at 5-6.

[102] *Id*, at 7.

enforcement of foreign arbitral awards, apart from foreign judgments, internationally easier.[103] Therefore, institutionalized commercial arbitration shall makes possible for commercial disputant parties "to consider and resolve all dimension of the dispute, including legal, financial and emotional aspects."[104]

Fourth, institutionalized commercial arbitration shall contribute in the transformation of Ethiopian economy. It generates income for the professionals and brings benefits for the community.[105] As a process, its services and facilities require the participation of experienced resident and member arbitrators; the attendance of diverse national and international companies, governments and business individuals or their counsels; and the support of a number of human personnel. It creates job for arbitrators and other supportive staffs as well as for legal counsels, expert witness and others.[106] Furthermore, all the individuals who come to use or visit the center spend their money to hotels, restaurants, shops and other services or facilities.[107]

Five, institutionalized commercial arbitration shall enhance the profile and reputation of Ethiopia in the eyes of the world, particularly among the business community.[108] Well-run and institutionalized commercial arbitration open an option for the country to become an international commercial arbitration center. This opportunity beefs up the country's cause to become the seat of African Union (AU) and the host of many diplomats, international and regional institutions. The country's economy is also growing fast and attracts giant enterprises. These all shall improve the economy of Ethiopia either directly or indirectly.

Finally, institutionalized commercial arbitration shall relieve the government of Ethiopia from incurring much expenditure. Institutionalized commercial arbitration is privately funded organization. Hence, it shall relieve the government from establishing, opening, and staffing new additional courts. It shall also open an opportunity for the government or its agencies to resolve their commercial disputes locally; rather than traveling overseas and incurring further expenses. This would be noteworthy particularly in investment disputes as the government of Ethiopia has increasingly entered in bilateral investment agreements which give foreign investors a choice to submit disputes before international arbitration forums.[109] The recent

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[103] Gavan Griffith and Andrew D Mitchell, Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration rules (1976) and the UNCITRAL Conciliation rules (1980), 3 MELBOURNE JOURNAL OF INTERNATIONAL LAW 184, 186 (2002).

[104] Law Reform Commission, *supra* note 99, at 143-144.

[105] See Charles River Associates, Arbitration in Toronto, 10 (2012). Institutionalized commercial arbitration transforms the economy of a country. For instance, Charles River Associates conducted a study on the economic impact of commercial arbitration on the City of Toronto economy in 2012. The associates used survey and secondary sources to assess and estimate the impact. Accordingly, the Charles River Associates estimated the total impact of arbitration on the economy of the City of Toronto to be $256.3 million in 2012, growing to $273.3 million in 2013 and $240.8 million in 2012, growing to $256.8 million in 2013 using its survey and secondary sources respectively. In fact, the results are confirmatory and show commercial arbitration does have significant impact on the economy of Toronto city.

[106] *Id.*

[107] *Id.*

[108] Khong Mei-Yan and Sim Chin Yee, how far is the practice of international commercial arbitration independent in Malaysia, at 2. Available at https://www.academia.edu/10349802/Independence_of_International_Commercial_Arbitration_in_Malaysia. Accessed on July, 2015. See Charles River Associates, Arbitration in Toronto 3 (2012).

[109] Ethiopia entered into a number of bilateral investment agreements with different countries. In most of these agreements the government of Ethiopian has consented any investment dispute would arise to be submitted by foreign investors' choice before any international arbitration for resolution. For instance, the bilateral

investment dispute between the Ministry of Mines of Government of Ethiopia Vs Chinese Petro Trans Gas and Oil Company which was settled before the Geneva based arbitration tribunal–operating under the auspices of International Court of Arbitration of the International Chamber of Commerce also substantiate the allegation.[110] However, if the country is able to establish efficient arbitration legal framework and institutionalized commercial arbitration, it would succeed in convincing foreign investors to settle their dispute within the country and thereby generate income as well as save itself from going out and incur more expenditures.

VI. CONCLUSIONS

Ethiopia has enacted the Civil Code, Civil Procedure Code and Chamber of Commerce and Sectoral Association Establishment Proclamation No 341/2003 that urge private individuals to set up institutionalized commercial arbitration in the country. However, these laws do not bring any considerable success in the country so far. There are only AACCSA Arbitration Institute and Bahir Dar University Arbitration Center which provide arbitration service to the large business community. This may be attributed to different factors. The arbitration laws are not comprehensive, and are sketchy and inconsistent with the modern laws and practices of international commercial arbitration. They are capable of neither organizing nor backing commercial arbitration centers to provide efficient service and address the interest of the business community. Likewise, the government does not blank out its old-fashioned system and encourage business bodies to establish institutional commercial arbitration. It does not brush-up or adopt arbitration laws which are comparable to UNCITRAL model law nor ratify the New York Convention, ICCSD and other relevant international commercial arbitration treaties. The judicial organ also intervenes in the arbitration proceedings beyond the modest. Public courts are intervening early in the arbitration proceedings, exercising wider judicial review power on awards and applying firm requirements in recognition and execution of foreign arbitral awards. They do not give the required legitimacy for arbitral tribunals and awards. Other stakeholders like law schools, lawyers, bar associations and business communities do not also show up their effort to set up modern and institutionalized commercial arbitration in the country to the level expected.

As a result, Ethiopia does not have effective, well-run and institutionalized commercial arbitration which receives increased attention in international commerce. Institutionalized commercial arbitration promotes investment, facilitates international commercial transactions, and enhances the profile, reputation and ultimately foster transformation of the country's economy. Thus, it is suggested that the Ethiopian government should extricate itself from the existing conundrum (especially on problems linked to legal frameworks) and cheer up the business bodies to engage in institutional commercial arbitration. The judicial system should also endorse commercial arbitration in the manner that meets international norm. Other

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investment agreement between Ethiopia and Great Britain and Northern Ireland under Article 8, Ethiopia and Turkey under Article 7, Ethiopia and Tunisia under Article 7 and Ethiopia and Sweden under Article 8 specify this fact.

[110] *Ethiopia Defeats Petro Trans in USD 1.4bln Arbitration*, THE REPORTER, January 19, 2016. In this dispute Petro Trans claims that the Ministry of Mines of Government of Ethiopia unlawfully terminated the Calub and Hilala gas field's appraisal and development agreement as well as four other exploration agreements signed in July 2011. In this claim Petro Trans claimed the Ministry of Mine to reinstate it or to award it a compensation of 1.4 billion dollars. However, the Geneva-based Arbitration Tribunal, after three years of proceeding, unanimously gave total victory to Ethiopia by rejecting Petro Trans' legal claim.

stakeholders should follow the same footsteps and contribute to the development of the system. In that case Ethiopia will have arbitration laws which organize efficient commercial arbitration that address the needs of the Ethiopian business community, and facilitate trade, attract investment and generally contribute to the overall economic development of the country.

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UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ETHIOPIA: THE PRACTICE UNDER VEIL AND DEVOID OF A WATCH DOG

Zelalem Eshetu Degifie[*]

Abstract

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) under Article 104 and 105 sets forth amending clauses for formal constitutional changes that sets procedures to be observed in the process of constitutional amendments: both initiation and approval. Such constitutional provisions serve to confine the power to amend the constitution within the prescribed legal requirements as well as help to control arbitrary changes to the constitution, which consequently promotes constitutionalism within the country. The FDRE Constitution has been amended twice within these twenty years. The first amendment was made on Article 98 of the Constitution in 1997, and the second on Article 103 (5) of the Constitution in 2005.This study explores the practice of such constitutional amendments and their constitutionality under the Ethiopian legal context. The study argues that the first and the second amendments substantially contravened procedural requirements set by the Constitution, and hence are unconstitutional. Moreover, the study also examines the institutional set up of the Ethiopian legal system and finds that neither the House of Federation nor ordinary courts are appropriate organs to review the constitutionality of constitutional amendments. Finally, the study recommends that amendments made on the FDRE Constitution should be published, and institutional reforms to be carried out in order to (re-)organize a watch dog body to safeguard the Constitution against practice of unconstitutional amendments.

Keywords: amendment, constitution, Ethiopia, House of Federation, judicial review, unconstitutionality

I. INTRODUCTION

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) under Article 104 and 105 sets forth amending clauses for formal constitutional changes.[1] These articles lay down procedures which have to be observed in the process of constitutional amendments. These procedures had been practically invoked while the Ethiopian Constitution was amended twice in the past twenty years. Accordingly, Article 98 of the Constitution has been amended so as to change the spirit of concurrent power of taxation in to revenue sharing. Besides, Article 103(5) of the Constitution has also been changed to extend the period for conducting national population census to more than 10 years.

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[1] The Federal Democratic Republic Of Ethiopia (FDRE) CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETA, 1st Year No. 1, 1995 (herein after FDRE CONSTITUTION), Art 104.

This scholarship intends to examine the constitutionality of these constitutional amendments and their review mechanisms under the Ethiopian legal system based on analytical approaches. This article has three main interrelated sections. Following this short introduction, the amendment rules for changing the Ethiopian Constitution will be discussed. In connection, procedural and substantive requirements for constitutional change will be elaborated. The Third section deals with the concept of unconstitutional constitutional amendment under the Ethiopian legal system. A particular focus is given to the first and the second amendments made on Article 98 and 103(5) of the FDRE Constitution. Judicial review of amendments and the question of competence as well as grounds of review are explored comparatively under Section Four. More importantly, it looks into the appropriateness of the House of Federation (HoF) as an umpiring institution to review unconstitutional constitutional amendments in Ethiopia. Finally, this piece closes with some concluding remarks.

II. THE AMENDMENT RULES IN THE ETHIOPIAN CONSTITUTION

Amendment clauses are common features of contemporary democratic constitutions. More importantly, this clause expressly provides rules for formal constitutional changes that imply amendments to be made only in accordance with the formula provided within the constitution.[2] This amending formula which is built-in the constitution serves to confine the right to amend within the prescribed legal requirements as well as helps to control arbitrary changes to the constitution, which consequently promotes constitutionalism within the country.[3]Although present-day constitutions make use of a wide variety of amendment formulas, it often comprises of procedural and substantive requirements, by which formal changes to a constitution may occur.

A. Procedural Requirements

The procedural aspects of an amendment formula have a formal character, and subsequently make out the bodies engaged on the process of constitutional amendment along with the majority required for amending the constitution. Typically, it deals with the rules of initiation and ratification.[4]The rules of initiation delineate the organs having legitimate power to kick off constitutional amendment proposals. However, they may not be necessarily made available within a constitution.[5] In such cases, initiation is assumed to be carried out in the same manner as to

[2] Teresa S. Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 CHICAGO L. J 327, 333 (2010); see also Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, 347 CHICAGO PUB. LAW. & LEG. THEO. W. PAP. 96, at 96-98 (2011).

[3] VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 201-203, 309-310 (Cambridge University Press, 2nd ed., 2006); Charles Fombad, *Limits on the Powers to Amend Constitutions: Recent Trends in Africa and Their Potential Impact on Constitutionalism*, 1, 20-21 (Paper Presented at the World Congress of Constitutional Law, Athens, Greece, 11-15, June 2007).

[4] Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 936-40 (2014).

[5] Carlos Closa, Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States, at 291-297, *available at*: https://www.researchgate.net/publication/259645822_Constitutional_Rigidity_and_Procedures_for_Ratifying_Constitutional_Reforms_in_EU_Member_States/ (accessed on 13 May 2015); See also Fombad, *supra* note 3, at 20-21.

ordinary legislations. And consequently the parliamentary working procedures for amending ordinary laws will be applied.[6]

Under the Ethiopian legal system, the rules governing initiation of constitutional amendment are provided under Article 104 of the Constitution. However, the organs having the power are not clearly apparent from the reading of the provision which at first glance gives an impression that the House of Peoples' Representatives (HPR), the House of Federation (HoF) and one-thirds of the State Councils of the member states of the federation have the authority to support or otherwise the proposals made by others in order to table it for discussion.[7]Although the title of Article 104 is about initiation, the power provided under it is not that of proposing constitutional amendments. Rather, it is the power to vote on amendment proposals, made by other bodies, for the purpose of submitting them to discussion. This way of interpretation has been endorsed by some authors like Dr. Monga Fombad who argued that the Ethiopian Constitution is silent on defining the bodies having the power to initiate constitutional amendments and he concludes that normal procedures for initiating amendments on ordinary legislations are applicable.[8]

However, this view departs from what was conceived by the constitutional framers who wished to give the power to the House of Peoples' Representatives, House of Federation and State Councils.[9]Inconsistently, this intention of the framers is not mirrored in the final text of the Constitution, which later on reflected on the House of Peoples' Representatives and the House of Federation Joint Organization of Work and Session Rules of Procedure Regulation No.2/2008.[10] This regulation under Article 9 provides that the HPR and HoF with a two-thirds majority may initiate amendments. Besides, one-thirds of the State Councils can also propose the same. Therefore, it is possible to conclude that in Ethiopia, the HPR, the HoF and State Councils have the power to initiate constitutional amendments.

In addition, the Ethiopian Constitution under Article 104 entails amendment proposals to be submitted for the general public. The purpose of this submission is for discussion and decision. This constitutional provision states that; "*any proposal for constitutional amendment… shall be submitted for discussion and decision to the general public*". Under the Ethiopian Constitution, the phrase " *submitted for the general public for discussion and decision*" is not clear whether it denotes referendum or not.[11]Although the Minute of the Constitutional Assembly is not clear enough on this point, it may give some clues to understand the spirit of the provision. During

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[6] *Id.*

[7] FDRE CONSTITUTION, *supra* note 1, at Art. 104.

[8] Fombad, s*upra* note 3, at 10-11.

[9] The Constitutional Assembly, *Minutes of Constitutional Assembly; Discussions and Debates on the Making of the FDRE Constitution*, Vol. 5, (Unpublished, Addis Ababa, Ethiopia, 1994).

[10] *The House of Peoples' Representatives and the House of Federation Joint Organization of Work and Session Rules of Procedure Regulation*, Regulation No. 2/ 2008, FED. NEGARIT GAZETA, Year 14, No.2. Addis Ababa, 2008 (herein after The Joint Working Procedure Regulation).

[11] Referendums are the most effective way of ensuring that the citizens are actively involved in the process of constitutional amendment. See ASHOK DHAMIJA, NEED TO AMEND A CONSTITUTION AND DOCTRINE OF BASIC FEATURES, 298-310 (Revised 1st ed., Wadhwa and Company Nagpur Law Publisher, 2007).

discussions of constitutional making, the Chairman of the Constitutional Structure Committee provided that *"as long as the Houses are the representatives of the people, then the people- the general public- is not directly required to participate in the amendment process.*"[12] Other members of the assembly also argued that "the *people have the right to be consulted on amendment proposals."*[13]

These and similar debates conducted at the time of constitutional making reveals that the role of the people on the process of constitutional amendment is not giving binding decision in a form of referendum. Rather, their role is mere consultation and discussion on the proposed amendments, by which they may contribute significant inputs to the decision making bodies. Therefore, although referendum as a means of giving binding decision is not envisaged under the Ethiopian Constitution, Article 104 requires the people to be notified and consulted on the amendment proposals. On top of this, the use of the word 'shall' under Article 104 indicates that submission of an amendment proposal to the general public is not an option left for agencies' discretion but a mandatory requirement that must be observed in the process of constitutional change.

The FDRE Constitution under Article 105 also provides rules for ratification of constitutional amendments. It provides two different kinds of rules, each used to ratify proposals relating to different matters. Amendment proposals relating to human rights and fundamental freedoms provided under Chapter Three of the Constitution, and the amending clause itself can be ratified by the HPR and the HoF, sitting separately, with a two-thirds of majority vote at each House. Moreover, it requires such amendment proposals to be ratified by all State Councils of the member states of the federation with a majority vote. However, amendment proposals pertaining to other provisions of the Constitution can be ratified with a majority vote of two-thirds at a joint session of the two Houses (HPR and HoF) and with the support of two-thirds of the State Councils with a majority vote at each regional state.[14]

All these reveal that the amending power under the Ethiopian legal system is characterized by procedural limitations. As a result, the Constitution can formally be amended only by institutions such as HPR, HoF and State Councils which must also exercise their powers in accordance with the procedures provided under the amending clauses. An attempt to change the Constitution in a manner different from that stipulated under the amending formula will be unconstitutional.

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[12] Minutes of Constitutional Assembly, *supra* note 9. የጉባኤው ሊቀመንበር ለቀረቡት ጥያቄዎች የህገ መንግስት ቅርጽ ጉዳይ ከሚቴ ምላሽ እንዲሰጥባቸው በጠየቁት መሰረት የኮሚቴው ሰብሳቢ ኢንጅነር አብያሌ ፍላቴ በህገ መንግስቱ ላይ ስለሚደረጉት ማሻሻያዎች የህዝቡ አስተያየት እንዴት እንደሚጠየቅ የቀረበውን ጥያቄ አስመልክተው በሰጡት ምላሽ የፌደሬሽን ምክር ቤትና የህዝብ ተወካዮች ምክር ቤት ህዝቡን በቀጥታና በተመጣጠነ መልኩ የሚወክሉት አባሎቻቸው የህዝቡን ፍላጎት የሚያንጸባርቁ የህዝብ ልሳን በመሆናቸው በህገ መንግስቱ ላይ የሚቀርቡ ማሻሻዎችን ሊያጸድቁ እንደሚችሉ፤ ከዚህም አኳያ ስለማሻሻያዎቹ ህዝቡ አስተያት እንዲሰጥ ላይጠየቅ እንደሚችል ገልጸዋል።

[13] *Id.* አቶ ሰለሞን አበበ የሚባሉ ተወካይ በሰጡት ማብራሪያ ላይ በአንቀጽ 94 (በረቂቁ ላይ ስለህገ መንግስት ማሻሻያ የሚደነግገው አንቀጽ) መሰረት በሚቀርበው ማሻሻያ ሀሳቦች ላይ ህዝቡ ሊወያይ እንደሚችል ገልጸዋል።

[14] THE FDRE CONSTITUTION, *Supra note* 1, at Art. 105 (2).

B. Substantive Requirements

In addition to procedural requirements, the amending formula of some constitutions place substantive limitations that prohibit changes on certain provisions of the constitution.[15] These constitutions set forth immutable principles which cannot be touched through the amending power.[16]Although the content of these provisions differ widely from country to country, a comparative study conducted by Ashok Dhamija demonstrates that the republican nature of the state, the fundamental rights and freedoms guaranteed to citizens, human dignity, rule of law, democratic structure of the state, territorial integrity of the state, separation of powers, independence of courts, popular sovereignty, political pluralism, official language, sovereignty of the state and the amending clause itself are the main and the most common subjects upon which the limitation has been placed.[17]

No substantive limitation up on the amending power is provided under the Ethiopian Constitution. The amending clauses, which are Article 104 and 105, are so general and plenary that gives power to the actors to amend the Constitution without any exception whatsoever. Had it been intended to save certain matters from the operation of the amending power, it would have been perfectly easy for the framers of the Constitution to make that indication clear by adding a stipulation to that effect. Thus, the plain meaning of the amending clauses of the FDRE Constitution suggests that every provision of the Constitution can be amended by following the procedure prescribed under it. And then literally it is possible to argue that there are no matters under the Ethiopian Constitution which have been clearly provided to be beyond the reach of the amending power. As a result, the amending power is not constrained based on substantive requirements in Ethiopia.

III. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS UNDER THE ETHIOPIAN LEGAL SYSTEM

A. The Practice of Constitutional Amendment in Ethiopia: General

Constitutional amendments may be unconstitutional for procedural as well as substantive reasons. A constitutional amendment which fails to comply with the relevant procedural requirements may not be held constitutional.[18] The same is true for amendments which are inconsistence with the eternity clauses which define the immutable elements of the constitution. At this time,

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[15] KEMAL GOZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS; A COMPARATIVE STUDY (Ekin Press, Turkey, 2008), at 55; Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL L. REV. 321, 336-341 (2011); Ulrich Preuss, *The Implication of Eternity Clauses; The Germen Experience*, 44 ISRAEL L. REV. 429, 431-433 (2011).

[16] *Id*. Article 79 of the German Constitution provides that any constitutional amendment against the federal nature of the state, the inviolable status of human dignity, the principle of republican and democratic government, the rule of law, popular sovereignty, the binding of the state authorities to the basic rights as set out in Articles 1 to 19, the separation of powers and the right to resistance against tyranny is inadmissible.

[17] DHAMIJA, *Supra note* 11, at 291.

[18] Gray Jacobsohn, *Unconstitutional Constitution? A Comparative Perspective*, 4 IN'L J. OF CONS. L (2006) 460, 460-470; Rosalind Dixon, *Transitional Constitutionalism and Un-Constitutional Constitutional Amendments*, 394 CHICAGO PUB. L. & LEG. THEO. W. PAP.1, at 1-8 (2011).

amendments could be declared unconstitutional on the basis that their content is at dissent with the express substantive limitations, albeit they are enacted in accordance with the constitutionally stipulated procedures.[19] Therefore, the procedural as well as the substantive requirements of the amending formula must be observed in the process to keep away from unconstitutional constitutional-amendments.

As long as there are no expressly provided substantive limitations against the amending power in Ethiopia, amendments may not be unconstitutional due to substantive grounds. However, there are possibilities for amendments to be unconstitutional because of procedural reasons. As we have seen, initiation by the appropriate organ, public participation and approval at HPR, HoF and State Councils in pursuance of the required majority are mandatory steps that should be carried out to amend the Ethiopian Constitution. Therefore, an attempt to change the Constitution in a way that departs from these procedural requirements would be held unconstitutional.

Practically, the 1995 FDRE Constitution has been amended twice within these twenty years. The first amendment was made on Article 98 of the Constitution in 1997. The second amendment was also made on Article 103 (5) of the Constitution in 2005. The author's preliminary observation shows that most of the citizens including political elites, constitutional law teachers, law students, judges, prosecutors and even parliamentary members have no information about such amendments, and hence are unaware of the substance of the changes.[20] Astonishingly, the 'official' copies of the Constitution still reflect the original versions of the two provisions. The copies distributed by the HPR or HoF, and other state entities, such as the National Human Rights Commission, do not reflect the changes.

Besides, some who have awareness about the amendments consider them as informal changes.[21] But the author believes that the amendments are formal constitutional changes intended to be carried out based on the amending clauses of the Constitution. The concerned bodies tried to amend the constitutional provisions based on the formal procedures of the Constitution provided under the amending clauses than using interpretation or political adaptation.[22] Therefore, the first and the second amendments are formal constitutional changes, albeit the existence of some irregularities on the process.

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[19] *Id.*

[20] The observation is preliminary and not made based on systematic approach. It was made at random. For instance among seventy five 4th year law students at Wollo University, School of Law in 2013 and 2014 which have taken the course of constitutional law, no one knows about the fact that the constitution has been amended. Most of the judges, attorneys and law instructors which I have consulted randomly have no information about the fact that the Constitution had been amended.

[21] Solomon Neguise (PhD, Asso. Prof.) and Taddese Lencho (PhD) consider, in their works, amendments made on Article 98 of the FDRE Constitution as informal changes. Dr.Solomon Neguise is the author of a book "Fiscal Federalism in Ethiopian Ethnic–based Federal System'' and teaches at Civil Service University and Addis Ababa University, and conducting research on the area. Dr. Taddese Lencho is also a prominent scholar on tax law law. See; Taddese Lencho, *The Ethiopian Tax System: Exesess and Gaps*, 20 MICHIGAN SATE INT'L L. REV. VoL. 328, (2012); Taddese Lencho, *Income Tax Assignment Under the Ethiopian Constitution: Issues to Worry About*, 4 MIZAN L. REV. 32, (2010).

[22] Besides the formal constitutional amendment mechanism that is carried out as per the constitutionally stipulated procedures, constitutional change can also be brought informally through constitutional interpretation and

B. The First Constitutional Amendment (1997)

Article 98 of the Ethiopian Constitution previously conferred concurrent legislative power over taxation to federal and state governments. This original provision provided that:

Article 98

Concurrent Power of Taxation

(1) The Federal Government and the States shall jointly levy and collect profit, sales, excise, and personal income taxes on enterprises they jointly establish.

(2) They shall jointly levy and collect taxes on the profit of companies and on dividends due to shareholders.

(3) *They shall jointly levy and collect taxes on incomes derived from large-scale mining and all petroleum and gas operations and royalties on such operations.*

Nevertheless, the first constitutional amendment made on the above provision changes the spirit of concurrency in to revenue sharing that allows the specified taxes to be determined and administered by the federal government while the constituent units share the proceeds from it.[23] This amendment on Article 98 provides that:

Article 98

Concurrent Power of Taxation

1. *Profit, sales, excise, and personal income taxes on enterprises jointly established by the federal government and regional states;*
2. *Taxes on the profit of companies and on dividends due to shareholders and;*
3. *Taxes on incomes derived from large scale mining and all petroleum and gas operations and royalties on such operation shall be levied by the federal government, and the proceeds will be divided between the federal government and states in pursuance of a formula determined by the House of Federation as provided under Article 62(7) of the Constitution. The federal government may delegate its power of tax collection to regional states.[24] (Translation from Amharic by the author)*

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political adaptation. Constitutional interpretation brought gradual revision of the constitutional framework. By judicial interpretation, the existing provision in the constitution may get a new meaning without there being any formal amendment to the constitution. Besides, unintended revision of the constitutional framework can also be brought through political adaptation by the legislative and executive bodies. According to Donald Lutz, when we compare these modes of constitutional changes, political adaptation and judicial interpretation reflects declining degree of commitment to popular sovereignty. See: Donald Lutz, *Towards A Theory of Constitutional Amendment*,88 AME. POL. SCI. REV. 355, 355-370 (1994).

[23] To understand the concept of concurrent power of taxation and revenue sharing see; Solomon Neguise, FISCAL FEDERALISM IN ETHIOPIA ETHNIC–BASED FEDERAL SYSTEM 63-67, 212-214 (Revised ed., 2008).

[24] The FDRE House of Peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made by the 1st HPR*, Vol.2, (1996/97, Unpublished, HPR Library, Addis Ababa, Ethiopia). The Amharic version of the amendment provides that;

አንቀጽ 98

የጋራ የታክስና የግብር ሥልጣን

1. **የፌደራል መንግስትና ክልሎች በጋራ በሚያቋቁሟቸው የልማት ድርጅቶች ላይ የሚጣለው የንግድ ትርፍ ግብር፤ የሥራ ግብርና የሽያጭና ኢክሳይስ ታክስ፤**

The amendment proposal was initiated by the Ministry of Finance and Economic Development (MoFED) that pointed out the practical difficulty of implementing the principle of concurrent power of taxation as a ground for justifying the amendment proposal.[25] The proposal was tabled for deliberation on March 6, 1997 to the HPR which discussed on the amendment accordingly and submitted it to the Parliamentary Legal Affairs Standing Committee for further scrutiny. The standing committee scrutinized the amendment proposal in detail and talked about it thoroughly with the concerned bodies like the Ministry of Finance and Economic Development and various committees such as the Legal Affairs Committee, the Regional State Affairs Committee and the Revenue Allocation Committee within the House of Federation.[26] The Parliamentary Legal Affairs Standing Committee submitted its report to the general meeting of the HPR on April 7, 1997. Besides, on its report, the committee recommended to the House for the approval of the amendment proposal according to Article 104 of the Constitution.[27] Based on this recommendation, HPR examined the amendment bill, and finally approved the proposal as proclamation No. 71/97 with a unanimous vote.[28]

This amendment bill was then directed to the HoF that deliberated on the proposal and voted in favor of the amendment on April 9, 1997. At that time, the Minister of Finance and Economic Development appeared on the floor of HoF to brief the members of the House of Federation about the rationales of the amendment proposal.[29] Lastly, the amendment bill was submitted to the joint session of the two Houses which unanimously approved the proposal on April 10, 1997. The Ministry of Finance and Economic Development also presented at the joint meeting for briefing the members about the importance of the constitutional amendment.[30]

C. The Second Constitutional Amendment (2004/2005)

The Ethiopian Constitution under Article 103 established a National Population Census Commission which is authorized to conduct a population census periodically. The Constitution further provides the periodic interval at which the census must be conducted. Accordingly, the national population census should have been conducted every ten years. The second constitutional

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2. በድርጅቶች የንግድ ትርፍ ላይ እና በባለአክሲዮኖች የትርፍ ድርሻ ላይ የሚጣለው ግብርና የሽያጭ ታክስ፤
3. በከፍተኛ የማእድን ስራዎችና በማንኛውም የፔትሮሊየምና ጋዝ ሥራዎች ላይ የሚጣለው የገቢ ግብርና የሮያሊቲ ክፍያዎች፤ የሚጣሉትና የሚሰበሰቡት በፌደራል መንግስት ሁኖ ፌደራል መንግስትና ክልሎች ገቢውን የሚከፋፈሉበት ቀመር በህገ መንግስቱ አንቀጽ 62(7) መሰረት የፌደሬሽን ምክር ቤቱ የሚወስነው ይሆናል፡፡ የፌደራል መንግስት ግብርን የመሰብሰብ ስልጣን ለክልሎች በውክልና መስጠት ይችላል፡፡

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] The FDRE House of Peoples' Representatives, *Minutes of the House of Peoples' Representatives at the 2nd Year Working Time 38th Regular Secession*, (1997, Unpublished, HPR Library, Addis Ababa, Ethiopia). As the minutes indicate, the Ministry of Finance and Economic Development briefed the members about the rationales of the amendment and responded for those questions raised by some parliamentary members. Most of the questions were actually about the impact of the amendment on the right of regional states.

[29] The FDRE House of Federation, *Minutes of the House of Federation on its 1st Year 2nd Regular Secession*, (1997, Unpublished, HoF Library, Addis Ababa, Ethiopia). Most of the questions raised by the members were about the relevance of the amendment. Latter on it approved the matter with Seventy Three supporting vote, Three opposition and Five abstentions.

[30] *Federal Democratic Republic of Ethiopia House of Peoples' Representatives and House of Federation 2nd Joint Session at the 2nd Working Year*, (April 10, 1997, Un Published, HoF Library, Addis Ababa, Ethiopia).

amendment changes this ten years' time table and allows it to be postponed as necessary. This amendment proposal adds a phrase on Article 103(5) which provides:

> *"However, if the HPR and HoF in a joint session ascertained the existence of a force majeure to conduct the census, this period of ten year may be prolonged as necessary.*[31]*(Translation from Amharic by the author)*

The second constitutional amendment was initiated by HPR. As the 2005 national election and national population census fell on the same fiscal year, making it difficult for the country to run both simultaneously due to financial constraints. Then, the HPR, based on the report and recommendation given by the Parliamentary Legal Affairs Standing Committee, decided the national population census to be put off until 2007 through constitutional amendment on September10, 2003.[32] This decision initiated the proposal for the second constitutional amendment. The initiation was then directed to the HoF, which also discussed on the matter thoroughly and voted in support of it, with four abstentions only, on October 6, 2003.[33]

After this juncture, the initiation which is supported by the two Houses was sent to the State Councils of the member states of the federation seeking their approval according to Article 105 of the Constitution. As a result, all except Gambella Regional State Council responded positively for the proposed constitutional amendment that is expressed through letters written to the Houses.[34]Most of the State Councils responded on a reasonable period of time. Nine months was the maximum period of time taken by Tigray and Afar Regional States. Most of the regional states responded with in four months. Lastly, the amendment proposal was submitted to the joint session of the two Houses which approved the proposal by the vote of all the members present and voting, but with six abstains, on October 5, 2004.[35]

D. A Blemished Practice of Constitutional Amendment

When we see the practice of constitutional amendment in Ethiopia, the process is found to be disregarding essential procedures that such amendments need to follow. In those cases, the

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[31] The FDRE House of peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made By the 2nd House of Peoples' Representatives at its 5th Working Year*, Vol. 1, (2005, Unpublished, HPR Library, Addis Ababa, Ethiopia). The Amharic version of the amendment provides that; "**ሆኖም ግን ቆጠራውን ለማካሄድ ከአቅም በላይ ችግር ስለመኖሩ የተወካዮች ምክር ቤትና የፌደሬሽን ምክር ቤት በጋራ ስብሰባ ካረጋገጡ የቆጠራው ዘመን እንደሁኔታው ሊራዘም ይችላል**"።

[32] The FDRE House of peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made By the 2nd House of Peoples' Representatives at its 3rd Working Year*, Vol. 8 (2003, Unpublished, HPR Library, Addis Ababa, Ethiopia).

[33] The FDRE House of Federation, *Minutes of the 2nd House of Federation on its 4th Working Year 1st Regular Secession*. (October 6 -7, 2003/4, Unpublished, HoF Library, Addis Ababa, Ethiopia).

[34] Oromiya Regional State with Date 02-07-96, No.Co/761/DA-01/96, Amhara Regional State with Date 26/6/1996,No.አ/ጉ/ወ/3624/ሙ/ፋ-1, Southern Nation Nationality and Peoples Regional State with Date 19/06/96,No. Kim01/Me/119/96, Tigray Regional State with Date 05/11/1996,No.Ti/29/1/84,Benishangul Gumze Regional State with Date 26/06/96, No.1367/Me-01/96, Afar Regional State with Date 2/11/96 No A4/5 and ,Harari Regional State with Date 8/7/96 No.3/Ha112/2/96 (all the letters are available at the Library of HPR, Addis Ababa, Ethiopia).

[35] The FDRE House of Peoples' Representatives, Proclamations, *Official Discussions and Resolutions Made By the 2nd House of peoples' Representatives at its 5th Working Year, Vol*. 1, (2004/5, Unpublished, HPR Library, Addis Ababa, Ethiopia).

amendments are likely to be unconstitutional. For instance, the first constitutional amendment was initiated by the Ministry of Finance and Economic Development, which was also active throughout the whole process. But the Constitution under Article 104 does not give the executives any power to initiate constitutional amendments. Thus, it was initiated by the body which has no power to propose constitutional amendments. More importantly, this amendment was not also approved by the State Councils. The first constitutional amendment was approved only by the joint session of the two Houses. State Councils of the member state of the federations did not take part at the stage of amendment approval, although the Constitution requires their participation under Article 105 (2).

As the author's interview reveals: "*they (the members of the HPR) were orally informed about the consent of the member states of the federation in favour of the amendment at the floor of parliament."*[36] But, this is not documented and carried out formally. As a result, nowadays it is difficult to verify the participation of the State Councils of regional states on the amendment process. As the Minutes of the amendment indicate, some parliamentary members raised the issue of regional states' participation at parliamentary discussion. However it was responded that "*the parliamentary members as well as the members of the HoF can evaluate the issue from the perspective of the interests of member states."*[37]From these discussions then, it is safe to conclude that the member states of the federation are denied of their right to participate in the process of constitutional amendment, which is guaranteed under Article 105 of the Constitution.

Moreover both the first and the second constitutional amendments were not presented for the general public. Consequently, public discussions along with consultations were not held on them. As the Minutes indicate, the process was directly from initiation to approval without inviting the people to participate in any manner.[38] Therefore, the public participation requirement which is envisaged under Article 104 of the Constitution is ignored during both the first and the second constitutional amendments. Besides, both the first and the second amendments passed through unnecessary steps like approval of the HoF at stage of initiation. For instance, for the second amendment, after it was initiated with a two-thirds vote at HPR, it was presented before the other House (HoF) as if the initiation process is not accomplished or to complete the initiation process. The same was true for the first constitutional amendment which was sent to the HoF, after it was discussed at HPR, as part of the initiation process. According to the Constitution, amendment proposals initiated at one of the Houses can go to the next steps of public discussion and approval without seeking support from the other House. Nevertheless, the first as well as the second amendment proposals which were held up at the phase of initiation by the HPR were needlessly directed to the HoF for further gratuitous support. Therefore, the practice on the first as well as the second constitutional amendments aptly indicates that they are not made in accordance with the procedures provided under the Constitution. As a result, it is possible to conclude that they are

[36] Interview with Ato Mohamed Ahmed, Senior Legal Advisor to the Office of the Speaker of HPR and Former Member of the House of Peoples' Representatives, On 15 April 2013.

[37] The FDRE House of Peoples' Representatives, *supra* note 28.

[38] Interview with Ato Mohamed, s*upra* note 36; Interview with Ato Seifu G/Mariame, Senior Legal Researcher at the House of Peoples' Representatives, On April 15 2013.

unconstitutional constitutional amendments, although their constitutionality has not yet been challenged.

E. Unpublished Constitutional Amendments: A Move towards Unwritten Constitution?

The first and the second constitutional amendments have not yet been published in the *Negarit Gazeta,* which is an official newsletter for publication of federal laws in Ethiopia.[39] Whether this failure to publish them renders the amendments to be unconstitutional needs critical examination. The amending clauses, which are Article 104 and 105 under the Ethiopian Constitution, do not require constitutional amendments to be published on the *Negarit Gazeta*. As a result, approval as per Article 105(1) (2) alone is sufficient to make an amendment be part of the Constitution.

However Article 71(2) of the FDRE Constitution which describes the powers and functions of the President provides that "*He (the President) shall proclaim in the Negarit Gazeta laws approved by the House of Peoples' Representatives*." Moreover the Federal *Negarit Gazeta* establishment proclamation states that all laws of the federal government shall be published in the Federal *Negarit Gazeta*.[40] The same proclamation under Article 3 further provides that all courts and all other organs of the federal and regional government as well as other natural and physical persons are required to take judicial notice of the existence of those laws that are published in the *Negarit Gazeta.*

All of these provisions are pertaining to ordinary legislations. If ordinary laws must be published, it may be strongly argued that, considering their significance, constitutional amendments must also be published. Besides, it is also reasonable to interpret the term 'law' in the aforementioned provisions so broadly that it includes constitutional amendments. As per this view, as long as constitutional amendments are federal laws, albeit a higher law, they must be published in the Federal *Negarit Gazeta* which is a federal law newsletter published under the umbrella of the House of Peoples' Representatives. Moreover, the fact that the FDRE Constitution itself has featured in the *Negarit Gazeta* incontestably demand all its amendments to follow the same practice.

However, there is nothing in the Federal *Negarit Gazeta* establishment proclamation or Article 72 of the Constitution which indicates that publication is a requirement for the validity of laws. From this what we can understand is that publication in the Federal *Negarit Gazeta* is a matter of practicality and judicial notice. It is not a matter of validity. Therefore, the first and second constitutional amendments may not be unconstitutional by the mere fact of not being published in the Federal *Negarit Gazeta.*

Nonetheless, the author of this piece does not deny the practical significance of publication. Publication in the official *Gazeta* has importance from practical point of view so as to improve access to the amended provisions, and maintain the comprehensiveness of the constitutional

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[39] *The Proclamation to the Establishment of the Federal Negarit Gazeta*, Proclamation No. 3/1995, FED. NEGARIT GAZETA, Year 1, No.3, Addis Ababa, 1995, Art. 2.

[40] *Id.*

document. It also enables the public and other institutions to be informed about the substance of the amendments and thereby invoke the amended constitutional provisions to demand their rights. Despite this practical importance, the first and second constitutional amendments have not yet featured in the official *Negarit Gazeta*.

Actually, there is no satisfactory reason for this incidence of unpublished constitutional amendments. However, the lack of an organ to assume the responsibility of publication can be pointed out as a reason for the failure to publication. For a long period of time that extends from 1995 to 2007, nobody was mandated specifically for the task of publishing constitutional amendments. The Office of Speaker of the House considered itself as competent only for laws (legislations) enacted by HPR. As the amendments are approved at the joint session of the two Houses (HPR and HoF), the Office viewed them as falling beyond its power and duty. Nowadays, this is essentially rectified by the Joint Working Procedure Regulation No.2/2008, which purposely mandated the HPR to publish constitutional amendments in the Federa *Negarit Gazeta*.[41]

IV. JUDICIAL REVIEW OF THE AMENDING POWER: A MEANS OF SAFEGUARDING THE CONSTITUTION

The exercise of the amendment power is one of the areas that raise disputes in many countries including Germany, Turkey, India and USA.[42] This would happen when the constitution has been amended by disregarding the prescribed rules and procedures.[43]In addition, amendments that are enacted according to the constitutionally stipulated procedures could also be declared unconstitutional on the ground that their content is at variance with the express substantive limitations.[44] At this juncture, the un-constitutionality of the amendments may be claimed and a case could be brought to an umpiring body, which has been established to rule on constitutional disputes.[45] However, whether this body has the power to review constitutional amendments is debatable for a long period of time among scholars. The question of competence and the scope of review are the focus areas of the debate.

A. The Question of Competence

Some constitutions make clear provision with regard to the competence of their umpiring body to rule on the constitutionality of constitutional amendments. As a result, the review would be

[41] The Joint Working Procedure Regulation, s*upra* note 10, Art. 9(7).

[42] Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Power*, 1, at 10-16 (Dissertation for Doctor of Philosophy, London School of Economics, England, February 2014).

[43] Richard Albert, *Non-constitutional Amendments*, 22 CANADIAN J. LAW & JURI, 5, 6-10 (2009).

[44] *Id*. See also; Barak, s*upra* note 15, at 322-332.

[45] Most of the constitutions expressly or impliedly recognizes the concept of judicial review and for this designate a body empowered to handle constitutional disputes. However, the nature of the institution and its jurisdiction may not be the same among constitutions. In some constitutions like Germany special constitutional court having broad power has been established where as in some countries like USA the ordinary courts with restrictive jurisdiction may engage on the task of judicial review. Despite these differences, the institution deals with, *inter-alia,* disputes relating to constitutional matters like the constitutionality of legislations. For more on the issue see: ASSEFA FISEHA, FEDERALISM AND ACCOMMODATION OF DIVERSITY IN ETHIOPIA: A COMPARATIVE STUDY 395-467 (3rd edn. 2010).

carried out through this institution.[46] For instance, the Constitutions of Turkey, Chile, Romania, Ukraine, Kyrgyzstan and South Africa clearly authorized their constitutional courts to review the constitutionality of constitutional amendments.[47]

The 1961 Turkish Constitution, as amended in 1971, under Article 147 stipulated that the Turkish constitutional court can review the constitutionality of amendments. On the same vein, Turkish Constitution which was enacted in 1982, under Article 148 expressly authorizes the constitutional court to review constitutional amendments.[48] The 1980 Chilean Constitution under Article 82(2) also regulates the judicial review of constitutional amendments and empowers the constitutional court to review their constitutionality.[49]Similarly, the South African Constitution under Article 167(4) allows the constitutional court to decide on the constitutionality of amendments.[50] Therefore, constitutions may specifically recognize judicial review of constitutional amendments.

However, as the study conducted by Kemal Gozler demonstrates, most of the constitutions are silent on the question of judicial review of constitutional amendments.[51] The same idea also resonates by R. Yaniv who provides that constitutional silence on the judicial review of constitutional amendments is the common trend of current constitutions.[52]According to Kemal Gozler, this constitutional silence on review of amendments has different meanings under the American and European models of judicial reviews. Under the American model of judicial review, courts may examine the constitutionality of constitutional amendments despite the silence of the constitution on the area. This is due to the fact that under the American model, the court does not need to receive special power for exercising judicial review which is part of their day to day activities.[53]For this reason, they have the competence to inspect the admissibility of the grounds invoked by the parties in the course of litigation.[54] Therefore, courts view themselves as competent to scrutinize the constitutionality of amendments, even if the constitution does not expressly vest them with this power.[55] The Indian, the Brazil and the US Supreme Courts are typical examples which have examined the constitutionality of amendments on a number of occasions.[56] Conversely, the US Supreme Court later on departed from this general trend and denies itself, the power to review constitutional amendments based on the political question

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[46] Barak, *Supra* note 15, at .322-332; Roznai, *supra* note 42, at 180-193.

[47] *Id.*

[48] GOZLER, *supra* note 15, at 4-5.

[49] Barak, s*upra* note15, at 331-332. See also: Dante Figueroa, *Constitutional Review in Chile Revisited: A Revolution in the Making*, 51 DUQUESNE L. REV. 387, 396-403 (2013).

[50] Barak, *supra* note 15, at 332; see also; Adem Kassee, *The Substantive Validity of Constitutional Amendments in South Africa*, 131 SOUTH AFRICA L. J., 135 (2014).

[51] GOZLER, s*upra* note 15, at 5-10.

[52] Roznai, *supra* note 42, at185.

[53] JACKSON & TUSHNET, *supra* note 3, at 456-460.

[54] *Id.*

[55] GOZLER, *supra* note 15, at 10-11.

[56] *Id*. See also Roznai, *supra* note 42, at 185-90.

doctrine.[57] The Court believed that amendment is a political issue, which should not be addressed by the judiciary; rather it must be left for Congress.[58]

Under the European model, judicial review is carried out through a special constitutional court that does not has a general jurisdiction to review all legal norms and acts. This constitutional court has limited and special jurisdiction on matters which are specifically given by the constitution or law that establishes it.[59] Subsequently, constitutional silence in European model of judicial review implies lack of competence to rule on the matter of constitutional amendments.[60]

Distinct from the examples provided above, in France, for instance, the Constitutional Council, which is the umpiring body, believed that its jurisdiction is strictly defined by the Constitution. Consequently, it deems itself incapable to rule on cases other than those expressly provided by the provision of the Constitution.[61]As constitutional amendment issues are not specifically given, the Council in France restrained itself from reviewing them. As a result, in France constitutional amendment bills are not subjected to judicial review.[62] Similarly, the Hungarian Constitutional Court ruled that its jurisdiction is confined on examining the constitutionality of laws without being extended to review the constitutionality of constitutional amendments.[63]All these scenarios, therefore, rightly demonstrate that under the European model the review of constitutional amendment is not possible if there is no express provision authorizing the constitutional court to do so.

However, some constitutional courts in countries adopting the European model of judicial review declared themselves as competent to rule on constitutional amendments. The base for their argument is the broad interpretation of the provision which empower the constitutional court to review the constitutionality of laws.[64] They understand the term 'law' so broadly that it includes constitutional amendments, and then assume jurisdiction over reviewing their constitutionality. The German and Austrian Constitutional Courts are typical examples for this, although some authors like Kemal Gozler criticized their views as "ill founded."[65]

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[57] Lynn Fishel, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications on the Equal Rights Amendment*, 49 INDIANA L. J, 147, 149-152 (1973).

[58] *Id.* The political question doctrine has reserved certain constitutional questions to be ultimately decided by the political branches. This doctrine requires certain matters like federalism and constitutional amendments as the proper spheres for the political organs. And thus the court proclaimed itself as incompetent to examine such kinds of questions.

[59] JACKSON & TUSHNET, *supra* note 3, at 467-75.

[60] GOZLER, *supra* note 15, at 12-17.

[61] Denis Baranger, *The Language of Eternity: Judicial Review of the Amending Power in France Or The Absence Thereof*, 44 ISRAEL L. REV. 389, 389 -399 (2001).

[62] *Id.*

[63] GOZLER, *supra* note 15, at16-17.

[64]*Id*, at 20-25.

[65] *Id.*

In addition, some courts also invoke the existence of eternity clauses within the constitution as a means for justifying their authority to review constitutional amendments.[66] The argument is that when un-amendable provision exists within the constitution, their judicial enforceability is self-evident so as to give effect for their protective functions that would be undermined in the absence of judicial enforcement.[67]Therefore, judicial review is considered as a natural mechanism for protecting eternity clauses in the constitution. This position can be best illustrated by the Czech Republic Court's decision.[68]The Court assumes jurisdiction to review constitutional amendments based on Article 9 of the Constitution that provides "the essential requirements for a democratic state governed by the rule of law are protected from constitutional amendments."From this provision, then the Czech Republic Court inferred its authority to review constitutional amendments.[69] The Court on its decision stated that the protection envisaged under this provision of the Constitution "is not a mere slogan or proclamation, but an actually enforceable constitutional provision."[70]

As this brief comparative constitutional study demonstrates, most of the constitutions are silent on the issue of review of constitutional amendments. However courts mostly construe the constitutional silence as an authorization to rule on constitutional amendments. As a result, they assume jurisdiction to review the constitutionality of constitutional amendments.

B. The Scope of Review

Reviewing the constitutionality of constitutional amendments is possible and practiced in most countries in the world. Nevertheless the scope of the review varies across constitutions. As a result, constitutions set different standards for reviewing the constitutionality of constitutional amendments.

1. Formal (Procedural) Grounds

A constitutional amendment can only have effect if it has been enacted in accordance with the procedures set forth in the constitution. For this reason, it is natural that a body having the authority of constitutional review examines whether these requirements have been fulfilled or not.[71]Amending laws that do not meet these procedural requirements laid down in the constitution may not produce the intended result of revising the constitution.[72] Thus, the body having competence to rule on a constitutional amendment must examine its formal and procedural

[66] Eternity clauses are constitutional provisions setting forth immutable principles which cannot be touched through the amending power. They articulate the founding myth of the system and define the identity and the foundation of the constitution expressly. See; Peuss, *supra* note 15, at 440.

[67] Roznai, *Supra* note 42, at 185-87.

[68] Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act*, 8 INT. CON. L. J., 29, 33-36 (2014).

[69] *Id.*

[70] *Id.*

[71] Barak, *supra* note 15, at 334; See also: Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 Int. J. CON, 339 (2013).

[72] Preuss, *supra* note 15, at 448.

regularity. It looks at the conformity of a constitutional amendment with the conditions of form and procedure. Besides it declares the amendment as 'unconstitutional' when amendments are found to be violating the procedural requirements stipulated under the constitution.[73] For instance, in the US, the Supreme Court has reviewed the procedural requirements of constitutional amendments in a number of cases.[74] Later on, however, in Coleman V. Miller, the Supreme Court refused to review the issue of constitutionality of constitutional amendments by invoking the political question doctrine.[75]

2. Substantive Grounds

The body having jurisdiction can also review constitutional amendments based on substantive grounds particularly when the constitution contains expressly provided eternity clauses.[76] For instance, the German Constitutional Court, on a number of occasion review constitutional amendments based on substantive grounds and mostly the court gives reasons based on eternity clauses.[77] As Peruss pointed out, judicial review is a means for enforcing eternity clause which provides "legal teeth" for it.[78] However, the mere existence of eternity clause by itself may not guarantee judicial review based on substantive grounds. For instance, although the 1982 Turkish Constitution contains eternity clauses, it clearly prohibits review based on substantive grounds, and confines the power of review on formal reasons only.[79] Thus, courts usually enforce eternity clauses through review on substantive grounds in the absence of clear prohibition to that effect.

Moreover, it is also possible to examine constitutional amendments from substantive grounds without eternity clauses. India is typical example for such kind of practice. Even though the Indian Constitution does not contain eternity clauses, the Supreme Court examines constitutional amendments based on substantive grounds in a number of occasions.[80]The Court has examined

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[73] GOZLER, s*upra* note 15, at 52-60.

[74] Hollings Worth v. Virginia (3 U.S. 378 (Doll) (1798), National Prohibition Cases (253 U.S. 350 (1920), Dillon v. Gloss (256 U.S. 368 (1921) and United Sates v. Sprague (282 U.S 716 (1931). For more on the area see: Barak, *Supra note* 15, at 329-331; GOZLER, *supra* note 15, at 28-32.

[75] Coleman v. Miller (307 U.S 433(1939). The case involved a question about the validity of the Kansas legislatures' ratification of the child labor amendment. The Kansas legislature originally rejected the proposed amendment in 1924 but reversed itself in 1937 and ratified the amendment. The Kansas state senators, who voted against ratification in 1937, sued arguing that by reason of previous rejection and failure of ratification within reasonable time, the proposed amendment had lost its vitality. And the second ratification vote in 1937 was invalid. The court held that congress, not the court had the final authority to determine the validity of amendment ratification based on the political question doctrine.

[76] Jacobsohn, *supra* note 18.

[77] Barak, *Supra* note 15, at 328-330; GOZLER, *Supra note*15, at 52-62. Klass Case (BverfGE 30, 1 (1970), Land Reform I Case (BverfGE 84, 90 (1991), Land Reform II Case (BverfGE 94, 12 (1991), Asylum Cases (2BvR1938/93; 2BvR2315/93) and Acoustic Surveillance of Homes Case (1 BvR 2378/98, 1 BvR 1084/99) are instances in which the court review amendments based on substantive grounds.

[78] Preuss, *supra* note 15, at 447-48.

[79] GOZLER, s*upra* note *15*, at 3-5

[80] DHAMIJA, *supra* note 11, at 330, 340,341-360. The Supreme Court in Minerva Mil Lltd V. Union of India Case (AIR 1980 SC 1789) declared the 42th amendment unconstitutional and void. The Supreme Court held that since the Constitution has conferred a limited amending power on the parliament, the parliament cannot under the exercise of that limited power enlarge that very power in to an absolute power. Indeed a limited amending power is one of the basic features of our Constitution, and therefore, the limitations on that power cannot be destroyed. In other words, parliament cannot under Article 368 expand its amending power so as to acquire for itself the right to repeal or

constitutional amendments based on the basic structure doctrine which is an implied limitation up on the amending power. Accordingly, the basic structure of the Indian Constitution cannot be changed through constitutional amendment.[81]

As the comparative scholarships and court practices demonstrate, those umpiring bodies having the competence to rule on the constitutionality of an amendment can examine it based on formal and/or substantive grounds. The substantive grounds may be expressly written on the constitution in the form of eternity clause or can be inferred from the entirety of the constitution as an implied limitation against the amending power like India. So, the authority to scrutinize the constitutionality of constitutional amendments can be exercised from the perspective of formal and/or substantive grounds.

C. (Judicial) Review of Unconstitutional Constitutional Amendments in Ethiopia

The 1995 Ethiopian Constitution under Article 53 establishes a bicameral House composed of the House of Peoples' Representatives and House of Federation. The House of Federation which is the second chamber in the Ethiopian context is a political organ composed of representatives of nations, nationalities and peoples.[82] This House is unique with regard to the powers assigned to it. Firstly, it does not have legislative function. Unlike second chambers of other federations, it is not involved in the law making process.[83] Second, it has the power to umpire constitutional issues. It engages on constitutional interpretation and rulings on the constitutionality of statutes.[84] The rationale for this is that the Constitution is considered as a political contract of the nations, nationalities and peoples. As long as it is the political contract of them, the nations, nationalities and peoples who are represented in the House should be the ultimate interpreter and guardian of it.[85] These factors make the Ethiopian second chamber (HoF) unique from other contemporary second chambers.

Although the HoF has the power to interpret the Constitution as well as to rule on the constitutionality of statutes, it is not specifically authorized to determine the constitutionality of constitutional amendments.[86] Besides, although Article 2(2) of Proclamation No. 251/2001, which is made to consolidate the power of HoF, defines the term 'law' broadly, the definition

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abrogate the Constitution or to destroy its basic and essential features. The doctrine has been further applied in several subsequent cases such as Waman Rao V. Union of India Case AIR 1980 SC 1789, Shri Kumar Padama Prasad V. Union of India (1992) 2SCC 428: AIR 1992 Sc 1213, Supreme Court Advocates-on-record Association V. Union of India (1993) 4SCC 441: AIR 1994 SC268, Pudyal V. Union of India (1994) SUPP 1SCC324, and KIhoto Hollohan V. Zachillhu AIR 1993 SC 412: 1992 SUPP (2) SCC651.

[81] *Id.*

[82] THE FDRE CONSTITUTION, *Supra note* 1, Art. 62.

[83] *Id.* It is obvious that the HoF participates in the constitutional amendment process. However this, strictly speaking, does not amount to taking part in the law making process.

[84] ASSEFA, *supra* note 45, at 123 -144.

[85] Assefa Fiseha, *Constitutional Interpretation: The Respective Role of Courts and the House of Federation (HOF), Proceeding of the Symposium on the Role of Courts in the Enforcement of the Constitution*, (2000); See also; Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring The Experience of the House of Federation (HoF*), 1 MIZAN L. REV. 1 (2007).

[86] FDRE CONSTITUTION, *supra* note 1, Arts. 62 & 84.

does not include constitutional amendments.[87] As the Ethiopian system of judicial review inclined to the European model, based on Kemal Gozler's analysis[88], it is possible to understand that the HoF has no power to rule on the constitutionality of constitutional amendments as long as the power is not specifically granted to it.

As per this author's view, however, this argument is weak and unsound. Modern constitutions in democratic countries necessarily include the principle of constitutional supremacy and both the US and European models of judicial review are based on this notion of the supremacy of the constitution.[89] As the constitution is the supreme law of the land, any act contrary to it may not have any effect. Thus, the natural and logical consequence of the inclusion of supremacy clause in the constitution is that there must be a body authorized to enforce it through making laws null and void when they contradict with the constitution.[90]As a result, by enforcing the supremacy clause, the umpiring body protects the constitution from being undermined by any act of legislation.[91]

The same would be true in Ethiopia, where the supremacy of the Constitution is recognized, and any law which contravenes the Constitution would be deemed null and void by the HoF, which is considered as a guardian of the Constitution.[92] Nevertheless, ordinary legislations are not the only means of undermining the Constitution. Constitutional amendments can also be used to undermine the Constitution. For instance, in Honduras President Manuel Zeleya attempted to amend the Constitution to remove term limits for the President. Similarly, the President of Chad, Gabon, Guinea, Namibia, Togo and Uganda amended their Constitutions to make a third term possible.[93]

Thus, HoF, as a guardian of the Constitution must protect the document not only from ordinary legislations, but also from constitutional amendments. As a 'guardian of the Constitution,' it must make sure that the supremacy of the constitution has been maintained in all aspects, be it constitutional amendments or ordinary laws. Thus, the author of this piece believes that the HoF can assume jurisdiction to examine the constitutionality of constitutional amendments, at least on procedural grounds, even if there is no an express statement authorizing it to do so.

The HoF, though have competence to rule on the constitutionality of amendments, is placed in a very difficult situation which make it practically impotent to effectively exercise its function of reviewing constitutional amendments. First, the HoF is one of the veto players on constitutional amendments. It is involved in the process of amendment at the stage of initiation

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[87] *The Proclamation to Consolidate the House of Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities*, Proclamation No. 251/2001, FED.NEGARIT GAZETA 7th Year No. 41, Addis Ababa, 6th July 2001.

[88] GOZLER, *Supra note* 15, at 5-10.

[89] JACKSON & TUSHNET, *supra* note 3, at 456-487.

[90] *Id.*

[91] *Id.*

[92] FDRE CONSTITUTION, *supra* note 1, Arts. 9, 62 & 82.

[93] Dante B. Gatmayton, Can Constitutionalism Constrain Constitutional Change? *Available at*; https://works.bepress.com/dante_gatmaytan/8/ (accessed on May 11, 2015).

and ratification. In consequence, any act of ruling on the constitutionality of constitutional amendment will make the HoF a judge on its own case. Second, as members of the HoF are at the same time active members within the regional governments and ruling party leadership, the HoF lacks complete independence from the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) and the executive branch of the government.[94] Consequently, the HoF is not expected to rule against the government and the interest of the ruling party when adjudicating constitutional disputes in general and constitutional amendment matters in particular. As a political organ under the influence of the executive and the ruling party, the HoF may not decide sensitive political issues like constitutional amendments in fair and unbiased manner. Therefore, practically the HoF may not be a sound institution to rule on the constitutionality of constitutional amendments.

Moreover the Ethiopian Constitution denies regular courts the power either of interpreting constitutional provisions or of reviewing the constitutionality of legislations. [95] The constitutional framers viewed the judiciary as undemocratic and conservative. They also believed that constitutional adjudication is a political function. This fear of judicial activism and the political question doctrine persuaded the framers to deny courts the power of judicial review.[96] Constitutional amendment is more of a political process than ordinary legislation making. On this point, Justice Black who was a judge at the US Supreme Court said that a constitutional amendment is "a political question: the process is political in its entirety, from submission until an amendment becomes part of the constitution."[97] Preuss, complementing this position, provided that the idea of constitutional amendment is a political rather than juristic concept.[98]

Thus, under the Ethiopian legal system ordinary courts are not expected to rule on such very political matter. As the intent of the framers and the spirit of the Constitution reveals, it is difficult to think that courts, which are not trusted even for ordinary legislations, to rule on the constitutionality of constitutional amendments. Therefore, neither HoF nor courts may review the constitutionality of amendments under the Ethiopian legal system. The system lacks an appropriate institution to rule on un-constitutional constitutional amendments, which undermines the Constitution.

V. CONCLUDING REMARKS

The 1995 Ethiopian Constitution has been amended twice in the past twenty years. Critical observation on these amendments aptly revealed that the practice disregards important procedural

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[94] ASSEFA, *supra* note 45, at 163-197.

[95] Assefa Fisseha, *New Perspective on Constitutional Review in Ethiopia*, 1 ETH. L. REV, 1, 3-11 (2002).

[96] *Id.*

[97] The justice Black was a judge at the Supreme Court of the USA. In Colema V.Miller,307 U.S 433(1939) Case he wrote as "Article V grants power over the amending of the Constitution to Congress alone….the process itself is political in its entirety, from submission until an amendment becomes parts of the Constitution. And it is not subject to judicial guidance, control, or interference at any point." See: Barak, *Supra note* 15, at 330-31.

[98] Preues, *supra* note 15, at 448.

requirements stipulated under the Constitution. Institutions which have not been assigned a role at the phase of initiation are participated in the process of proposing constitutional amendments. For instance, the Ministry of Finance and Economic Development, which initiated the first constitutional amendment, has no constitutional power to propose amendments. In addition, the first and the second amendment proposals were not also submitted to the general public for discussion and consultation as required by the Constitution. The practice also undermines the role assigned for State Councils of the member states of the federation. This was more apparent on the first constitutional amendment which is not approved by Regional State Councils. Thus, the practice of constitutional amendment disregards substantial procedural requirements demanded by the Constitution which in turn renders the first and the second constitutional amendments unconstitutional, though their constitutionality has not yet been challenged before any umpiring organ.

Although the Constitution does not specifically authorize HoF to rule on the constitutionality of constitutional amendments, as a guardian of the Constitution, it may assume jurisdiction to examine the constitutionality of constitutional amendments. But practically, this would be impossible due to the fact that HoF itself is one of the veto players in the process of constitutional amendment. Consequently, its review would be investigating the constitutionality of amendments made by itself. Besides, its impartiality is also doubtful to rule on such sensitive political matters. As the Constitution denies courts the power to adjudicate on constitutional issues, it is difficult to think them as an institution capable of scrutinizing the constitutionality of constitutional amendments, which is more of a political act. As a result, neither the House of Federation nor ordinary courts may have practical power to rule on the constitutionality of constitutional amendments. This indicates that judicial review as a means of safeguarding the Constitution against unconstitutional constitutional amendments has no significant place under the Ethiopian legal system.

Therefore, despite the un-constitutionality of the practice, the State lacks an appropriate institution to watch and review the process of constitutional amendment. Judicial review as a means of safeguarding the Constitution from unconstitutional constitutional amendment is not well recognized and developed under the Ethiopian legal system. As a result, the amending power can also be used to undermine the Constitution. Hence, it is imperative to revisit the Constitution so as to (re-)organize an institution that would examine the constitutionality of constitutional amendments in Ethiopia. This recommendation can be effective through re-considering the powers of the existing institutions like HoF and courts or establishing a new organ like constitutional court based on further study.

In addition, it is aptly indicated in this article that both the first and the second constitutional amendments have not yet been published in the *Negarit Gazeta*, which is an official news-sheet for publishing federal laws. Although publication is not a matter having a negative consequence on the validity of the amendments, it is important from practical point of view so as to maintain the comprehensiveness of the written Constitution. Therefore, it is the firm belief of this author that amendments made on Articles 98 and 103(5) of the Constitution should be published on the official *Negarit Gazeta*. The Office of speaker of the House should take the responsibility of

publishing the amendments. Moreover the amended texts have to be included on the official copies of the Constitution. The precedent used in USA may be instructive. Accordingly, amendments may be included as supplementary provisions at the end of the Constitution. It is also possible, for instance, to include amendments in each provisions of the Constitution, specifically indicating when it was amended or do it as we did for amendments to ordinary laws. This point, therefore, may require further study of all the options. However, it is inescapable that, at the publication of new copies of the Constitution, the amended provisions have to be included.

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DEPARTURE OF ETHIOPIAN FAMILY LAWS: THE NEED TO REDEFINE THE PLACE OF SOCIETAL NORMS IN FAMILY MATTERS

Mulugeta Getu Sisay*

"No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation." *Emperor Haile Sellassie I*[1]

Abstract:

Most legal theorists agree that law is the 'mirror of society' and its purpose is 'maintenance of social order'. This so called mirror-theory underlines that the basic source of law is social values and interaction, and the state should not blatantly ignore societal values and impose aspirational laws. Unfortunately, Ethiopia has taken measures to modernize the country through legislative reforms including by abolishing selected aspects of customary family institutions in 1960 and 2000. As a result, important values of the society have been overlooked in the official family laws and that separate the law from the community. Betrothal, one of the long established practices of Ethiopians, is totally ignored by the federal family law and has become an extra-judicial act. Similarly, though customary way of family dispute settlement is recognized under the FDRE Constitution, the family law barely empowers it thereby eliminating its functions and importance. Equally, the law that obliges adoption agreement to be in written form, parties to appear before court of law and secure approval of the relation, is believed to be mechanical and contrary to societal practices. As a result, the family laws have been considered by many as a poor adoption of foreign practices that ignore societal values and long-proved customary institutions. The author, however, argues for "a multilayered approach to family regulation [that] builds on the notion that many families have a complex identity and experience, shaped and defined by many different cultural, legal, and political ties." Indeed, the manuscript presents that there are sufficient reasons to argue for greater accommodation of indigenous legal tradition (cultural and religious diversities) in Ethiopian family laws.

Keywords: adoption, arbitration, betrothal, custody, family, mirror, society, spouses

I. INTRODUCTION

Law is a dynamic developing social institutions and changes with the change of circumstances – social, political, economic, physical environment etc. - in the society it governs.[2] African laws are essentially "an integral part of their culture" and reflected its

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[1] ABBA PAULOS TZADUA & PETER L. STRAUSS (EDS.), THE FETHA NEGEST: THE LAW OF THE KINGS, (Carolina Academic Press, Durham, North Carolina, 1st edition, 1968), at preface at v. Reciting Conquering Lion of the Tribe of Judah Haile Sellassie I Elect of God, Emperor of Ethiopia,' 29th of August, 1968. The book was translated to English from Geez.

[2] Abiola Ayinla, *African Philosophy of Law: A Critique*, JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, Vol. 6:147 (2002).

cultural diversities.[3] African traditional institutions, however, had been systematically and gradually eliminated during colonization and in the process of anti-colonial movement which finally resulted in a massive reform on customary laws.[4] In addition, African legal systems are under the influence of the introduction of foreign legal systems due to globalization and transplantation, urbanization and the growth of money economy.[5]

Though Ethiopia did not experience European colonial rule, there were analogous process of interference with Ethiopian customary institutions in different times under the disguise of modernization and territorial expansion.[6] Ethiopia together with Tunisia are mentioned as the top two African countries to make radical measures "to abolish legislatively carefully selected aspects of customary law" while recognizing and enforcing customary laws continued in other African nations after independence with a varied degree of adjustment.[7] This ongoing process of interface between the traditional institutions and alien/modern principles reached our time, and continued to characterize current legal studies. In this era of interface, it is unconceivable to expect Ethiopian laws, including family laws, to become the perfect mirrors of the society or reflect the custom and values of the society it governs.[8] Though there are considerable number of scholars who argue that law should mirror its subjects, other – advocates of legal transplants or law and development - argue that laws reflect uniformly accepted values and should be used flexibly.[9]

This Article, then, asks questions and scrutinizes to what extent Ethiopian official family laws, especially the federal law, is the mirror of prevailing practices and to what extent these laws do contribute to the maintenance of social order. Generally, the author argues that important values of the society have been overlooked in the official family laws and that separate the law from the community, and advocates for reincorporation of customary laws in the official laws or juridical recognition of some customary practices.

It starts with a literature analysis of the relation between law and society and looks from 'mirror' theory and 'legal transplants' points of view. With a view to making the picture of family laws very clear, Section III of the Article proceeds with a historical accounts and development of the body of laws that regulate family matters in Ethiopian history. Accordingly, the place of customary laws and the *Fetha Negest* in family relations, the 1960

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[3] TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW, (Manchester University Press, UK, 3rd ed.) (1972); See also *Id.*

[4] BAHRU ZEWDE AND DIEGFRIED PAUSEWANG (EDS), ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW (United Printers, Addis Ababa, Ethiopia) (2006), at 17-18.

[5] BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY, (Oxford University Press) (2001), at 112.

[6] BAHRU, *supra* note 4, at 17-18. Bahru mentions that the incorporation of the Southern part of the country under the administration of Menelik II in the late 19th century marked the interface between the native and alien institution. That seems the starting point of the interface but never become the final and decisive moment. A more influential and successful, to say, interface was experienced in the 20th century, especially during the codification periods of 1960s and which is still an ongoing process.

[7] Paul Kuruk, *African Customary Law and the Protection of Folklore*, COPYRIGHT BULLETIN, Vol. XXXVI, No. 2 (2002), at 6-13. In other instances, South Africa and Namibia are mentioned in their efforts of constitutionalizing group rights thereby preserving culture through education and language and to have unwritten customary law treated as legally binding. See Lona N. Laymon, *Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*, 10 S. CAL. INTERDIS. L.J. 353 (2001).

[8] TAMANAHA, *supra* note 5, at 1.

[9] Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, CORNELL INTERNATIONAL LAW JOURNAL, Vol. 44:209 (2011); John Gillespie, *Towards A Discursive Analysis Of Legal Transfers Into Developing East Asia*, INTERNATIONAL LAW AND POLITICS, Vol. 40:657 (2008).

Civil Code, the Federal Revised Family Code [RFC here after], states' family laws and constitutions are briefly discussed. Section IV through V of the Article appraise selected family institutions in line with the prevailing custom and norms of the society. Accordingly, the long-practiced institutions of betrothal [known as *metechachet* by its Amharic equivalent], family arbitration [known widely as *shimigillina* by its Amharic equivalent] and adoption [widely known as *gudifecha* by its Afan Oromo equivalent] and child custody are thoroughly assessed. Finally, brief conclusion and remarks look to issues for the future.

The manuscript predominantly takes doctrinal – and of course exclusively qualitative - approach but with some empirical evidences that are obtained from practitioners through in-depth interview to corroborate the theoretical frameworks. Literature review that are commonly applied in (legal) history research are widely employed to unearth legislative history, present legislative frameworks and comparative experiences.[10] Literature review also assisted to set the framework for analysis: 'mirror' theory and conceptual underpinnings of the different family institutions discussed below. Scope wise, the primary focus of this study is the federal RFC and the in-depth interviews were made with 'purposively' selected federal court judges and practitioners, most of whom were family bench judges. The semi-structured interview protocol was designed in a way that the informants could tell both their professional and personal experiences on the issues. These qualitative empirical data are analyzed through thematic analysis methods [11] to help examine the social setting, how those using the institutions make sense of them and utilities of existing laws.[12] Apart from federal laws, on few occasions comparisons with- and references to- seven state family laws and practices are made whenever necessary.

II. 'MIRROR' THEORY: HOW FAR SHOULD LAW REFLECT SOCIETY'S VALUES?

Despite the differences among legal theorists regarding how law should be defined, the form that it takes, the criteria for its existence and validity, its relation to morality, whether it represents coercion or consensus, whether it need or need not be attached with state etc, most agree on the common proposition that "law is the mirror of society, which functions to maintain social order".[13] This so-called "mirror theory" provides that "[l]egal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect

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[10] Ciarán Dunne, *The place of the literature review in grounded theory research*, INTERNATIONAL JOURNAL OF SOCIAL RESEARCH METHODOLOGY Vol. 14, No. 2, 111–124 (2011), at. 113-114.

[11] CATHERINE DAWSON, PRACTICAL RESEARCH METHODS: A USER FRIENDLY GUIDE TO MASTERING RESEARCH TECHNIQUES AND PROJECTS, (UBS Publishers, UK) (2002), at 119; LORAINE BLAXTER, CHRISTINA HUGHES & MALCOLM TIGHT, HOW TO RESEARCH (Open University Press, 4th Ed, USA.) (2010), at 235.

[12] JODY MILLER & BARRY GLASSNER, The 'inside' and 'outside': Finding realities in interviews, in David Silverman (ed), QUALITATIVE RESEARCH: THEORY, METHOD AND PRACTICE, (Sage Publication, 2nd edn, 2004), at 126; see also ROBERT LOUIS KAHN & CHARLES F. CANNELL, THE DYNAMICS OF INTERVIEWING: THEORY, TECHNIQUE, AND CASES, (4th ed.Wiley Publisher, the University of Michigan, USA) (1957), at. 149; BRUCE L. BERG, QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES, (4th ed. A Pearson Education Company, USA,) (2001), at 66; and CATHERINE MARSHALL & GRETCHEN B. ROSSMAN, DESIGNING QUALITATIVE RESEARCH, (4rd ed. Sage Publications, California) (2006), at 101. These works demonstrate that interview is the most feasible and powerful tool to understand the complicated social world, institutions and obtain data about professional experiences.

[13] TAMANAHA, *supra* note 5, at 1; Catherine Piché, *The Cultural Analysis of Class Action Law*, JOURNAL OF CIVIL LAW STUDIES, Volume 2. Issues 1, 101-145 (2009), at 11; For a review of the debate see also ALAN WATSON, THE NATURE OF LAW (1977); DAVID NELKEN, Towards a Sociology of Legal Adaptation, in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001); OSCAR CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005).

what is happening in their own societies."[14] This theory has two mutually supportive components: 'law is the mirror of society' and 'purpose of law is maintenance of social order'. The prominent advocates of this theory are the two prominent American scholars, Brian Tamanaha and Lawrence Friedman. It was also said that the great Ancient Greek philosophers, including Plato and Aristotle, believed that the fundamental function of law is the maintenance of social order or an orderly maintenance of an idealized social status quo."[15] Tamanaha argued that 'unless law is imposed from the outside by an alien power, a society's law will reflect its patterns of life and morality'[16]. He further said

> *The very fact that law mirrors society, it is often said, is what makes law effective and legitimate in functioning to maintain social order. Because law reflects and bolsters prevailing social norms, the bulk of behavior conforms to these norms without the need for legal sanction, allowing law to conserve resources and maintain efficacy…The citizenry view the norms enforced by law as their own products, reflecting their way of life, manifesting their consent. Law, in turn, claims that citizens owe it obedience because it is doing their work, preserving their norms, constituting their way of life, keeping their order, allowing them to pursue their projects and enjoy life in safety and security.*[17]

Similarly, the well-known sociologist of and historian of American law, Lawrence Friedman, continually argued that American law relates to American society, and then is mirror of society.[18] He once wrote that "It [American law] takes nothing as historical accident, nothing as autonomous, [and] everything as relative and molded by economy and society."[19] He persistently argued that social forces shape legal order of any type including family law which he said is 'a product of society, and it reflects, in its general contours, the social structure, social practice and social debates within its society'.[20] Jenkins also argues that the fact that law is a reflection of society is what renders it effective in the maintenance of social order.[21]

A great deal of socio-legal scholars agree that 'law is made by the society around it, and that it necessarily reflects the complexity of social relationships'.[22] Even those who disagree about how closely law mirrors society don't at least dispute that law is a product of social interaction; in the contemporary jargon, it is "socially constructed."[23] If it is not the exact mirror now, law that comes out of social interaction should slowly mold compliance and

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[14] Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law,* 32 STAN. J. INT'L L. 65 (1996).

[15] TAMANAHA, *supra* note 5, at 11.

[16] IREDELL JENKINS. SOCIAL ORDER AND THE LIMITS OF LAW. Princeton, N.J.: Princeton University Press, (1980) cited by TAMANAHA, *supra* note 5, at 2

[17] Brian Z. Tamanaha, Law And Society, St. John's University School Of Law, Legal Studies Research Paper Series, Paper #09-0167, February 2009, also available at http://ssrn.com/abstract=1345204/

[18] LAUREN EDELMAN, Lawrence Friedman and the Canons of Law and Society, in LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN (Robert W. Gordon & Morton J. Horowitz eds.) (2011); James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Round?* 40 TULSA L. REV. 579 (2005).

[19] John W. Cairns, *Watson, Walton, and the History of Legal Transplants,* GA. J. INT'L & COMP. L. Vol. 41:637 (2013), at 651.

[20] LAWRENCE MEIR FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW, (Harvard University Press, London, England) (2004).

[21] TAMANAHA, *supra* note 5, at 3.

[22] Marina Kurkchiyan, *Perceptions of Law and Social Order: A Cross-National Comparison Of Collective Legal Consciousness,* WISCONSIN INTERNATIONAL LAW JOURNAL, Vol. 29, No. 2 (2012).

[23] *Id.*

behavior to turn into 'mirror' at a later stage of its development. On the other hand, very good characterization of the social interactions (including dynamics) and converting it into law are pivotal to the success of law.

The mirror theory has been challenged, however, notably by Alan Watson and his legal transplants theory.[24] Watson argues that "the laws of one society are primarily borrowed from other societies; these laws are developed by transplantation of legal rules between legal systems, or by elaboration and application of existing legal ideas to other systems by analogy to new circumstances."[25] Watson's theory that law is insulated or autonomous from its society were criticized by later works of Otto Kahn-Freund, Tamahana, Edelman, Friedman, Jenkins and other critical legal studies movements.[26] Iredell Jenkins, for example, argued that "legal reform of social institutions is likely to fail if the reform is not consonant with society's habits and goes beyond the scope of legal resources."[27] Similarly, Tamanaha criticized the 'legal transplants' as the source of law and claimed that "the social ordering capacity of such laws are negligible"[28] and it undermines the legal pluralism.[29]

Tamahaha and other supporters of the 'mirror' theory also acknowledged that the official law declared by states or courts are not necessarily a mirror of the society it purportedly governs, and abandoned examples where law and social life diverge. According to Tamanaha such mismatch occurs 'when massive legal transplant happen, an overarching political authority enacts a uniform law to govern diverse populations, or when the norms of one group receive official sanction to the exclusion of the norms followed by other groups in the society.'[30] As we shall see from the forthcoming discussion, I argue that Ethiopian family laws have suffered from one of those instances where state laws have tried to sanction a uniform terms for significantly diverse citizenry leaving the later with no option of respecting it. Accordingly, scholars retreat that "rule of law presupposes pluralistic society of diverse religious, social, and political groups coupled with a shared belief among the members in the 'subjectivity' of values and hence public officials must remain neutral on questions of the 'best' way to live.[31]

It is of course naivety to challenge the dynamic nature of family laws. As the 'mirror' theory itself explains, family law should frequently respond to societal values and changes, or in the words of Friedman, 'should evolve with society'.[32] We have witnessed that substantially in the past where family law has taken the twist from simple primitive to complex relations;

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[24] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed., University of Georgia Press) (1993).

[25] *Id*.

[26] Piché, *supra* note 13; Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 MOD. L. REV. 1 (1974). *See also*, Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 12 (1998). It was of course criticized by comparative law advocates as well. See Cairns, *supra* note 19.

[27] John T Valauri, Book Review of Iredell Jenkins's '*Social Order and the Limits of Law' Princeton*, N.J.: Princeton University Press (1980), DUKE LAW JOURNAL, Vol. 1981:607 (1981), at 611.

[28] TAMANAHA, *supra* note 5, at 7.

[29] Brian Z Tamanaha. *Understanding Legal Pluralism: Past to present, local to global.* SYDNEY LAW REVIEW, Vol. 30: 374 (2008) http://sydney.edu.au/law/slr/slr30_3/Tamanaha.pdf. Accessed on Sep. 2015.

[30] TAMANAHA, *supra* note 5, at 7.

[31] [], Theories Of Law: Natural Law, Legal Positivism, The Morality of Law Dworkin's "Third Theory of Law" Legal Realism and Critical Legal Studies, available at University of Trento, Faculty of Jurisprudence www.jus.unitn.it/users/patterson/course/topics/materiale/analyticjurissupplemental.pdf/ Accessed on Sep. 2015.

[32] FRIEDMAN, *supra* note 20, at 6.

from 'status' to 'contract' based family; moving slowly away from communal (society) influence to private (individualistic) management of marriage.[33] Yet in the course of all those dynamism, one should not blatantly ignore societal values and impose aspirational laws – especially in family law that regulates highly guarded and sacred institution.

In the upcoming sections of this manuscript selected institutions of Ethiopian family law are analyzed by taking mirror-theory as the framework.

III. DEVELOPMENT OF ETHIOPIAN FAMILY LAWS: BRIEF DESCRIPTION

Marriage and the resulting family relationship is the naissance of the community and statehood.[34] Marriage and family practices around the world are embedded in a rich matrix of cultural norms, generated by legal rules, religious traditions, and social expectations. Marriage is understood as an important cultural expression and social construct in most non-Western cultures and the crossover between its cultural meaning and legal framework is inevitable. Hence, more than cementing sacred relation and status between the spouses, marriage creates 'an institution' where mutual relation and bonds among the vast members of the spouses' family emerges.[35]

In more diverse societies like Ethiopia the range of normative variation expands, and individuals may face contrasting opportunities and constraints from official and unofficial norms of family behavior. Marriage is multifaceted with its private and public features; privately arranged but with far reaching public impact calling for state or societies intervention.[36] After considering one of the African communities, the Melanesian, Malinowski concluded that "marriage establishes not merely a bond between husband and wife, but it also imposes a standing relation of mutuality between the man and the wife's family."[37] Thus, the laws that regulate this institution have to be crafted with proper care and due cognizance of the prevailing customary norms and beliefs of its subjects.

Coming to Ethiopia, in several personal matters, including family, *Fetha Negest*,[38] and customary and religious laws were prevalent before the coming of the 1960 Civil Code.[39]

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[33] *Id.*

[34] For instance Mbiti considers African marriage, in particular, as the focus of existence and he said that "Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. Therefore, marriage is a duty, a requirement from corporate society, a rhythm of life in which everyone must participate. Otherwise, he who does not participate in it is a curse to the community, he is a rebel and law-breaker, he is not only abnormal but 'under human'. Failure to get married means that the person has rejected society and society rejects him in return". *See* JOHN S. MBITI, AFRICAN RELIGION AND PHILOSOPHY (New York: Praeger) (1969), at 133.

[35] JONATHAN HERRING (ED.), FAMILY LAW: ISSUES, DEBATES, POLICIES (Willian Publishing, UK) (2001), at 3. It is noted that marriage as a 'status' or 'contract' is debatable and treated differently different jurisdiction. Some argue that it has both contract and status character due to the interest of state and society to its protection and maintenance. Yet in Ethiopia its 'status' characteristics are more visible. See also Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System,* UNBOUND, Vol. 6:1 (2010); Janet Halley, *What is Family Law?: A Genealogy Part I,* YALE JOURNAL OF LAW & THE HUMANITIES, Vol. 23 (2011): Issue 1, Available at: http://digitalcommons.law.yale.edu/yjlh/vol23/iss1/1; Lana B. Singer, *Legal Regulation of Marriage: From Status to Contract and Back Again? In Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know?* Washington, DC, Family Impact Seminar, June 23-24, 1997. p. 129-134. Available at www.digitalcommons.law.umaryland.edu Accessed on Sep. 2015.

[36] STUART BRIDGE, Marriage and Divorce: the regulation of intimacy in Jonathan Herring (ed.), FAMILY LAW: ISSUES, DEBATES, POLICIES (Willian Publishing, UK) (2001), at 10.

[37] BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY, (Littlefield, Adams and Co.) (1926), at 35. The Melanesian community lives in the Trobriand Archipelago, North East of New Guinea.

[38] *Fetha Negest* is the ancient laws of Ethiopia introduced to the nation in the mid of 15th century during the reign of Emperor ZereYacob. The code has three parts regulating spiritual affairs of the Ethiopian Orthodox

Fetha Negest was prevalent dominantly in the Northern Christian communities and around the palace together with the customary laws of the community, whereas customary laws were widespread in the vast majority of the country.[40] Almost every ethnic group has its own customary laws to regulate many aspects of family relations like ways of creating the relation, identity of spouses, consent of families and spouses, bride money or dowry, marriageable age, etc.[41] But commonly, the laws were the reflection of the overall values of the community in a sense that every community member were loyal to the norms and disregard of the same were rebuked with severe social sanctions.[42]

The *Fetha Negest* is a codex regulating both secular and religious matters. The fact that marriage relation is exclusively regulated in the secular part of the codex under Chapter 24 demonstrates the place marriage has in the heart of the law.[43] Many matters are regulated under the codex, including, conditions of betrothal and marriage (e.g. marriage age and consent of spouses), acts to be performed during marriage, rights and duties of spouses and families, grounds and effects of divorce etc. The *codex* also inspired many of the modern laws and some customary practices.[44]

The 1960 Civil Code is one of the six codes of the time which, *inter alia,* regulate family matters.[45] Pioneered by the 1955 Revised Constitution, that extended special protection to family,[46] and the Universal Declaration of Human Rights, many of the then existed novelties were incorporated in the Civil Code. Yet, the issue whether the provisions of the Civil Code were reflections of the then Ethiopian society has been a point of argument since then. Rene

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Church (ecclesiastic law chapter 1-22), Civil Matters (chapter 23-51) and Succession matters (the appendix). See Peter H. Sand, *Roman* Origins of the Ethiopian 'Law of the Kings' (*Fetha Nagast),* at xxxix in the preface of 2nd edn of FETHA NEGEST, *supra* note 1.

[39] ABERRA JEMBERRE, LEGAL HISTORY OF ETHIOPIAN – 1434 – 1974: SOME ASPECTS OF SUBSTANTIVE AND PROCEDURAL LAWS *(*Rotterdam: Erasmus Universiteit and Leiden: Afrika-Srudiecentrum) (1998), at 77.

[40] *Id,* at 76.

[41] For instance, consent of spouses is not a pre-condition in most of the customary laws of many ethnic groups like *Amhara, Tigreans, Gurage, Kunama, Kefecho, Afar,* and *Somali* and some in *Oromo* while marriage is initiated by the future spouses in *Anuak, Wolaitta*. See *Id,* at 76.

[42] *See*, ABERRA, *supra* note 39, at 76.

[43] Chapter 24 entitled as "Betrothal, Dowry, Marriage and Dissolution of Marriage" runs from section 826 to 987. See Sand, *supra* note 38, at xli.

[44] Submitting family disputes of any kind to religious fathers or priests were the only ways of settling disputes during the days of Fetha Negest but now only an alternative. In addition, the 1930, 1957 penal laws, the 1960 civil code and to a certain degree the family laws of the time are influenced by this law codex. *See* PHILIPPE GRAVEN, AN INTRODUCTION TO ETHIOPIAN PENAL LAW: ARTS. 1-84 PENAL CODE, (Faculty of Law Haile Selassie I University and Oxford University Press, Addis Ababa-Nairobi) (1965) providing an elaborating explanation on the importance of the codex while drafting the 1957 Penal Code; ABERRA, *supra* note 39, at 194-225; see also Zuzanna Augustyniak, *The Genesis of the Contemporary Ethiopian Legal System,* Studies of the Department of African Languages and Cultures, No 46, pp. 101-115, (2012) ISSN 0860-4649; For *Fetha Negest's* contribution on the educational system see MESSAY KEBEDE**,** RADICALISM AND CULTURAL DISLOCATION IN ETHIOPIA, 1960-1974, **(**University Rochester Press, USA) (2008); and Aselefech G/Kidan Tikuye, *The Role of Ethiopian Orthodox Church in the Development of Adult Education: The Case of Ye'abnet Timhirt Bet,* (2014) Master's degree thesis submitted to AAU; for its theological account NEGUSSIE ANDRE DOMNIC, THE FETHA NAGAST AND ITS ECCLESIOLOGY: IMPLICATIONS IN ETHIOPIAN CATHOLIC CHURCH TODAY (Peter Land AG Publishers, Switzerland) (2010).

[45] Articles 198-338 and 550-825 of the CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, [here after CIVIL CODE].

[46] Article 48 of the 1955 Revised Constitution of Ethiopia reads that "The Ethiopian family, as the source of the maintenance and development of the Empire and the primary basis of education and social harmony, is under special protection of the law."

David, the drafter of the code, claimed that given unwritten and diversified customary laws of the nations, he had incorporated as much norms as possible from customary laws to mold modern civil law jurisprudence.[47] On the other hand, other scholars argue that due to the notion of modernizing Ethiopia by westernizing/'modernizing' its laws and the little experience the drafter had over the customary norms of Ethiopians, many of the valued societal values had been ignored by the code.[48] But for years the official laws of the state and unofficial laws of the community were competing to get the upper hand one over the other. Perhaps, the customary laws were dominating family matters even in the presence of a contrary stipulation under the official law.[49] Given the literacy level of the community and absence of stronger state machineries to indoctrinate the citizenry, one expects there to be discrepancy between law and practice opening up the way for customary norms to dominate personal matters and relations.

Next, the *Derg* regime did not bring substantial changes to the laws and pre-existing practices except with some matters like according better protection to women.[50] Hence, the civil code was in place though a stronger constitutional provision that guaranteed full consent of a man and a woman during conclusion of marriage, equal rights of spouses in all family relations and state's duty to protect marriage institution were introduced in later times: 1987.[51]

Important provisions aimed at the protection of family, women and children are the integral part of the 1995 constitution, in addition to expressly integrating international human right documents to the system.[52] The protection extended to family relations, equality of men and women in conclusion of marriage, administration of family matters, and during dissolution of marriage; consideration of the best interest of the child on matters he is involved; and protection of adoption are some of them.[53] The frequent mention of equality of men and women in all family relations arises, according to Fassil Nahom, "from the need to combat traditional practices based on customary or religious notions prevalent in segments of the society, whereby women are systematically discriminated against."[54] It is true that all over

[47] *See*, ABERRA, *supra* note 39, at 200. Dr. Aberra mentions instances like recognizing three ways of marriage celebration (religious, customary and civil); reasons and conditions of divorce; attainment of majority at 18 for both, though woman can marry at 15 and emancipate from minority; illegalizing of marriage among blood relation; outlawing of polygamy; equal treatment of '*legitimate'* and '*illegitimate'* child; and introducing equality between spouses though the husband is still the head of the family and decide their common abode, etc. More importantly, George Krzeczunowicz mentions betrothal, marriage, maintenance as well as family arbitration provisions being highly influenced by the local custom. *See* ANTONY ALLOTT & GORDON R. WOODMAN (EDS), PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS, (Foris Publication, Dordrecht, Holland) (1985), at 207.

[48] ALULA PANKHURST & GETACHE ASSEFA (EDS), GRASS-ROOTS JUSTICE IN ETHIOPIA, THE CONTRIBUTION OF CUSTOMARY DISPUTE RESOLUTION (Centre Francais d'Etudes Ethiopiennes, Addis Ababa) (2008), at 4-6.

[49] The registration requirement of many of the family aspects (including marriage, divorce, birth, marriage contract, adoption etc), family name, equality of spouses, marriageable age etc are only few of the provisions overridden by contrary traditional practices.

[50] The author believes that family relations were regulated by the civil code before and after the enactment of the constitution (1987). Hence, the constitution was not followed by body of laws that amend the family provisions of the civil code.

[51] Article 37 of the 1987 PDRE CONSTITUTION. [Proclamation No1/1987].

[52] Article 13 of the 1995 FDRE CONSTITUTION integrated UDHRs, International Covenants On Human Rights and other international instruments to which the state is signatory with the fundamental rights and freedoms stated in chapter III of it [Proclamation No 1/1995 here after 'FDRE CONSTITUTION'].

[53] *See*, Articles 34, 35 and 36 of the 1995 FDRE CONSTITUTION.

[54] FASSIL NAHOM. CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT, (New Jersey and Asmara: The Red Sea Press, Inc) (1997), at 137.

the world, women are exploring ways to challenge and redefine cultural and religious norms in ways that reflect a commitment to gender equality.[55]

On the other hand, with the view of accommodating customary and religious values pertaining to family relations, the constitution has recognized marriages concluded under customary and religious systems.[56] More importantly, settlement of family and personal disputes according to religious or customary laws and practices are acknowledged if the disputing parties have fully consented to it.[57]

Since then, seven of the nine states[58] and the federal government have issued their own respective family laws though states' law in most respects are the replica of the federal Revised Family Code [RFC] enacted in 2000 for the federally administered cities of Addis Ababa and Dire Dawa.[59] The Revised Family Code, highly inspired by women and children right advocates, has made substantial changes to the preexisting Civil Code and customs, and is believed to have incorporated the modern and universally accepted values of the time.[60]

This body of law which was highly enthused by human right groups indeed attained, with some reservation, its objectives.[61] The breakthroughs from the earliest laws, *inter alia,* include abandonment of betrothal, limiting the role of family arbitrators; and protecting the interest of the child especially during divorce and adoption.[62] However, as we can see below, under the pretext of human rights, many of the valued interests of the community have been repeatedly ignored. Needless to say, when drafted, the RFC is meant not only to regulate family matters in the two federally administered cities of Addis Ababa and Dire Dawa but also to be a model for states in adopting their own family laws.[63] Hence, though literally its jurisdictions are

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[55] Justice Richard J. Goldstone, *Women, Children, and Victims of Massive Crimes: Legal Developments in Africa*, 31 FORDHAM INT'L L.J. 285 (2007). Available at: http://ir.lawnet.fordham.edu/ilj/vol31/iss2/5; Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa,* 31 FORDHAM INT'L L.J. 289 (2007). Available at: http://ir.lawnet.fordham.edu/ilj/vol31/iss2/1.

[56] Ethiopia does not seem to be the only country to recognize the customs of its indigenous population. For instance, it is mentioned that *25 U.S.C. 371* allows for the recognition of Native American marital customs that would otherwise be legally invalid. *See* Laymon, *supra* note 7.

[57] Article 34 (4) and (5) and 78(5) of the 1995 FDRE CONSTITUTION

[58] Except Afar and Ethiopian Somali Regional States, the rest seven states of the federation, i.e. Amhara, Oromia, Tigrai, SNNP, Benshangul, Gambella and Harari have enacted their own family laws after the promulgation of the federal Revised Family Code. In Ethiopian Somali the Ethiopian Civil Code of 1960 as a statutory, and customary (Xeer) and Sharia laws operate simultaneously. Berihun Adugna Gebeye, Women's Rights and Legal Pluralism: *A Case Study of the Ethiopian Somali Regional State,* WOMEN IN SOCIETY Volume 6, (2013) ISSN 2042-7220 (Print) ISSN 2042-7239 (Online). Afar has the same practice.

[59] Soon after the promulgation of the constitution, the power of enacting family law was at issue where House of Federation called to decide that states can enact family laws of its own and the federal government for its administration cities of Addis Ababa and Dire Dawa. Constitutional Inquiry Raised Regarding Promulgation of Family law and Decision of the House of the Federation (April 2000).

[60] The Ministry of Justice worked the draft in consultation with human right advocacy groups like Ethiopian Women Lawyers Association [EWLA], and the Women's Affair Standing Committee of the House of Peoples' Representative.

[61] Mulugeta Tadesse mentions achievements observed due to the withering of the powers of family arbitrators like accelerated and qualitative decisions on divorce and related matters as opposed to delayed and illegal decisions that had been made by family arbitrators. *Mulugeta Tadesse, ex-Federal High Court Assistant Judge in Family Bench and now private practitioner, interviewed on February 11, 2010.*

[62] Many can be mentioned, like judicial declaration of paternity; recognizing non-marital cohabitation [irregular union]; equality among spouses in personal effects of marriage like head of the family, management of the family, establishment of common residence, personal as well as common property and its administration etc.

[63] መሓሪ ረዳኢ፣ የተሻሻለውን የቤተሠብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ቅጽ 1፣ 1995 ዓ.ም.፤ [MEHARI REDAE, SOME POINTS IN UNDERSTANDING THE REVISED FAMILY CODE, Vol. 1, 1995 EC, Amharic Version], at 6.

limited to these cities, practically it significantly influenced laws of states. Accordingly, the RFC has to be understood as a law regulating multicultural societies of the nation.

According to Ann Laquer Estin, "a multilayered approach to family regulation [which] builds on the notion that many families have a complex identity and experience, shaped and defined by many different cultural, legal, and political ties" is vital.[64] Indeed, this article presents that there are sufficient reasons to argue for greater accommodation of indigenous legal tradition (including cultural and religious diversities) in family laws,[65] though some fear that the accommodation of cultural differences may be incompatible with the traditional values of democracy.[66] Below is the evaluation of selected family institution of betrothal [*metechachet*], family arbitration [*shimigillina*], adoption [*gudifecha*] and child custody. Though it is not viable to conclude that the inhabitants of the two cities or the Ethiopian society have subscribed to similar practices and norms, significant degree of uniformity are observed in some family institutions discussed below and help to evaluate the interface between official laws and customary practices.[67]

IV. BETROTHAL

Betrothal, also known as engagement or *fiancer*, is defined as "an agreement between the future spouses to get married in the future."[68] The *Fetha Negest* also acknowledged betrothal as "a pledge of marriage and a pre-marriage promise" accompanied with declaration to the public by different means.[69] Very importantly, this law book requires that betrothal to be initiated only for a person who is certain to marry either by sending elders or letter to the lady's family, or by his guardians if he is below the marriageable age.[70]

Likewise, the Civil Code defines the same as "a contract of betrothal is a contract whereby two members of two families agree that a marriage shall take place between two persons, the fiancé and the fiancée, belonging to these two families."[71] A close look at the other provisions of the Civil Code exhibits the other key features of betrothal which, *inter alia*, includes mandatory consent of betrothed couples;[72] betrothal distinguished from a simple promise of marriage exchanged between two persons; existence of rituals or declaration to the

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[64] Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449 (2009), at 452; see also *Id.*

[65] Perhaps the arguments whether or not law should reflect the custom and morals of the society or should lead the society [together with its custom] to a determined value level never been ended. *See*, TAMANAHA, *supra* note 5, at 27.

[66] ASPASIA TSAOUSSI & ELENI ZERVOGIANNI, Multiculturalism and Family Law: The Case of Greek Muslims; in Katharina Boele-Woelki & Tone Sverdrup (eds.), EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW, European Family Law Series (Intersentia; Antwerp, Oxford, Portland) (2008), at 209.

[67] Uniformity in this sense, however, does not mean absolute conformity and submission of Ethiopians to a single customary law. In addition, the important nature of customary laws, i.e. *diversity* due to factors like language, proximity, origin, history, social structure and economy, and *dynamicity* where its rules change from time to time to reflect changing social and economic conditions, are duly considered. *See*, Kuruk, *supra* note 7, at 6.

[68] *See*, MEHARI, *supra* note 63, at 8; and Draft RFC article 8[Under the Ministry of Justice, Unpublished]

[69] *See*, Section 869 of Chapter 2 of the Fetha Negest [included under the old Ethiopian law compilation of THE EMPIRE OF ETHIOPIA, METS'HAFE HIGIGAT ABEYIT, (Birhanena Selam Pr. Press) (1962 EC), here after *Fetha Negest]* [translation mine].

[70] *Id*, Chapter 24, Sections 826, 841, 866, 898 and ff.

[71] Article 560(1) of the Civil Code.

[72] Article 565 of the Civil Code.

public, concluded for short or limited span of time;[73] and payment of compensation (for the expenses incurred in connection with the betrothal and moral damages) during breach of the betrothal contract by the defaulting party. [74] Hence, betrothal becomes a public acknowledgment of the couple's right to spend time together – sometimes 'chaperoned', offers his future bride and families gifts and spend time with one other's family by contemplating marriage.

As marriage has wider features of alliance not only between the spouses but also between groups of kin,[75] so does betrothal. As a result, betrothal and marriage have sometimes been used by families for different purposes: for creating amicable relation between families in feud, seeking an alliance with other family groups, and sometimes in consideration of a debt.[76] It also opens the door for adult arranged or forced marriage where teenagers get married without their consent, and more importantly a girl to a man whom she does not prefer.[77] According to some writers, the fact that the consent of the families of each of the future spouses are required under the civil code is the reflection of such practice which might go against the interests of the future spouses.[78] Though the Civil Code stipulated that betrothal shall have no effect unless the betrothed couples consented; the freedom to express once consent is unlikely to exist when they are under the influence of their families, elders and the community in general.[79] However, the practice where family members play a significant role in arranging marriage, as long as the final decision remains with the prospective bride and bridegroom, should be unobjectionable.[80]

During the drafting process of the RFC, provision were included to maintain betrothal without compromising the interest and full consent of the future spouses, which, however, was totally eliminated from the final document.[81] Among the reasons given for the elimination were the established fact that the agreed betrothed couples could not be forced to get married and couples could get married without concluding betrothal.[82] More importantly, it was said that in view of Ethiopia's cultural diversities, retaining betrothal in the law as a uniform practice would not serve any meaningful purpose.[83] The drafters argued that the institution does not deserve such a high regulation by the official laws since it does not add any

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[73] Article 570 of the Civil Code gave the power of determining the duration of betrothal to the contracting parties. However, in default of that, six months' time from declaration of intention to get married by one of the spouses is provided by the law.

[74] Articles 560 – 576 of the Civil Code.

[75] LUCY MAIR, AFRICAN MARRIAGE AND SOCIAL CHANGES (Frank Cass & Co.Ltd, London) (1969), at 4.

[76] *Id*, at 4.

[77] Prashina J. Gagoomal, *A Margin of Appreciation for Marriages of Appreciation: Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law*, 97 GEORGETOWN LAW JOURNAL 589 (2009).

[78] MEDHANIT LEGESSE, MAJOR CHANGES MADE BY THE REVISED FAMILY LAW OF 2000 REGARDING WOMEN'S RIGHTS AND THE NEED TO ENHANCE AWARENESS OF THE SOCIETY *(*Ababa University Press, Addis Ababa) (2008), at 33; and MEHARI, *supra* note 63.

[79] *See, Id*, at 33.

[80] Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004). The role of families under arranged marriage, which is common everywhere like in Africa and India, and forced marriage is significantly different. The decisive decision making power remains in the couples in the former while they have no power in the latter.

[81] The Draft Revised Family Code presented by the Ministry of Justice, Articles 8-17 (unpublished).

[82] MEHARI, *supra* note 63, at 9.

[83] TILAHUN TESHOME, Ethiopia: Reflections on the Revised Family Code of 2000, in INTERNATIONAL SURVEY OF FAMILY LAW 153 (Andrew Bainham ed., 2002 Edition), at 6; *see also* MEDHANIT, *supra* note 78, at 34.

meaningful value to married couples nor to the society. The drafters, however, did not deny the existence of the practice within the society and said that its exclusion from the law would not illegitimatize the traditional practice as long as it honors constitutional provisions.[84]

Most of the interviewed judges expressed their disappointment by the exclusion of betrothal from the RFC. Philipos Aynalem, ex-Federal High Court Judge, argued that laws should maintain 'agreed values of its subjects' as its supreme source, and 'regulation of social behaviors' as its purpose.[85] He noted that betrothal is widely practiced in urban life late alone in rural areas and is a juridical act that demands legal protection by the family law as long as it is not contrary to the laws of the nation. Philipos regretted that the very importance betrothal has to the society and the couple and their families are all ignored. Likewise, Goshye Damtaw, ex-Federal First Instance Court Judge, said that as marriage is the reflection of customary values of the spouses and the society, official laws should acknowledge such customs.[86] He understood the practices in the capital Addis Ababa, long renowned as 'little Ethiopia', as the reflection of the whole Ethiopian community and its cultural diversities. Besides, he argued, betrothal is a widely practiced custom across different communities apparent in the city and all over the country as a kick off to marriage where the spouses will remain affiliated to each other's behavior.

According to these experts, denying legal recognition to this valuable institution amounts to doing away with the rights of its subjects, and would make the law 'poor adoption' of foreign practices than a reflection of the society it purports to regulate. Goshye categorically stated that it will be difficult for him to give any legal effect to betrothal relation if such a case appears before him. Evident in the current discussion is that the law overlooked juridical effects of betrothal, like costs incurred during the betrothal festival, gifts offered to one another, and informal transactions entered between them concerning the acquisition or improvement of property, and moral damages sustained by the spouses during breach of the promise.

On the contrary, Yoseph Aimiro, ex-Federal High Court Judge, is believes that though the RFC does not regulate it, such arrangement could be considered as ordinary contractual relation and subject to general contract provisions of the law.[87] Given the special nature of the betrothal contract, the role it plays in the society and its extra-legal social effect, regulating betrothal by the general contract provisions of the civil code does not bring life in to the institution. Primarily, betrothal is not an agreement of proprietary nature (Article 1675 of the Civil Code) to be regulated by general contract provisions and would not guarantee the society with full protection of such juridical act from imprudent actors. The regional family laws,

[84] MEHARI, *supra* note 63, at 10, [translation mine]. The international experience envisages betrothal as a highly recognized institution in many communities like Africans, Muslims, Christian and Jewish though recognition by law is not strong enough. It is noted that the Convention on the Elimination of All Forms of Discrimination against Women, [adopted on Dec. 18, 1979, 1249 U.N.T.S. 13] under art. 16(2) prohibited only child betrothal.

[85] Philipos Aynalem, ex-Judge in Federal High Court for many years, and now private practitioner, interview conducted on February 13, 2010.

[86] Goshye Damtaw, ex-Judge in Federal First Instance Lideta Brach Family Bench for 7 years, on February 15, 2010.

[87] Yoseph Aimiro, ex-Federal High Court Judge in its 1st Instance Jurisdiction *Lideta* Bench and now private practitioner and partime lecturer at Addis Ababa University School of Law, Interview conducted on February 11, 2010.

nonetheless, have made a departure from the RFC by recognizing betrothal and according protection to it without contravening the constitutional principles.[88]

Though betrothal is slowly eliminated from modern (western) laws, different jurisdictions have devised mechanisms of protecting parties' interests involved in the relation. England has modified its laws in 1970 to give protection only to properties created during betrothal relation by extending the laws enacted for resolving property disputes between spouses to engaged couples.[89] This Act also entitles a claim against all gifts made during the engagement relation except the engagement ring which is presumed to be an 'absolute gift' unless the giver rebuts this and show that it was in fact conditional.[90] However, gifts from third person to the engaged couple should be treated as unlawful enrichment. In USA, most states have abolished the law that awards punitive damages for breach of betrothal mentioning its excessive use and blackmailing operation. As regards property questions, the criterion of unjust enrichment is generally applied in those states.[91] Yet in handful of states breach of betrothal is still considered as a cause of action for claiming damages under their Heart Balm Laws.[92]

In Egypt, similar to Ethiopian legal system, there are limited circumstances under which there may be legal consequences for withdrawal of betrothal promises. To such effect Egyptian Court of Cassation has ruled that "moral or material injury in conjunction with withdrawal from the promise to wed (by either party) may constitute tort and not contractual breach".[93] Yet only in rare cases that damages are awarded in a civil suit when the applicant can prove harm resulting from a broken betrothal.[94] Hence, Egyptian families have designed a legal fiction by insisting the fiancé to sign a commercial document like a post-dated check or a trust receipt – which result in criminal misdemeanor charges for breach and civil liability of repaying the amount or items listed – as a surety that he attends the wedding preparations in good faith.[95] Christine described the situation as 'regrettable' because such legal fiction has transformed the betrothal relation into commercial transactions by masking the real intention of the act, and hence curtain autonomy of parties.[96]

Jurisdictions have adopted different laws that suit their needs. It was possible both to accord legal protection of the betrothal and protect modern values of consent and equality of spouses that the new RFC asserts to protect. Legal plurality and not withdrawing legal

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[88] See, for instance, Article 11 and of Tigrai [Proclamation No 33/91 EC], articles 9-18 of Oromia [Proclamation No 83/2003], article 1-11 of Amhara [Proclamation No 79/1995 EC], articles 8-19 of Benashangul-Gumuz [Proclamation No 63/1998 EC], and article 123 of SNNP family laws.

[89] Law Reform (Miscellaneous Provisions) Act 1970, CHAPTER 33, Section 1 and 2.

[90] Law Reform (Miscellaneous Provisions) Act 1970, CHAPTER 33, Section 3; See also REBECCA PROBERT, FAMILY LAW IN ENGLAND AND WALES, (Kluwer Law International Publishers, Netherlands) (2011).

[91] But there are handfuls of states that consider circumstances like age, occurrence of pregnancy and fault in determining outcomes. Some states also have stipulations for recovery of properties including gifts made during betrothal relations.

[92] Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, Vol. 24:365 (2012); No more Balm for the Broken-Hearted? CHICAGO DAILY LAW BULLETIN, Vol. 161 No. 19, Wednesday January 28, 2015. Only the states Illinois, Hawaii, Mississippi, Missouri, New Hampshire, New Mexico, South Dakota and Utah still permits such causes of action – broken relation or breach of promise.

[93] Christine Hegel-Cantarella, *Kin-to-Be: Betrothal, Legal Documents, and Reconfiguring Relational Obligations in Egypt*, LAW, CULTURE AND THE HUMANITIES, 7(3) 377–393 (2011) DOI: 10.1177/1743872110383354, at 391.

[94] *Id*, at 379.

[95] *Id*, at 378.

[96] *Id*, at 392.

protection to existing practices should have been the solution for such diversified customary practices.

V. FAMILY ARBITRATORS

Customary dispute settlement systems that often uses the elders as a dynamic machinery "is widespread and found spatially almost ubiquitously throughout the country and has worked historically in the absence of the state justice system as well as where it exists in the past and in the present."[97] Submitting dispute of any kind to arbitrators, which are mostly composed of elderly people, is one of the most respected tradition and valued instrument for securing peace and stability within the society.[98]

True in other parts of Africa, elders (*shimagelles)* are respected as trustworthy mediators all over Ethiopia because of their accumulated experience and wisdom.[99] Their roles in conflict resolution of any kind, *inter alia,* include representing important shared values, pressurizing or directing disputants, making recommendations, giving assessment and conveying suggestions on behalf of a party.[100] As Brock-Utne stated, "the elders from a family, clan, state or neighbor see their traditional objectives in conflict resolution as moving away from accusations and counter-accusations, to see the heart feelings and to reach a compromise that may help to improve future relationships"[101] True in family matters, during customary dispute settlement process, relationships are given prime attention, and the aim would be to improve future relationships, mend the broken or damaged relationship, rectify wrongs, restore justice, ensure the full integration of parties into their societies, and to adopt the mood of co-operation.[102]

Hence, the Fetha Negest, which is the indigenized translation based on the imported biblical and Romano-Byzantine tradition,[103] determined marriage disputes whatsoever to be submitted to the elderly priests, and then to the head of the local church.[104] These priests, who are considered as the guardian of the institution, are the one who had celebrated and pronounced the conclusion of the betrothal and/or marriage by a ritual taken place in the church.[105] Therefore, family disputes were submitted to socially responsible, highly respected and extremely experienced persons who know the local custom and practice very well, understand the relation and root cause of the conflict and believed to bring about peace and stability for the spouses and the community at large.

Likewise, the Civil Code formalized the traditional system and established the Council of Family Arbitrators composed of persons who have witnessed the conclusion of marriage or betrothal, or in their absence persons elected by the spouses, or in spouses' failure by persons

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[97] ALULA & GETACHEW, *supra* note 48, at 1.

[98] AYALEW GETACHEW, CUSTOMARY LAWS IN ETHIOPIA: A NEED FOR BETTER RECOGNITION? A WOMEN'S RIGHTS PERSPECTIVE (Copenhagen: Danish institute for human Rights) (2012).

[99] ALULA & GETACHEW, *supra* note 48; Birgit Brock-Utne, *Indigenous Conflict Resolution In Africa,* A draft presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research 23 – 24 of February 2001, at 11; Francis Kariuki, *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities* (2015) available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0; Accessed on Nov. 2015.

[100] Brock-Utne, *Id*, at 10

[101] *Id*, at 8

[102] *Id*, at 8-9

[103] ALULA & GETACHEW, *supra* note 48, at 1.

[104] FETHA NEGEST, *supra* note 1, at Section 24.

[105] *Id*.

appointed by court.[106] Family arbitrators, as they may be close relatives of the parties, were believed to take the necessary responsibilities and patience to avoid misunderstandings and preserve the marriage relation; and if not, pronounce divorce without much trouble.[107] In addition to working for the integration and co-existence of the spouses in the course of their marriage, the family arbitrators have first instance jurisdiction over much of family disputes including dispute over betrothal; dissolution of marriage by death; hear and decide over divorce whatsoever; decide over provisional measures like maintenance, administration of children and common property; and also pecuniary and other effects of divorce.[108] The parties, however, can appeal to court of law on extended grounds like corruption of the arbitrators, fraud in regard to third persons, or illegal or unreasonable decision of family arbitrators.[109]

The RFC, however, made critical changes to this institution by limiting its power, making it optional and to function under high court supervision in case of divorce.[110] Regarding divorce, the family arbitrators may only be called to reconcile the spouses within a month time if the spouses prefer, and cannot decide over divorce and related matters like maintenance, custody of children.[111] Likewise, after the court pronounced the divorce, the decision over the conditions of divorce can only be referred to arbitrators up on the full consent of the parties; otherwise, it will be entertained by the court. Yet, disputes arising out of marriage other than divorce shall be decided by arbitrators chosen by the spouses, whose decision is appealable to court of law.[112]

Therefore, one can notice that family arbitrators who once play a significant role in the family integration are devoid of its original place, and neglected in a very important family matter, i.e. divorce. Concerns raised against the institution by the drafters and the community during the drafting process, *inter alia,* include subjecting spouses to professional arbitrators who make money out of it; secrecy of marriage relation was not maintained as meetings were held in churches and other public areas; delay of decisions for sake of per-diem; arbitrators were non-lawyers and unable to decide according to the law; and taking away the power of regular courts.[113] In addition, facts like the problem of enforcing the awards of family arbitrators as they are informal adjudicatory panels with no enforcing machinery, and bribing arbitrators by the economically advantaged male to the prejudice of women were presented to show that the institution were not functioning as expected.[114]

It is apparent as well that there were strong oppositions to the withering away of the institution during the drafting process. The latter group underlined, among other things, the importance of retaining successful customary practice and social figure in giving effect to the constitutional rights of settling family and personal matters with customary and religious

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[106] *See*, Arts 725 – 734 of the Civil Code

[107] MEHARI, *supra* note 63, at 101-102.

[108] *See*, Articles 666 – 669, 692- 696, 722-726,

[109] *See*, Art. 736 of the Civil Code. There is, however, regarding the conceptual and practical distinction between arbitration, mediation, '*shimgilina'* and '*yegiligil daginet'* in Ethiopia. Fekadu Petros, *Underlying Distinctions between Alternative Dispute Resolutions (ADR), Shimglina and Arbitration*, MIZAN LAW REVIEW Vol.3 No.1: 105-133 (2009).

[110] *See*, Articles 108-122 of RFC.

[111] Arts. 82(5), 83, 113, 117 of RFC.

[112] Art. 118 of RFC.

[113] MAHARI 1, *supra* note 33, at 103-104.

[114] *Id*, at 69.

dispute settlement mechanisms, and relieving courts from case congestion and delay of family matters.[115] More importantly, participants during the drafting process made the distinction between the institution and individuals who are nominated as arbitrators, and called for changes in the combination or otherwise of the arbitrators instead of eliminating the institution.[116] Regarding the legal illiteracy of the elderly arbitrators, some argued that arbitrators need not be lawyers for appeal to courts were allowed similar to other *quasi* dispute settlement system: social courts and administrative tribunals.[117]

Finally, according to the drafters, the RFC has tried to accommodate the concerns of all these competing groups primarily by dividing marriage disputes in to two, i.e. divorce and dispute arising out of marriage. It empowered arbitrators over the later and court and court supervised arbitration over the former. Secondly, it empowered both spouses to decide the nomination of arbitrators and determination of the arbitral process.[118] Similar provisions are observed in states' family law except Tigrai where social courts are empowered to entertain all family matters.[119] Whether the stipulations of RFC are sufficient to enforce the constitutionally recognized rights of spouses to submit their family and personal matters to customary and religious institutions is debatable.[120]

Philipos believed that customary dispute settlement mechanisms are recognized by the constitution though the RFC takes away the right of the community and powers of publicly recognized peace makers.[121] According to him, there is nothing wrong in recognizing family arbitration as an alternative to courts, like Shari'a courts. And the RFC should have strengthened the institution to rectify the weaknesses of earlier practices, like by requiring court supervision, determining time limitation for the disposition of the case, etc. Philipos strongly opposes bringing family cases to court as it further antagonizes spouses, open room for the involvement third parties, discloses private matters to the public, and makes preserving the relation an impossible task. He added that divorces pronounced by family arbitrators, who are very close to the relation and much cautious for the continuation of the marriage, and agreed up on by the spouses should have been recognized by courts.[122]

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[115] *Id*, at 104.

[116] በኢፌዲሪ የሕ/ተ/ም/ቤ/ የሴቶች ጉዳይ □ሚ ኮሚቴ፣ *የተሻሻለው የቤተሠብ ሕግ አዋጅ ቁጥር 213/1992 ዝርዝር ዘገጅት ሰነድ*፣ 1994 [FDRE HPRs Women's Affair Standing Committee, Proceeding of the Preparation of RFC No 213/2000, Amharic Version, translation mine]፤ at 148 and 196-199.

[117] *Id*. One of the very famous national figure and elder of the country, Fitawrari Amede Lemma, strongly supported the retention of family arbitrators and as an alternative he proposed elderly, experienced and local judges to preside family bench.

[118] MEHARI, *supra* note 63, at 105-106, and Arts 118, 119-122 of RFC.

[119] *See* Article 140 of Tigrai, Articles 105 and 108 of Oromia, Articles 128-133 and 88 – 95 of Amhara and Articles 137-146 of Benshangul-Gumuz family laws. It is noted that the jurisdiction of entertaining all family matters are given for ***Wereda*** courts, equivalent in hierarchy with federal first instance courts but higher than social courts.

[120] Article 34(5) and 78(5) of the FDRE Constitution where the former reads as *"This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law."*

[121] Philipos Aynalem, *supra* note 85.

[122] Now courts tend to recognize and give legal effect to '*de facto* divorce', divorce which were not pronounced by court but apparent from other evidences. Most parties that appeared before court stated that they separated "under mutual consent and having settled their cases with family arbitrators". See Filipos Aynalem, *ሳይፋቱ (ዲፋክቶ) ፍቺ (De facto Divorce)*, MIZAN LAW REVIEW, Vol. 2, No. 1: 131-132 (2008); Mehari Radae, JOURNAL OF ETHIOPIAN LAW, Volume XXII, No.2, p 37-45, December 2008; and Dejene Girma Janka, *Tell Me*

It is true that, according to many scholars, regular court litigation is not well designed to deal with very important, intimate, emotional and psychological aspects of family disputes like divorce.[123] Moreover, regular court process also seems to encourage and exacerbate a sense of bitterness and irreconcilability between the disputing spouses, and create a battlefield.[124] As De-Jong observes "in the process everyone is prejudiced: the divorcing parties and their children are emotionally shattered and the state ends up with ongoing family problems which may well require intervention sooner or later."[125] However, if family arbitrators are allowed to function well, it could offer many advantages including reducing the financial and emotional costs of legal proceedings, maintaining relationship and improving communication among spouses.[126]

This line of argument is supported by Goshye who claimed that family arbitrators are in a better position than courts to understand the situation in the marriage, the character of the spouses, the values of the spouses and the community in which the spouses live.[127] He is of the opinion that the absence of family arbitrators contributed to the current increase in divorce cases as reconciling spouses once they appear before court was proven to be extremely difficult. Goshye argues that there should be apparent distinction between actors of the institution and the very institution. 'How would the performance level of the actors define the existence of long standing institution?' he asks.

The interviewed legal practitioners argue that the previous family arbitrators should have been preserved with more flexible status and court supervision as is true in other countries. For instance, in Israel judges sitting in Rabbinical (Jewish) or Shari'a (Muslim) courts are appointed according to a state-defined selection process, and are subject to closer scrutiny'.[128] According to Yoseph, the current arbitration envisaged under RFC is toothless and is hardly assisting the system in bringing about the desired harmony and peaceful coexistence of family members. Some also propose that the law should make referring family cases to arbitration (or mediation) mandatory and empower arbitration (or mediation) on a wider range of matters.[129] Mandatory family mediation or arbitration is witnessed widely elsewhere. To mention some,

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Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division, JIMMA UNIVERSITY JOURNAL OF LAW, Vol. 2, No. 1 (2009).

[123] Madelene De-Jong, *An Acceptable, Applicable and Accessible Family-Law System for South Africa, Some Suggestions Concerning a Family Court and Family Mediation* (1993), at 1-3, available at http://www.mediators.co.za/articles/familycourt.pdf/; see also Julien D. Payne, *Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options***,** REVUE GÉNÉRALE DE DROIT, (1999/2000) 30 R.G.D. 663-687 **(**2000), at 1, available at http://id.erudit.org/iderudit/1027763ar/ .

[124] *Id*.

[125] *Id*, at 1-3.

[126] See Tarekegn Tafesse, Effects of Traditional Family Arbitration and Legal Divorce on Divorcees and Their Children: The Case of Boloso Sore Wereda, Wolaita Zone, Southern Ethiopia, A Thesis Submitted to the Graduate School of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Social Work, Addis Ababa University, June 2015.

[127] Goshye Damtaw, *supra* note 86.

[128] AYELET SHACHAR, Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law, in LEGAL PLURALISM, PRIVATIZATION OF LAW AND MULTICULTURALISM; THEORETICAL INQUIRIES IN LAW, Vol 9: 573, (the Berkeley Electronic Press) (2008), at 582.

[129] *See*, De-Jong, *supra* note 123, at 9-10. Regarding mandatory arbitration/mediation, De-Jong argued that "it is desirable so that anyone who has to experience the pain of family breakdown should benefit from the advantage of mediation." De-Jong tried to equate such with legislation that obliges motorists and passengers to wear seatbelts or that forces motor-bike riders to wear crash helmets. Hence, even disputants who were originally unwilling to submit their cases to mediation will benefit out of the process.

the Family Courts of Australia will not hear the case unless parties passed through the mandatory non adversarial family dispute resolution which is available at local level by government and private providers.[130] In Canada, though non-adjudicatory family dispute settlement is not a mandatory requirement, statutory regulation manifest that court litigation should be viewed as a last resort in family disputes.[131] Some jurisdictions in USA chose to make family mediation mandatory while in Quebec parties will be required to attend the mediation information session.[132]

In our case it seems that the state, that established special dispute settlement tribunals for matters like labor and tax, has undervalued the importance of family matters. Hence trying to resolve the most sensitive and emotional family matters by courts is not the wisest approach especially when we witness that court entertain family matters only when divorce is requested.[133] Scholars advise to move towards social realities[134] and understanding conflict as non-isolated social events.[135]

Likewise, Nicodimos remembers the lobbying put up by women and children's rights advocacy groups during the drafting of the RFC which were believed to manifest the most democratic practices and end the injustices suffered by these groups.[136] However, he believes that due to poor adoption and emotional decisions during the drafting process, women are proved to be the losers in the absence of family arbitrators. Nicodimos adds that the new law has accelerated divorce cases under the pretext of accelerated justice thereby provoking emotional, economic and parenting crisis.[137] It also brought emotional and mechanical divorce decision that did not consider extra-judicial element of marriage, and accelerated property divisions.[138] In traditional family arbitration, however, "social importance of conflict is key consideration, consensus seeking is the approach, and much patience is the strategy" that lastly brings about effective and long lasting solidarity.[139]

Different from the RFC and other state family laws, jurisdiction over all family disputes are given to social courts in the Tigray family law. To such stipulation interviewed judges similarly responded that family dispute is a private and local matter and its administration should also be left to local institutions. Possibly these local officers/social court judges would be in a better position to understand the best interest of the disputants and local custom. This also seems to be a compromised approach compared to the two extremes, i.e. giving unlimited

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[130] Becky Batagol, *Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution,* 8 QUEENSLAND U. TECH. L. & JUST. J. 24 (2008), at 25.

[131] See Payne, *supra* note 123, at 2.

[132] Noel Semple, *Mandatory Family Mediation and the Settlement Mission: A Feminist Critique*, CANADIAN JOURNAL OF WOMEN AND THE LAW, Volume 24, Number 1 (2012), at 210-211.

[133] This is the strictest interpretation adopted by most judges for Article 118 of the RFC that empowered arbitrators first instance jurisdiction on all disputes arising out of marriage except divorce. The fact that family arbitrators as an institution hardly exist and courts decline to have first instance jurisdiction forced spouses to petition divorce including for a trivial disputes which would have been reconciled by arbitrators.

[134] Ineba Bob-Manuel, A Cultural Approach To Conflict Transformation: An African Traditional Experience. *Term Paper.* Written for the course: "Culture of Peace and Education" taught at the European Peace University Stadtschlaining Austria. Fall 2000.

[135] Brock-Utne, *supra* note 99, at 8.

[136] Nicodimos Getahun, ex-Judge in Federal High Court, and North Gondar and North Showa (Amhara Regional State) and now private practitioner, on February 13, 2010,

[137] See Payne, *supra* note 123, at 3.

[138] Nicodimos Getahun, *supra* note 136.

[139] Brock-Utne, *supra* note 99, at 12.

power to family arbitrators (Civil Code) and withering its power (RFC). Goshye added that judges in a court are not always familiar with every local value, and even if the judge knows the custom, the law may not recognize such practice. For instance, *'Yemeher Genzeb'* is the amount of money due during marriage but that should be returned during divorce, if any, in some traditions. Judges however, tend to ignore it due to absence of legal recognition, but those within the community knows how to treat it.[140]

In addition to customary institutions, religious courts are given the mandate in the 1995 constitution for adjudicating family and personal matters.[141] Thus, religious and customary courts recognized by the state could apply their own religious or customary substantive laws while states would determine the procedural laws.[142]

Historically speaking, the ecclesiastic court of Ethiopian Orthodox Church and *Shari'a* courts were functioning in Ethiopia though the former had only brief existence. In 1942 ecclesiastic courts of Ethiopian Orthodox Church were established in the level of High and Supreme Court in Addis Ababa with a jurisdiction over, *inter alia,* matters related to religious marriage and to hear appeal from the diocesan ecclesiastic courts.[143] The hearings before such court were required to be presided by three judges, and apply *Fetha Negest* in substantive matters and unwritten customary laws in procedural matters.[144] Likewise, *Shari'a* courts were established by law in 1942, though they were functioning *de facto* before that,[145] and reestablished recently to entertain family related disputes.[146] As an alternative family dispute settlement mechanism, *Shari'a* courts are required to secure express consent of the disputants before adjudicating the matter,[147] and apply the state civil procedural law and any substantive Islamic law.[148] It is all said that "the qualified recognition of the religious tribunal by the secular state may ultimately offer an effective, non-coercive encouragement of egalitarian and reformist change from within the religious tradition itself."[149]More should be done to allow regulated interaction between religious and secular sources of law, so long as the constitutional rights remains firmly respected.[150] This could be done by allowing the establishment ecclesiastical courts to deal with personal including family matters.[151]

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[140] Julie Macfarlane, *Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System*, CARDOZO J. OF CONFLICT RESOLUTION, Vol. 8:487 (2007), at 493.

[141] Article 34(5) and 78(5) of the FDRE CONSTITUTION.

[142] FASSIL, *supra* note 54, at 139.

[143] Article 10 of Decree No 2/1942 Establishment of Ethiopian Orthodox Church Ecclesiastic Court, NEGARIT GAZETTE. Year 2 No 3.

[144] ABERRA, *supra* note 39, at 227 and 230.

[145] Hillina Tadesse, *The Shari'a as Regards Women,* BERCHI Vol. 1.2 (2001), at 117-158;

[146] Ethiopia, 'Proclamation to Provide for the Establishment of Naiba and Kadis Councils,' Proclamation No. 62/1944. NEGARIT GEZETA 3, NO. 62, 1944.

[147] Article 4 of Federal Courts of Sharia Consolidation Proclamation No.188/1999, FEDERAL NEGARIT GAZETTE, 6th Year No. 10, Addis Ababa -7th December, 1999.

[148] There are different interpretations of Islamic laws (schools of thoughts). However, Ethiopian laws does not determine the school of thought that the Ethiopian Shari's courts should follow and is considered as a gap left to be filled soon by many. *See* Hillina, *supra* note 145.

[149] SHACHAR, *supra* note 128, at 602.

[150] Id, at 575.

[151] For more on ecclesiastical courts and extended importance see Mulugeta Getu, Belaynew Ashagrie & Alemayehu Yismaw, *Establishing an Ecclesiastical Court for the Ethiopian Church: the Need and Importance*, JOURNAL OF THE ETHIOPIAN CHURCH, Issue. 2 (2012).

Despite their vigorous involvement in the lives of many and presence of stronger constitutional recognition, bureaucracies have restricted the importance and utilities of religious and customary laws and tribunals.[152] Hence, the role of customary and religious dispute resolution needs revisiting and their mandate, relationships and interactions with the formal judicial structure should be reconsidered to enhance local level justice delivery while ensuring the protection of human rights, notably those of women, children and minorities.[153] Equally important is that "if a resolution by a religious or customary tribunal falls within the margin of discretion that any secular family-law judge would have been permitted to employ, there is no reason to discriminate against that tribunal solely for the reason that the decision-maker used a different tradition to reach a permissible resolution."[154]

Elders, *shimagelles*, in arbitration have wider range of experience on family matters, respect and trust in the society, and wisdom and patience of handling antagonized family disputants, which the courts do not. Hence, referring divorce cases only to courts goes against this very important social reality. The writer is of the opinion that arbitrators may disfavor the interests of vulnerable groups which, of course, is the salient features of other customary practices too.[155] However, rectifying the wrongs by adopting the practice in line with the core constitutional values and taking the dynamic nature of customary practices is not all impossible.[156] In view of the utilities it would offer to the society, retaining the institution outweighs abolishing it.

Hence, restructuring the institution of family arbitrators in a way that would respect rights of disputants, enhance quality of awards, allow the process to be more flexible to respond to changing circumstances and cultural norms should be considered. One way of doing this could be making family arbitration or mediation compulsory before resorting to courts. This is what the 'protective function' of family law should do.[157] Alternatively, a family court could be established at a local level with the power of entertaining divorce and many other family disputes. Such court will feature both social and judicial components and be a more inquisitorial and less formal forum and the parties will have a greater say and control in the decision making process.[158] Moreover, tribunals like religious, customary and family courts could go beyond the natural role of courts - adjudication of disputes - to proactive management of family matters and a "rehabilitative" or "problem-solving" process, and restructuring family relationships.[159]

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[152] ALULA & GETACHEW, *supra* note 48, at 2.

[153] *Id.*

[154] SHACHAR, *supra* note 128, at 602.

[155] BAHRU, *supra* note 4, at 8.

[156] For instance, the customary laws of Guraghe, *Kicha*, has been adopted by accommodating changing circumstance and require couples to make HIV/AIDS test before concluding Betrothal and again before marriage, and during the unification of separated couples. See, Guraghe People's Self-Help Development Organization, *Kicha: Guraghe Customary Law Revised,* September 2000 EC [Amharic Version, translation the author], Article 4 Section 3.

[157] Estin, *supra* note 80. The 'protective function' of the family law is evident everywhere, for instance, in determining age limitation, effecting consent of spouses, subjecting marriage contract under close state supervision, determining pecuniary effects of the relation, etc.

[158] De-Jong, *supra* note 123, at 5-9. The experience in Australia, for instance, shows that family courts should be lower courts with the view of making it socially responsible as well as accessible.

[159] John Lande, *The Revolution in Family Law Dispute Resolution,* 24 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 411 (2012), at 431.

Finally, I would like to quote Ann Laquer Estin and say, "the process [settling family disputes] is most successful where it is built on a dynamic conception of families and cultures that recognizes both tradition and change, respecting diversity and religious norms without losing sight of the core values of the legal system and the democratic state."[160]

VI. ADOPTION AND CHILD CUSTODY

In Ancient Egypt and Rome, adoption used to be made by the consent of both parties in the existence of witnesses and families of both. It had been primarily a means to procure heirs, to transfer wealth, and to circumvent the laws of intestate succession.[161] Adoption in Ethiopia is commonly known by its equivalent *'gudifecha'* in *Afan Oromo* and *'yetut lij'* or '*yemar lij'* in Amharic.[162] In Ethiopia, adoption was undertaken for different reasons including to get someone to look after them when they get older (especially those unable to give birth), for charity (like the one takes place by monks), for creating kinship between families.[163] Though the 1960 Civil Code tried to formalize the institution, for instance, by requiring compulsory court approval and protection of the best interest of the child,[164] it has been overridden by the long lasting traditional practices.[165]

In this respect, the RFC does not differ from its predecessor in many respects; for instance, it does not prescribe a special form for the adoption agreement though it requires court approval.[166] However, this requirement of court approval impliedly obliges parties to make the agreement in a written form.[167] Not surprisingly, regional family laws also require court approval, thereby making proof of adoption impossible without providing such approval records.[168] Besides, Oromia, whose customary practice is believed to have inspired the national practice and RFC, family law recognized traditional adoption but require mandatory court approval.[169] Here comes the issue whether or not requiring court approval for local level adoption, as if it is the only protector of adopted child, is the reflection of community's

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[160] *See*, Estin, *supra* note 80.

[161] Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29 (2005).

[162] *መሓሪ ረዳኢ፣ የተሻሻለውን የብተሠብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ቅጽ* 2፣ 1999 *ዓ.ም*.፣[MEHARI REDAE, SOME POINTS IN UNDERSTANDING THE REVISED FAMILY CODE, Vol.2, 1999 EC, Amharic Version], at 84 & 85. The Tigrian family law used the term *'yemar lij'* as an alternative to '*gudifecha'* in its Amharic version.

[163] *Id.*

[164] Arts 803-805 of the Civil Code.

[165] MEHARI, *supra* note 162, at 85.

[166] Articles 180-196 of RFC. The approach taken by the RFC is the best interest of the child and the court is determined to be the appropriate institution to look after it and enforce constitutional rights.

[167] MAHARI, *supra* note 162, at 90, and the Federal High Court has taken the same opinion in file no 03814.

[168] *See*, Articles 199-211 of Oromia, Articles 205 of Amhara and Articles 204-220 of Benshangul-Gumuz family laws.

[169] Article 211 of Oromia Family Law [Proclamation No 83/2003].

interest.[170] It is, however, not arguable that Ethiopia's international obligation, as rightly explained by the Federal Supreme Court, requires court supervised foreign adoption.[171]

Philipos Aynalem said that the mandatory requirement is creating social chaos, and is destabilizing family relations.[172] According to him, recognition should have been accorded to customary ways of adoption like that of the *Oromos*, which is held in a public ritual,[173] and proof of the existence of adoptive relation or registration of local administration should be sufficient to proof the status. Besides requiring court approval procedures might deter intra-country adoption and may defeat social relations based on mutual interpersonal trust.[174]

Goshye, nevertheless, said that dispute over adoption often arises after the death of the adoptive families and also long after the adoption had been celebrated.[175] Accordingly, proving adoption by other forms like bringing witnesses and showing status of adoptive relation were becoming difficult. Hence, according to Goshye, for the best interest of the adopted child and timely disposition of inheritance disputes, the law is right in requiring adoption to be approved by court. But he agreed that the law goes contrary to the local traditions and did little to change the practice, and suggested that customary adoption should be allowed to continue with registration of the same in a local administrative unit.

This line of argument brings into table the two most challenging issues raised in the recognition of customary laws and withering its role: evidentiary standards and public policy.[176] Laymon argues that the extra weight given to written evidence in formal courts results in a burden of proof that the vast majority of cultural norms are unable to meet since customary law is, by definition, unwritten.[177] Hence, if we want to recognize customary practices of adoption, we will be required to redefine the evidentiary standards and notoriety of the custom, i.e. practices witnessed by experts or elders of the community or evidence of the ritual.

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[170] The RFC recognized two kinds of adoption (local and foreign) and subjected it to different requirements. *See* Articles 193 and 180-196. The discussion under this paper, however, is only about local adoption, especially with in the same community. It is, however, important to mention that intercountry adoption is the subject of international laws, in addition to RFC's concern, where treaties like the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) will be called. *See* also Benyam D. Mezmur, *From Angelina (To Madonna) To Zoe's Ark: What Are the 'A-Z' Lessons for Intercountry Adoptions in Africa?* 23 INT'L J.L. POL'Y & FAM. 145 (2009).

[171] Fransuwiss Poster Vs Dukman Veno and Barboute Letteteya, Federal Supreme Court, Cassation Bench, File No. 44101 (1 March 2010) Vol. 10, p. 40; See also Federal Supreme Court, Cassation Bench, File No. 52691 (30 April 2010) Vol. 10, p. 72. Child Rights Convention, which Ethiopia has signed, requires adoption to be authorized by competent authority. Art. 21 of United Nations. "Convention on the Rights of the Child." Treaty Series 1577 (1989): 3 (hereafter CRC)

[172] Philipos Aynalem, *supra* note 85.

[173] *See* Ayalew Duressa, *Guddifachaa: Adoption Practice in Oromo Society with Particular Reference to the Borana Oromos*, A thesis submitted to the school of graduate studies Addis Ababa University, June 2002 Addis Ababa, [Unpub], at 103.

[174] Though they are not conclusive, especially intra-country/local adoption, a total of 2,760 inter-country and 130 intra-country adoptions between 1999/2000 and 2002/2003 are reported. *See* Seyoum Yohannes & Aman Assefa, *Harmonisation of laws relating to children Ethiopia*, THE AFRICAN CHILD POLICY FORUM, at 26.

[175] Goshye Damtaw, *supra* note 86.

[176] Laymon, *supra* note 7. The public policy argument against the formal recognition of some customs are meant to protect the vulnerable or minorities, like women and children, or morals of the public or merely to meet international obligation.

[177] *Id*. For instance, courts usually give more evidentiary weight for documents like marriage certificate, prenuptial or betrothal agreements, and written agreement/acknowledgement of adoption than for witnesses' testimony.

Similarly, who should take custody of children during divorce is the other contentious issue. In old times, where traditional male dominance was evident, custody of children was left for the fathers' determination. However, current developments tend to favor the interest of the child than considering the socially dominance situation of the fathers marking the movement from paternal patriarchy to judicial patriarchy and maternal preference.[178] Well informed by such trend, the Civil Code, the 1995 constitution and RFC protected the best interest of the child and maternal preference.[179] The maternal preference clause in the Civil Code is intentionally avoided in the RFC which stated parameters to be used for such determination, i.e. the income, age, health, and condition of living of the spouses as well as the age and interests of the children.[180]

Hence, one might say that the RFC made the determination more flexible though still courts are favoring the mother than the father for custody of children without stating the reasons thereof.[181] The RFC, however, left a wider room for customary values of the community, regarding custody, maintenance and related issues, to be given effect in courts. Yoseph mentions instances where the close relatives of spouses are favored to take custody of the children in the existence of the parents though the RFC does not speak so.[182] A close look at the important provisions of the RFC demonstrates that only spouses will be called to take custody of children during divorce which seems too mechanical and impracticable in some exceptional circumstances when parental-custody does not enforce the best interest of the child.[183] Such happens when, for instance, the children were not originally under parental custody, the spouses are not in a condition to ensure the interest of the children, the spouses are thoughtless for the children, and at the same time other close relatives are willing and in a better situation to look after the children. It is not uncommon to witness that traditionally children are reared by their grandparents and sometimes by uncle and aunt more sympathetically than their parents.

In W/t Tsedale Demissie vs Ato Kifle Demisse case the Woreda Court in Bonga Area of Kafa Zone of Southern, Nations, Nationalities and Peoples Regional State (SNNPRS) gave the father (respondent Ato Kifle) custody rights over paternal aunt of the minor (applicant W/t Tsedale). The applicant opposed the decision stating that the father has failed to provide the child with necessary care. But she was told that the law does not allow the aunt to be granted custody while the father is still alive. Finally, the Federal Supreme Court Cassation Division reversed the decisions of lower courts by noting that the literal adherence to the words of the law that gives priority to parents for child's custody[184] should be interpreted to serve the best

[178] Wondwossen Demissie, *Implementation Problems of Revised Family Code*, BERCHI, Issue 6 (2007), at 29.

[179] Articles 681 of the civil code determined that custody and maintenance of children shall be determined solely by considering the interest of the child, and unless there exists "a serious reason for deciding otherwise, the children shall be entrusted to their mother up to the age of five years."

[180] Art 113(2) of RFC.

[181] Wondwossen, *supra* note 178, at 30-32.

[182] Yoseph, *supra* note 87.

[183] Art. 113 of the RFC. Art. 9 of the United Nations. "Convention on the Rights of the Child." Treaty Series 1577 (1989): 3 (hereafter CRC) requires State Parties to ensure that a child shall not be separated from his or her parents against their will except for their best interests like when abandonment by parents occur, and Arts. 659 and 574 of the Revised Criminal Code of Ethiopia criminalizes the act.

[184] Article 235(1) of Family Code of Southern Nations, Nationalities and Peoples Regional State, Proclamation No.75/1996 which is similar with Art. 113 of the RFC.

interests and well-being of children as mentioned in Art. 36(4) of FDRE Constitution and Art. 3 and 9 of CRC.[185]

After looking the important provisions of the RFC, some considers it as poor adoption of foreign practices and does not give legal effect to valuable local practices, which in effect creates distrust among family members.[186] It, for instance, tries to take each and every relation under the supervision of court by ignoring the social reality. Goshye on the other hand considers RFC as an advanced document which goes and aspires beyond the horizon of the society. The writer however believes that it is unattainable to try to bring justice from the top by promulgating such kind of law before transforming the societal practices to the expectation of the law. But I agree with what Carl Schneider has called the 'protective function' of family laws and do not advocate for abolition of state laws on the subject.[187]

VII. CONCLUSION

The RFC is believed to have been advocated by human rights groups, mostly by women and children's rights advocates, and inspired by the modern principles of equality. Yet under the pretext of promoting modernity and equality between men and women, many of the innate societal norms and values are disregarded. Turning blind eyes to betrothal, withering the institution of family arbitration and abolishing customary forms of adoption are only few of them. The RFC generally tried to bring every family relation under the supervision of state and makes the relation to be regulated by mechanical state laws. Although the constitution promises to recognize the customary laws of the indigenous populations,[188] the formal recognition usually falls short of accommodating the cultural meaning embedded in indigenous customary laws. I argue that at the time of drafting RFC, the nature of law to reflect the customary behavior and the present state of human relation were overridden by the other failed purpose, i.e. to reform the society through legal measures. However, the author beliefs that such struggle in reforming society like redefining women's status within their cultural communities should not be at the expense of valuable culture, but through reforming the traditional institutions themselves.

One of the long established practices of Ethiopians, betrothal, is totally disregarded by the RFC though all the regional family laws have recognized it. I have tried to show that legal fictions were designed to rectify damages sustained during the engagement (Egypt), punitive damages were recognized (some US States), and pecuniary interests created during the relation are protected (US and England). Ethiopian legal system remained blunt on it as neither the law nor the practices inform us the existing remedies so far.

More importantly, though customary way of family dispute settlement is recognized under the constitution, the RFC that was expected to give effect to it, barely empower it thereby eliminating the functions and importance of the institution of family arbitration. As

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[185] W/t Tsedale Demissie Vs Ato Kifle Demisse, Federal Supreme Court, Cassation Bench, File No. 23632 (6 Nov 2007) Vol. 5, p. 188. On another time, the Cassation division has even turned the guardianship request of the mother and gave it to the aunt to protect the best interest of the child. W/ro Etsegenet Eshetu Vs W/ro Salamawit Negussie, Federal Supreme Court, Cassation Bench, File No. 35710 (Vol. 8, p. 243) See also Fasil Mulatu and Rakeb Messele, *Impact Assessment Report on the Draft National Child Policy of Ethiopia* (2011), Center for Human Rights, Addis Ababa University, January 2014.

[186] Philipos Anynalem, *supra* note 85.

[187] Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992).

[188] Article 34, 78 and 91 of the FDRE CONSTITUTION.

courts are the only authorities to decide over divorce cases, the society is left to abide by the mechanical provision which, at the end, according to interviewed federal judges, accelerated family dissolution. The literature and most interview judges called for renewed efforts of revitalizing alternative locally available mechanism – preferably family mediation or arbitration – to deal with family matters.

The provision of the RFC that regulate adoption agreement and child custody are the other segment which is believed to be mechanical and contrary to societal practices. Accordingly, both RFC and regional laws require adoption agreement to be in written form, parties to appear before court of law and secure approval of the relation. Yet instead of court documents, celebration of the adoption rituals, proof of adoptive relation or administrative record should be recognized for local level adoption.

Similar with the broader global trend, Ethiopia experienced shifts in the law where family has been privatized; it has shifted toward a focus on the individual rather than the family as an entity; it draws increasingly on contractual rather than moral discourse; it is less hierarchical and more concerned with gender equality,[189] but much earlier than the transformation of Ethiopian families in reality. As a result, the RFC has been considered by many as a poor adoption of foreign practices that ignore societal values and long-proved customary institutions. Incredibly, regional family laws, believed to be very close to the society and inspired by societal needs, did not give much effect to the prevailing customary practices of their own people except recognizing betrothal.

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[189] Estin, *supra* note 80.

EVALUATION OF THE EFFICIENCY OF STANDARD ASSESSMENT FOR CATEGORY C TAXPAYERS IN ETHIOPIA: THE CASE OF TIGRAY REGIONAL STATE

Muuz Abraha Meshesha*

Abstract

This article evaluates the application and efficiency of the Ethiopian standard tax assessment, as enshrined in the Income Tax Regulation No. 78/2002, against the tax liability of Category C Taxpayers, commonly known as small business taxpayers, referring to the practice in Eastern Zone Administration of the Tigray National Regional State. This mode of tax assessment was introduced to ensure the basic principles of tax systems such as equitability, efficiency, certainty, simplicity etc; as opposed to the situation when the tax regime is employing estimated tax assessment for the same purpose. It is found that there is a contradiction between the rules of standard tax assessment and their practical application, since the actual tax liability of the large section of the Category C Taxpayers is being assessed according to estimated taxation and this practice is incurring higher cost of administration. This article argues that the practical assessment of tax liability of Category C Taxpayers is not ensuring efficiency and the practice has to conform to the rules of standard tax assessment to meet efficiency; yet the criteria for categorization of taxpayers into Category C Taxpayers must be revised to fit the actual incomes of taxpayers to ensure equity and equality.

Keywords: Category C, Efficiency, Ethiopia, Presumptive taxation, Standard assessment, Taxpayers, Tigray

I. INTRODUCTION

In different tax regimes of many countries, taxes are levied on different sources of income classified in to some number of segments. Largely, countries set their source of income tax taxpayers in to small, medium, and large taxpayers mainly depending on the amount of income derived by the taxpayers. Tax law frameworks of different countries including Ethiopia provide specific rules governing the assessment method, tax rate, accounting period, deduction, exemption, and other related guidelines for each of the above listed group of taxpayers. Although the impacts of application of different types of income tax assessment mechanisms would also deserve discussion, the theme of this article is on the 'efficiency'[1] of the standard assessment as implemented for assessing income tax liability of the small businesses, contextualized as 'Category C Taxpayers'[2] in Ethiopia.

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[1] From the public finance theory perspective efficiency stands for delivering maximum results from limited resources. *See* LEE BURNS AND RICHARD KREVER, *Taxation of Income from Business and Investment*, *in* TAX LAW DESIGN AND DRAFTING 2, 1-36 (Victor Thuronyi ed., 1998)

[2] In this article, category C taxpayers are based on the terminology given to them under the Income tax Proc. no. 286/2002, considered as the taxpayers whose annual income turnover is less than or equal to 100,000 Birr.

During the initiation of the Income Tax Proclamation No.286/2002[3], there have been many expectations to be optimistic in one hand and concerning issues on the other hand about the efficiency of the provision of standard assessment to assess income tax liability of category C taxpayers. The expectations emanate from the very nature of standard assessment and its supposed solution for easing the problems that used to be manifested. Conceptually, income tax assessment refers to an impartial determination of the amount of tax for a given item that is subject to taxation. However the subsequent enactment of the regulation for the better regulatory purpose has come with a little room for reducing the inherent problems of the hard to tax categories or groups. The prevailing shortcomings of tax assessment of these groups include investment of extra administration cost, escaping of tax net, under-taxation, low tax compliance behavior, and/or uncertainty on the part of the tax authority and taxpayers attributable to the difficulty of locating the actual amount of tax liability to be paid.[4]

II. PRESUMPTIVE INCOME TAX ASSESSMENT

Presumptive taxes are taken as one of the oldest types of taxes dating back to the 18th century where tax liability has been assessed based on the whole asset of taxpayers and other related parameters than the actual income or revenue of the taxpayer.[5] Income tax assessments made on the basis of this technique involve employment of surrounding indirect factors to determine the actual taxable income and tax liability.[6] According to Victor Thuroyni, a renowned scholar on taxation:

> *The term "presumptive" is used to indicate a legal presumption that the taxpayer's income is no less than the amount resulting from application of the indirect method. The concept covers a wide variety of alternative means of determining the tax base ranging from methods of reconstructing income based on administrative practice, which can be rebutted by the taxpayer, to true minimum taxes with tax bases specified in legislation.*[7]

Though the turnover can be varied by the Ministry of Finance and Economic development, currently, Category C taxpayers are termed under art. 19(3) of the Income Tax Regulation No. 78/2002 as Category C, unless already classified in Categories "A" and "B" those whose annual turnover is estimated by the relevant Tax Authority as being up to Birr 1000,000 (one hundred thousand Birr).

[3] *The Income Tax Proclamation*, Proclamation No. 286/2002, FED. NEGARIT GAZETTA, 8th year No. 34 4th July 2002.

[4] Zerihun Asegid, Presumptive Income Taxation of Small Business in Ethiopia; The Law and Practice relating to standard assessment in Addis Ababa city 75 (July 2013) (Research paper submitted to Mekelle University for the Award of Master's Degree in Laws of Taxation and Investment). The author provides that Estimation of daily sale has remained the main source of conflicts between taxpayers and the Authority. Media outlets, meetings organized by the Authority and review committees have been some of the places where one can visualize how the problem is serious. Not only the cause it inflicts on taxpayers within the same category to pay the same tax under standard assessment, the practice has brought varied tax liabilities for taxpayers in similar occupation because the estimates were subjective and based on the personal observation of the tax officers and the estimates have also made taxpayers not to be certain about their tax liability.

[5] Konstantin Pashev, *Presumptive Taxation and Gray Economy: Lessons for Bulgaria,* 4 (Dec. 2015) (WP 0512/1, Center for the study of Democracy) <https://www.files.ethz.ch/isn/29878/2005_12_Presumptive.pdf>, accessed on July 2016.

[6] 'The term presumptive taxation covers a number of procedures under which the desired base for taxation (direct or indirect) is not itself measured but is inferred from some simple indicators which are more easily measured than the base itself. *See also* EHTISHAM AHMAD & NICHOLAS STERN, THE THEORY AND PRACTICE OF TAX REFORM IN DEVELOPING COUNTRIES, 276 (Cambridge Univ. Press, 1991).

[7] VICTOR THURONYI, *Presumptive Taxation in* TAX LAW DESIGN AND DRAFTING, 1 Chapter 12 (Victor Thuronyi ed., Vol.1; IMF: 1996)

Though there are variations on the initiation and justifications of presumptive taxes across countries, it is believed that objectives behind the introduction of presumptive taxes are improving the efficiency of collection by reducing taxpayers' 'administrative and compliance costs; reducing the administrative costs of compliance and enforcement management; and bridging the way from informal to formal activities and from assessment based on indicators to self-assessment based on actual income.'[8] From such policy objectives, presumptive taxation techniques are taken as a device to minimize the share of shadow economies/businesses, increase efficiency, and fighting corruption by shielding the interactive contact between taxpayers and tax assessing employees.[9]

Similarly, Thuroyni has given the justification/reasons behind the introduction of presumptive techniques stating:

> *First is simplification, particularly in relation to the compliance burden on taxpayers with very low turnover…. Second, is to combat tax avoidance or evasion….. Third, by providing objective indicators for tax assessment, presumptive methods may lead to a more equitable distribution of the tax burden, when normal accounts-based methods are unreliable because of problems of taxpayer compliance or administrative malpractice. Fourth, rebuttable presumptions can encourage taxpayers to keep proper accounts, because they subject taxpayers to a possibly higher tax burden in the absence of such accounts. Fifth, presumptions of the exclusive type can be considered desirable because of their incentive to a taxpayer who earns more income in which he/she will not pay more tax. Finally, presumptions that serve as minimum taxes may be justified by a combination of reasons (revenue need, fairness concerns, and political or technical difficulty in addressing certain problems directly.*[10]

Generally, we can infer that presumptive taxation is one of the techniques that serve to assess taxable income and tax liability of taxpayers without obliging to keep record of income and expenditure. On the other hand, there is no uniformity in applying the presumptive taxation in each tax regime as different types of presumptive methods exist in different countries. However, the most notable methods of working with presumptive taxation are standard presumptive assessment and estimated presumptive assessment.[11]

A. Standard Assessment

One of the two presumptive tax approaches frequently applied by presumptive tax rate approaches for tax assessment is the standard assessment, which assesses "a given amount of

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[8] Pashev, *supra* note 5, at 4.

[9] *Id.*

[10] THUROYNI, *supra* note 7 at 3. *See also* Kyle D. Logue & Gustavo G. Vettori, *Narrowing the Tax Gap through Presumptive Taxation*, 2 COLUM. J. TAX. L. 121, 101-149 (2011) www.repository.law.umich.edu/cgi/viewcontent.cgi?article=2730&context=articles/ accessed on June 12 2016.

[11] Estimated tax assessment is a method of tax assessment in which 'tax authorities use indicators of business activity to presume profits or tax liabilities whereas, the standard presumptive tax assessment assesses income tax burden of a given tax-payer based on a given set of criteria.' *For further elaboration see* Yury Valevich, Dirk Kiesewetter (Coach), Alexander Chubrik (Lector) Minsk, Proposals for Further Improvement of the System of Presumptive Income Taxation of Individual Entrepreneurs in Belarus, 3 (Sep. 2004) (PP/11/04 IPM research center), <http://www.bsu.by/Cache/pdf/303183.pdf> accessed on July 3, 2016.

taxpayers' taxable income using a simple lump-sum tax based on the average income of a particular trade or profession".[12]

Such method of income tax assessment is typically considered as a model of presumptive tax assessment which applies an objective reference to fix the standard amount of taxable income and tax liability.[13] Assessments are made taking average income of the respective occupations, and/or businesses working an average hours using an average effort.[14] In principle, this income tax assessment modality is taken as an approach of assessment which is 'irrebutable'[15], and exclusive.[16] Based on a research carried out by Mr. Helawy Taddesse and Gunther Taube on experiences and prospective of presumptive taxation in sub-Saharan Africa, it is stated that, standard assessment is represented by the Tachshiv of Israel and complemented;

> *The Tachshiv of Israel is widely referred as the most elaborated standard assessment method …. the Tachshiv for each industry was prepared, often over several years, after extensive research and many visits to a sample of businesses. The average profitability of a particular industry and its relationship to the specific indicators were discussed with representatives of the industry before the official tachshiv was issued. Examples of the indicators employed included location, seating capacity (for restaurants), number of employees, skill level of employees (for carpenter's workshops or garages), and etc.*

In addition, other researchers have also asserted that payments made under standard income tax assessments are fixed lump-sum in nature.[17] When Helaway and Taube illustrate such behavior of the Ghanaian Standard Income Tax Act of 1963, as an example, they state that;

> *The standard assessment Act decreed that "all persons carrying out any trade, business, or profession in any year must register with the Commissioner of income tax, and specific lump-sum tax payments based on occupational grouping were established". There are thirty three sectors in which their income tax assessment is made and prepared on the basis of standard assessment. All of these sectors need to obtain annual tax clearance certificates to be displayed on their premises, as a proof of payment.*[18]

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[12] Helaway Tadesse, & Günther Taube, Presumptive taxation in Sub-Saharan Africa; Experiences, and Prospects 12 (January 1996) (WP/96/5 IMF African Department). Available at www.imf.org/external/pubs/ft/wp/wp9605.pdf/ accessed on July 3, 2016.

[13] Valevich *et al*, *supra* note 11.

[14] *Id.*

[15] Presumptive income taxation can be rebuttable and irrebuttable. Rebuttable taxation is one that can be appealed by the taxpayer through proving that his actual income, calculated under the regular rules, was less than that calculated under the presumption. By contrast, irrebuttable taxation cannot be appealed. As a result, rebuttable taxation can encourage taxpayers to keep proper accounts, because they subject taxpayers to a possibly higher tax liability in the absence of such accounts. *See* Valevich *et al*, *supra* note 11, at 2.

[16] Another ground for classification of presumptive income taxation is classification into formal and discretionary taxation. Formal taxation means determination of tax liability according to the established rules. By contrast, discretionary taxation assumes a high degree of tax authorities' discretion while determining tax liability. Hence, it appears that formal presumptions are less open to corruption and administratively simpler. But formal presumptions are considered as less equitable because they don't take into account taxpayer-specific conditions. *See* Valevich *et al*, *supra* note 11, at 3.

[17] Helaway Tadesse, & Günther Taube, *supra* note 12, at 12. This research has further disclosed the adoption of the system in most federal states like Nigeria, Mozambique, Lesotho, Sierra leon, and Ethiopia was made in the 1960's and 1970's.

[18] *Id.*

This shows the fact that an idle enforcement of the standard income tax assessment was placed in the Ghanaian income tax act. This can be inferred from the comprehensive netting of all traders, business men, and professionals for registration and making them subject to specific lump-sum payments based on groupings.

In addition to the above points, the above researchers on presumptive taxation have put the initial intention of the country on introducing the technique suggesting the reason 'of imposing minimum tax on the different occupations/businesses' before they serve as a final tax liability at latter times.[19] However, stipulation of the income tax act in the above country case, and a standard assessment in general, to assess their tax liability on a lump-sum basis doesn't mean that every taxpayer in every grouping shall be subject to the same tax liability.[20]

Regarding the bases of income tax assessment, the standard assessment technique of Ghana has employed different factors such as the number of service years, and size of means of conducting business and/or trade to levy the actual income tax.[21] In other developing countries more or less means of standardizing the lump-sum standard assessments have been used. Countries like Burkinafaso, Rwanda, and Ethiopia have respectively applied locality, construction of business premises, and the use of freight and seating capacity, for standard assessment of transport vehicle owners.[22]

1. What Merits does Standard Assessment have?

The application of standard assessment to different occupation-specific assessments as described in the above topic has been one of the most preferable tools in many countries; especially in developing countries for different reasons.

First, administration of standard tax assessment is simple in nature.[23] The principal role of the government under standard assessment is to ascertain the remittance of the actual owed presumptive tax liability of such taxpayers.[24] For example, a fixed lump-sum tax imposed on a given sector or category under standard assessment is not heavily dependent on the

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[19] *Id*., at 13.

[20] Emmanuel G. Ofori, *Taxation of the Informal Sector in Ghana: A Critical Examination*, 22 (May, 2009) (A Dissertation presented to the Institute of Distance Learning, Kwame Nkrumah University of Science and Technology for the award of MA in Business Administration) <http://ir.knust.edu.gh/bitstream/123456789/583/1/Emmanuel%20G.%20Ofori.pdf> accessed on July 5 2016. In this case, the researcher illustrates the specific treatment of groups under similar sector taking the Taxi and Intra-city transport service taxpayers which are made subject to separate treatment.

[21] As an example, he has presented the fact that 'medical doctors and dentists had to pay varying lump-sum taxes according to the number of years in practice while the lump-sum amounts paid by fishermen were calibrated by the length of their fishing vessels.' *See* Helaway Tadesse, & Günther Taube, *supra* note 12 at 13.

[22] *Id*. Not only these tax regimes but other countries of the Sub-Saharan Africa have also adopted the standardized income tax assessment for their different sectors based on different adjustment imputes. For example, in this research, the researchers have denoted the regulation of the agricultural sector by standard income tax assessment explaining as "calibrated standard payments are also used to tax agricultural incomes, based on various indicators. Mostly standard assessments or levies for the agricultural sector has been based on the crop planted, area covered, average yield, and number of livestock. Apart from this in countries like Mozambique, the payment depends on the fact that whether the farmer uses a tractor or not?" *For the Ethiopian case, see The Council of Ministers Income Tax Regulations*, Regulation No. 78/2002, FED. NEGARIT GAZZETA 8th Year, No.37, Addis Ababa, 19 July 2002, Annexed schedule II.

[23] Logue & Vettori, *supra* note 10, at 126. *See also* Pashev, *supra* note 5, at 7.

[24] Helaway Tadesse, & Günther Taube, *supra* note 12, at 14.

investigative assessment of the taxpayers income; instead, an 'average income is presumed to be earned by members of a particular occupation'.

Secondly, imposing of an average lump-sum tax on taxpayers who fulfill common minimum threshold within a group provides them ancillary incentive for extra gain earned above the average standard tax.[25] Such incentives will consequently encourage taxpayers to exert additional effort which can boost up their respective productivity and economic efficiency.

Thirdly, viewed from the principle of equity, it enables to rectify horizontal tax equity of small businesses which operate in a shadow economy/market.[26] This is realized by the reason that narrowness of tax base and specifically, exclusion of small business taxpayers operating outside the knowledge of a tax administration can be easily captured into the tax base by a simple formulation of standard tax assessment for a given sector.

Fourthly, standard tax assessments enable to 'minimize opportunities for corruption and collusion since there is discretion on the side of the tax official; instead, lump-sum taxes are predetermined and derived from tables or matrices that simply show occupation on one side and a corresponding tax liability on the other.'[27]

Finally, standard assessment is considered as a tool to trap informal business/trade operations which operate in a covert economy to be brought in to the eyes of the tax administration thereby become subject to tax levy.[28]

2. Demerits of Standard Assessment

Viewed from other perspectives, standard assessment is not without limitation. The first and commonly known demerit of standard assessment is its 'poor performance with respect to resource mobilization.'[29] This is due to the fact that the fixed standard tax payment assessments by a tax regime are mostly based on the minimum income threshold which causes assessment of the average tax that does not exhaustively tax income of higher income gaining small business taxpayers.[30] As a result, the income tax revenue that would be collected from a group of taxpayers above the average standard tax assessment line shall be missing.

Secondly, tax assessments made on the basis of standard approach are less adaptive to economic changes as they are most of the time drawn at a time giving no or little consideration to the possible short and long run economic fluctuations, if any.[31] In this regard, if the tax system fails to be flexible to the new economic indicators typical principles of taxation such as equity shall be distorted as the tax rate of a given group will remain unchanged despite of the alterations on economic variables.

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[25] *Id*. This is true, since a given group of taxpayers who has been subject to the same standard tax payment may gain a profit beyond the average ground of lump sum tax assessment which shall be taxed at a zero rate resulting in an additional economic benefit to the taxpayer.

[26] *Id*. *See also* Ofori, *supra* note 20, at 21. In this case, the researcher stipulates that inclusion of the potentially excluded small business taxpayers in to a tax base promotes horizontal equity in a given tax system.

[27] Helaway Tadesse, & Günther Taube, *supra* note 12, at 14.

[28] *Id*.

[29] *Id*., at 15.

[30] *Id*.

[31] *Id*.

Thirdly, standard tax assessment violates important economic principles. Whereas the first shortcoming of such tax assessment technique is its weakness to recognize relevant economic realities such as loss to determine the standard assessment tax liability. Secondly, it is against the principle of progressivity of a tax system in that taxpayers with a better earning of income are taxed with taxpayers of lower income earners equally.[32]

Generally, while standard assessment approach is formulated for administrative simplicity and increment of tax compliance behavior for taxpayers currently, its application is getting limited in scope.[33]

B. Estimated Assessment

Under this type of presumptive tax assessment method, tax liability is assessed by taking indicators which are specific to a given business/trade, and/or occupation.[34] Tax liability of a given taxpayer is assessed taking one or more relevant indicating factors such as the size of production facility, quantity of stocks, quality of means of production, and capacity of supplying a given service.[35] After an estimation of income is made based on these factors and other similar measurements; final tax liability is fixed either by direct application of an existing business tax rate to the estimated income or presume tax liability having regard to the income assessed.[36]

On comparing the two common forms of presumptive taxation, 'estimated assessments are considered as a somewhat more refined and sophisticated presumptive taxation techniques than standard assessments.'[37] This was supplemented with an argument which reasons out assessment based on indicating factors is more effective and relevant than an assessment made on the basis of similar grouping in that grouping under similar category does not directly lead in to a closer amount of income.[38] In addition, estimated assessments are taken as more advantageous than standard assessments due to their room to consider business or occupation based losses.[39]

On the other hand, standard assessments take comparative advantage over estimated assessment having the nature of estimated assessment which opens a door for an individual interaction of tax administration and taxpayers due to the discretion provided to a given tax authority to investigate estimated income of a given taxpayer.[40] Impliedly, such interactions between the parties create possible loopholes for corruption. Similarly, though the employment of indicators to assess income tax liability of a taxpayer has a prevailing benefit

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[32] *Id*. Becoming subject to the same tax burden because two lawyers or doctors are in a similar occupational category distorts vertical as well as horizontal equity. *See also* Logue & Vettori, *supra* note 10, at 126.

[33] Helaway Tadesse, & Günther Taube, *supra* note 12, at 14. The researchers stated that 'In Ghana where, standard assessment has had a longer and more extensive application than anywhere else in Africa, its role in the tax system has gradually been minimized.' They have also added that such group of taxpayers are currently becoming obliged to keep record so that their tax liability is assessed based on the income registered in the account. *See also* Zerihun Asegid, *supra* note 4, at 41.

[34] Helaway Tadesse, & Günther Taube, *supra* note 12, at 14.

[35] Valevich *et al*, *supra* note 11, at 3.

[36] Helaway Tadesse, & Günther Taube, *supra* note 12, at 15.

[37] *Id.*

[38] *Id.* This is due to the fact that extra gaining/profit from extra works or business expansion could be taxed more accurately under estimated assessment than under standard assessment.

[39] *Id.,* at 16.

[40] *Id*.,at 16

over the other assessment methods, the selection of better 'indicators'[41] pose a challenge to a tax authority.[42]

Regarding the common indicators used by developing countries for estimated assessments, they are illustratively given as: 'the size of business's premises; the number of employees; the skill of employees; the amount of installed machinery, and the level of inventory' whereas specific indicators of service recommended are indicators 'such as seating capacity of a restaurant or the number of rooms in a hotel.'[43] Other ancillary mechanisms such as questioning of businesses which have business transaction with the taxpayer may also be devised by tax authorities to find out an income assessed.[44]

As stated above, despite estimated tax assessments capacity to tax taxpayers based on their individual performance taking particular indicators, its administrative difficulty added with its tendency to corruption makes it less preferred.[45] On the other hand, due to estimated tax assessments requisition of detailed tax assessment report and investigation, several minimum conditions should be fulfilled. Some of the minimum requirements identified to be complied with are:

> *First, the tax administration must have the technical resources to make detailed studies of profitability by type of activity, and second, an adequate number of tax officials must be available to verify information provided by taxpayers about the characteristics of their business. Third, because the system involves discussions between officials and taxpayers on the level of the assessment, officials must be strictly supervised and adequately paid.*[46]

Having set the above minimum grounds, scholars warn that failure to fulfill any of the above requirements deprives effectiveness of the estimated tax assessment.[47]

III. WHAT MAKES STANDARD ASSESSMENT EFFICIENT?

Theoretically, income tax assessment and generally tax systems are judged from many iconic perspectives such as efficiency, equitability, neutrality, certainty, potential of the tax

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[41] On the criteria to identify a good indicator factor, it is advised to use 'level of observability and recordability of the indicator; the level of falsification and concealment of the indicator; and thirdly, the correlation of that indicator to income and the stability of that correlation over time.' Based on these criteria, indicators which are 'recordable, difficult to falsify or substitute, and indicators with strong correlation to income are taken as better indicators that enable to reach at a better assessment. *See* Helaway Tadesse, & Günther Taube, *supra* note 12, at 16.

[42] *Id.*

[43] *Id.* Occupations such as, transport services can be assessed by easy recordable indicators such as passenger capacity or cargo space. Some creative tax authorities of some countries have also resorted to more sophisticated techniques such as the electric, and water bills.

[44] *Id., at 17.*

[45] The administrative difficulty arises from the very nature of estimated tax assessments in which the assessments tend to require deployment of hefty labor and financial resources while its tendency for corruption is connected with the physical interaction and discretion of assessment of the tax officers with the taxpayers.

[46] Vito Tanzi & Milka Casanegra de Jantscher, Presumptive Income Taxation: Administrative, Efficiency, and Equity Aspect 12 (August 17, 1987) (WP/87/54 IMF Fiscal Affairs Department) <http://www.imf.org/external/pubs/ft/wp/wp8754.pdf> accessed on July 3, 2016. The authors also described that enforcement of estimated tax assessment, especially in countries with an inadequate resources is not easy raising the fact that such countries which have tried such formulation in history had remained with a flawed system.

[47] *Id.*, at 13.

system to adapt to inflation and other macro-economic changes, etc.[48] From the public finance theory's perspective, efficiency stands for delivering maximum results from limited resources.[49] Unreasonably high taxes may discourage taxpayers from doing extra work, since the marginal gains from each additional unit of effort is decreasing. For the sake of evaluating a given income tax system from the efficiency's point of view, it demands the lowest tax burden on businesses and individuals.[50] When a given income tax system makes any types of economic reforms with respect to taxes, it can affect economic efficiency and ultimately living standards in many ways.[51] This could for instance happen in a situation where a government carries-out its income tax assessment in a form that increases the tax burden or tax rate on the taxpayers. In this circumstance, even though it is possible to improve the revenue of the government, the welfare of the taxpayers could be threatened. As such, it is advisable for the government to pursue tax reform without or with little increment of the overall tax burden. Apart from the level of the tax burden, the way any given amount of tax revenue is raised may also have effects on efficiency.[52] Any additional tax burden may tend to discourage the activity on which it is imposed. It follows that the more comprehensive the tax system is the less distortion there will be of the relative rewards of different types of work, of the relative attraction of work and leisure, of the relative returns from different types of investment, and of the relative prices of goods and services.[53]

Generally, efficiency, is supposed to be secured under presumptive income tax assessment than in an assessment of actual income.[54]

IV. THE LEGAL FRAMEWORK OF STANDARD ASSESSMENT IN THE ETHIOPIAN CONTEXT

As stated under the preceding section, traditionally the Ethiopian income tax system dates back to Axumite kingdom; whereas, the beginning of modern tax system traces back to the 1941.[55]

Regarding the history of beginning period of the income tax assessment, it is believed that Ethiopia income tax system was inhibited by the presumptive taxation model.[56] That is to say, the taxable incomes had not been inferred from taxpayers' accounts. Rather, various proxies were used to establish tax liability of different taxes.[57] For example, under the Land Tax Proclamation of the 1942, land tax has been assessed based on the fertility of land classified as fertile, semi fertile, and poor land with respective 15, 10, and 5 Birr income tax

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[48] Daniel J Pilla, Ten Principles of Federal Tax Policy 2013 *cited in* Taddesse Lencho, The Ethiopian Income Tax System: Policy, Design and Practice 43 (2014) (A dissertation submitted to University of Alabama for the award of LL.D Degree in Taxation Laws) <http://www.acumen.lib.ua.edu/content/u0015/0000001/0001504/u0015_0000001_0001504.pdf> accessed on July 3, 2016.

[49] *See* Zerihun Asegid, *supra* note 4, at 36.

[50] *Id.*, at 37.

[51] *Id.*

[52] *Id.*

[53] *Id.*, at 38.

[54] Helaway Tadesse & Günther Taube, *supra* note 12, at 9. The authors added that, the most indicating criteria for the detection of efficiency of the tax assessment is to comparatively use relatively small amount of administrative cost for tax assessment.

[55] Tadesse Lencho, *Towards Legislative History of Modern Taxes in Ethiopia (1941-2008)*, 25 JOURNAL OF ETHIOPIAN LAW 106, 104-158 (2012).

[56] See Zerihun Asegid, *supra* note 4, at 42.

[57] *Id.*

per *Gasha*.[58] Regarding, the design or the tax structure, there were three Schedules (A-C). Schedule C income tax ladder was standing for business income tax sources and subcategorized in to class A, class B, and class C categories.[59]

It was after the enactment of the Income Tax Decree of 1956 that businesses were brought under differed treatment in calculating tax liability and keeping of record.[60] For the first time, businesses other than those identified as small ones was obliged to keep book of accounts about their income and expenses for the purpose of calculating tax liability.[61] However, by the then Income Tax Authority, businesses with an estimated annual taxable income of less than 15,000 Birr were named as 'small businesses'.[62] They were still exempted from the record keeping requirement and paid tax at a fixed rate, according to rules to be prescribed by the then Finance Minister.[63] Modifications were made in the subsequent times with regard to the thresholds of the small business categories. The term 'Category C Taxpayer' was introduced for the first time to refer to small business by Income Tax Regulation issued pursuant to the Legal Notice 258/1962.[64] After the application of the standard assessment for four years, then comes a shift in the assessment method in 1960s, following the formulation of the Income Tax Proclamation No. 173/1961. Under this proclamation, the estimated income tax assessment approach was introduced to be applied 'if no records and books of account are maintained by the taxpayer or if for any reason the records and books of accounts are unacceptable to the Income Tax Authority, or if the taxpayer fails to declare his or its income within the time specified in the law.[65] This proclamation continues to be effective holding the estimated income tax assessment until it was repeal by a subsequent Income Tax Proclamation No. 227/2001.[66]

The estimated assessment was calculated by estimating daily sales of the taxpayer times the annual working days times the profitability rate, and then allocates to the relevant schedule C matrices.[67] Lack of efficiency, creating disputes/conflict, vulnerability to corrupt practices caused by the estimated assessment lead the introduction of standard assessment.[68]

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[58] For example such historical legislation could be referred from the then laws. *See The Proclamation to Provide for a Tax on Land*, Proclamation No. 8/1942, NEGARIT GAZETTA, 1st Year No. 1, 1942, Article 3(ii) (*now repealed*),

[59] Schedule 'A' and 'B' represent personal and business incomes respectively while Schedule 'C' dealt with Sur-tax; *See the Income Tax Decree of 1956*, FED. NEGARIT GAZETTA 16th year No. 1, Addis Ababa, 1956, Art. 43 (*now repealed*).

[60] *The Income Tax Decree of 1956*, FED. NEGARIT GAZETTA 16th year No. 1, Addis Ababa, 1956, Art. 43 (*now repealed*).

[61] Under this proclamation, companies and associations that were liable to keep records and businesses with annual turnover of 500,000 Birr and above was obliged to pay income tax on the basis of actual income inferred from records. *See* Zerihun Asegid, *supra* note 4, at 42.

[62] *Id*, at 44-46.

[63] *Id*.

[64] *The Income Tax Regulation*, Legal Notice No. 258/1962, 1962, Art. 25 (*now repealed*)

[65] *The Proclamation to Income Tax*, Proclamation No. 173/1961, NEGARIT GAZETTA, Art. 40 (*now repealed*),

[66] *The Income Tax (Amendment) Proclamation*, Proclamation No. 227/2001, FED. NEGARIT GAZETTA, 7th year No. 9, 2001 Art. 2(4) (*now repealed*).

[67] *Id.*, Art. 10

[68] The Federal Democratic Republic of Ethiopia House of Peoples' Representatives, *Hearing on the Draft Income Tax Amendment Proclamation before the Standing Committee for Budget and Economic Affairs*, (Statement of Beyene Bekele, General Director of the then Federal Inland Revenue Authority), (1993 E.C), *cited in* Zerihun Asegid, *supra* note 4, at 45.

From the year, 2001, onwards, a universal country level tax reform on all types of tax as part of the general tax reforms was made four times.[69] One of the reforms was the introduction of standard assessment in lieu of the estimated assessment.[70]

The Proclamation recognized the fact that standard assessment must be preceded by a one year survey period.[71] And, during this period, without recourse to estimation of daily sale, the Proclamation introduced a transitional rule whereby small businesses must pay a tax equal to the tax paid in the previous year, adjusted upward by 6% increase for inflation, until the end of the survey and formulation of standard assessment tables.[72] In the immediate next year, 2002, due to its failure to accommodate the tax system principles suggested before, a comprehensive income tax law was enacted. In its extensive coverage of the issues of income tax, in the case of standard assessment, nothing new was added on the 2002 Proclamation.[73] Basically, there was high expectation by everyone for the new approach of standard assessment to substantially solve the problem of estimated assessment considering the fundamental assumptions of the standard assessment.[74]

However, according to Zerihun, the new Income Tax Proclamation of 2002 did not come up with details of the standard assessment, save to the indication of the factors to be used as a source of classification. It rather, puts the underlying principle and ways to implement the system. The author said that pursuant to Articles 2(16) and 68(2) of the mentioned Proclamation, 'the Council of Ministers has been expected to decide the maximum threshold for small businesses and to come up with model standard assessment guides.'[75]

Interestingly, the authorized office, Ministry of Finance Economic Development, take over the assignment on time and start as per the procedurally correct implementation of the standard assessment, but missed the what should have been done.[76] The Income Tax Regulation provides two schedules with 69 sectors, dissected at 19 scales on an annual turnover of 5,000 Birr interval. The first schedule inhibits the variety of 69 category C taxpayers while the neighboring second schedule contains Attorneys, Flourmills, Transport

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[69] The first stage of reform took place between 1992/93 and 1995/96 and the second reform covered the time line between 1996/97 and 2000/01. The third and fourth reforms were supposedly happened in 2001/02-2005/06 and in 2006/07 respectively. See *an Interview with Ato Nigussie Muruts*, Category C Taxpayers income tax assessment expert in the *Tigray Regional State* Revenue Authority, *Mekelle*, (20 Dec, 2014).

[70] Article 2(4) of the Proclamation is stipulated to replace Article 40 of the Income Tax Proclamation of 1961 and it stated that standard assessment shall be used to determine the income tax liability of category 'C' taxpayers. *See also* Zerihun Asegid, *supra* note 4, at 50.

[71] *The Income Tax (Amendment) Proclamation*, Proclamation No. 227/2001, *supra* note 65.

[72] *Id.*

[73] Under Art.68 (1) of the Income Tax Proclamation of Proc. No. 286/2002, it is stipulated that standard assessment method shall be used to determine income tax liability of category C taxpayers. Like the repealed proclamation, the principal indicators of the standard assessment are type (quality of the sector), location (geographical location of the business), and size of businesses. *See supra* note 3, Art. 68 (1).

[74] The underlining steps for implementing standard assessment are identifying the type of business in which the taxpayer is engaged and determining the corresponding tax amount from the standard assessment schedules. *See* Zerihun Asegid, *supra* note 4, at 51.

[75] As a result, the Council of Ministers came up with regulation No. 78/2002 stretching the threshold income of category C taxpayers. *See The Income Tax Regulation*, Regulation No. 78/2002, FED. NEGARIT GAZETTA, 8th year No. 37 19th July 2002.

[76] The first step in the introduction of standard assessment being the market surveying the Institutions have based their study on the size and diversity of taxpayers that were found in the list of the Tax Authority. At the time, the main focus areas of the formulation were categorization of businesses and setting annual turnover, amount of exempt income, profit ratio, and fixed taxes.

Services, Driving trainers, and some other taxpayers with respective level indicators.[77] Here it is worthy to mention that; configuration of the matrices or scales of the first schedule was not based on the indicators standard assessment should base itself. The first schedule of the income tax regulation annexed is based on annual turnover of each sector.[78]

The regulations' attempt to treat these taxpayers in this manner seems to cause recurrence of the wound they have been suffering under the estimated assessment in one hand, and an attempt to keep progressivity of the tax system on the other hand. However, taking in to account the introduction of standard assessment to simplify the burdens on taxpayers and tax authority, and avoid inappropriate relations of the two during assessment the first goal outweighs the second.[79] So we can say that, decision of the Council of Ministers to shorten expectation were not legally given and administratively feasible. This also arises from the absence of indicators that can serve for the placement of taxpayers in the schedule without recourse to records.

Category C taxpayers are indebted with an express obligation of declaring their turnover, but not keeping records and accounts.[80] Such stipulation could distort the taxpayers' inherent privilege of being free from similar duties or on the other hand enhance his active participation on the tax assessment. As a right, the prime remedy given to category C taxpayers under the regulation is their right to disprove the tax assessment made by the tax officer through the presentation of evidence only if the tax authority has approved the record presented by the taxpayer.[81] However, this is hardly easy to the taxpayer to exploit the opportunity since financial and skill requirement could be unbearable and even it is at the discretion of the tax authority to approve or reject the statement. In addition to this, due to the nonexistence of clear specification about the particulars to be included in the record of account, the taxpayer could fail to proceed.

When tax administrations work with the standard assessment they are heavily required to include revision rules, on when to update or by whom to revise, the income tax assessment rules.[82] Ministry of Finance and Economic Development (MOFeD), the ministry responsible for the enactment of standard assessment Directives in Ethiopia,[83] has once revised the schedules at the back of the Income Tax Regulation No.78/2002.[84]

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[77] The sectors under the second schedule have level of license, number of seats, source of power generation, and carrying capacity as indicators to categorize the Attorneys, Public transport, Flourmills, and Dry transports in to the specific band.

[78] On his opinion, the author dictates that basing the annual turnover as a standard to prepare categorization of the category C taxpayers was outside the IMF recommendation. It also argues that, categorization of these taxpayers on the basis of annual turnover creates a mess both part of the tax administration and taxpayers record keeping duty to assess the proximate amount of turnover. *See* Zerihun Asegid, *supra* note 4, at 52.

[79] Zerihun Asegid, *supra* note 4, at 53.

[80] *The Income Tax Regulation of the Tigray Regional State,* Income Tax Regulation No. 31/1995, TIGRAY REGIONAL STATE NEGARIT GAZETTA, 12th year No. 11, Art. 22 (1(a)).

[81] *Id.*, Art. 21(3).

[82] Zerihun Asegid, *supra* note 4, at 22.

[83] *Income Tax Proclamation*, Proclamation No. 286/2002, *supra* note 3, Art. 68 (3)

[84] The Ministry has set up a joint committee consisting of representatives from all regional governments and city administrations. Subsequently, the committee has carried out its study and submitted draft standard assessment schedules to the Ministry in 2004. In addition to this, profitability rate and the amount of tax assessed was modified except the two bands categorized inside the up to 10,000Birr and 10,000-15,000Birr. The ministry has distributed a letter to all regional governments and city administrations to implement the revision since 2004. *See* Ref. No አማ3/16/28/509 *cited in* Zerihun Asegid, *supra* note 4, at 46.

V. INCOME TAX ASSESSMENT OF CATEGORY C TAXPAYERS IN TIGRAY REGION: THE LACUNAS AND THE WAY FORWARD

Tigray region is the most northerly region of Ethiopia bordering Eritrea to the north, Sudan to the west, the Afar Region to the east and the Amhara region to the south. The region has an estimated area of 50,078.64km^2. It is one of the regions recognized under the 'FDRE Constitution'[85] as a regional state entitled with a power of law making, enforcement of the laws, and interpretation of laws through its respective legislative, executive, and judicial organs of governments within its regional jurisdictions. Tigray regional state is structured from the regional state downward to zonal administrations, and this zonal administration in turn is sub divided in to *woredas*, the level of organization whereby main activities of the regional state such as collection and administration of tax are implemented, then the *woredas* in to sub-provinces. Taking this in to account, there are 'Seven Zonal Administrations'[86] and fifty two *woredas*, whereby the *woredas* are the final organs of the regional government to collect and administer taxes of taxpayers in their territory.

Under the FDRE constitution powers of the Federal and Regional governments are separately provided. In the cases of division of revenue among the two levels of governments, the regional states have power to levy and collect taxes and duties on revenue sources reserved to the States and to draw up and administer the State budget.[87] With respect to effective administration of the revenue sector, the regional state of Tigray has carried out many remarkable activities. To this effect, before March 2008 the office was set up as a single department within the Bureau of Planning for Finance and Economic Development of the region. After two years, 2010, the establishment of the sector is revised and made to be an Agency called Regional state of Tigray Revenue Agency through Proc. No.180/2002.[88] Further modification was made on the agency and it is now formulated as a Tigray Revenue Authority with the coming in to force of Proclamation No. 210/2003 of the Tigray regional state.[89]

Not only structure of the revenue sector, but the size of the businesses to be treated as small taxpayers (category C taxpayers in this case) was similarly fluctuating. Before the restructuring of the sector in July 2010, income tax assessment of category C taxpayers was

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[85] *Article* 47of the FDRE constitution enumerates the following 9 regional states, and 2 city administrations as members of the federal government. These are; the State of *Tigray*, the State of Afar, the State of *Amhara*, the State of *Oromia*, the State of Somalia, the State of *Benshangul Gumuz*, the State of the Southern Nations, Nationalities and Peoples, the State of the *Gambela*, the State of the *Harari*, the City administration of Addis Ababa, the City Administration of *Diredawa*. *See* FDRE CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETTE, 1st Year No. 1, Addis Ababa August 21 1995 (*here in after* referred as FDRE CONSTITUTION), Art. 47.

[86] The five zonal administrations are; Eastern zone, Central zone, Western zone, Southern zone, South Eastern zone, North Western, and *Mekelle* zones.

[87] FDRE Constitution, Art.52 (2(e)).

[88] *The Turn-over Tax (Amendment) Proclamation of the Tigray Regional State*, Proclamation No. 182/2002, TIGRAY REGIONAL STATE NEGARIT GAZETTA, 17th year Mekelle, August 8, 2010 No. 25, Art.1.

[89] Adjustment of the sector in to such form of organization (in the form of an authority) brought about comprehensive reformation of the administrative, legal, and financial changes. For example, in addition to the establishment proclamation, there were additional legislations enacted, such as regulation no. 68/2003 for the disciplinary regulation of its staffs. *See Income Tax Proclamation of the Tigray Regional State*, Proclamation No. 210/2003, TIGRAY REGIONAL STATE NEGARIT GAZETTA, 17th year No. 25, Mekelle, July 8 2011 Art.4 (1).

made by an estimated assessment.[90] The estimated assessment during this time involves representatives of the taxpayers, chambers office, trade bureau, revenue agency, and bureau of finance to make the estimating committee.[91] Estimations made by this committee had been used as a standard for the assessment of income of taxpayers for the next five consecutive years.[92] It is probably a simple mathematics to measure and find inefficiency and inequitability of such income tax assessment that was carried out without considering the economic factors affecting incomes of the small businesses. Therefore, we can say that until the dissolution of this committee, the approach of the revenue office was not appropriate due to inefficiency, probable tax base constriction, fairness, and system of the income tax assessment.

In 2010, the existing approach that has been done through such committees dissolved and replaced by another committee wholly made up of the then revenue agency, when the sector was established in an agency form.[93] However, there was no improvement in the approach of income tax assessment of small businesses except to the withdrawal of the estimation committee members who represented other four offices and wholly replaced by the revenue office. Therefore, during this time estimated assessment has been used. This indicates the insistence of the tax system to continue with daily estimation of income collected once, and applying it for years, as many as four or five, without revision when the sector was structured in the form of an agency.

Despite of the power given to the Bureau of Finance and Economic Development on the revision of the standard assessment matrices given annexed with the 'Tigray Income Tax Regulation No. 31/1995'[94], it has been revised only two times, in the whole past ten years. The revision for the elevation of the minimum profitability rate from 7% to 10% and extension of the number of sectors, at the same time increasing the number of sectors within the tax net, to be entertained under category C has been made on 2005 and 2008 E.C. respectively.[95]

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[90] *An Interview with Mrs. Alganesh Birhane*, Tigray regional state tax authority tax Assessment case team Coordinator, (13 November 2014).

[91] Each of the five bureaus explained above randomly assign a single representative and participate on the estimation. Here the estimated assessment was conducted once for the result of the estimation to serve for about five years.

[92] *Mrs. Alganesh Birhane*, *supra* note 90.

[93] *Id.*

[94] *The Tigray Income Tax Regulation*, Regulation No. 31/2004, TIGRAY REGIONAL STATE NEGARIT GAZETTA, Mekelle, April 2, 2004, Art. 22 (5).

[95] *Mrs. Alganesh Birhane*, *supra* note 90.

Table 1: *List of Statics Category A-C taxpayers in Eastern, and Mekelle Zones of Tigray*

S/n	Woreda	No. of taxpayers in each Category in 2011				No. of taxpayers in each Category in 2012					No. of taxpayers in each Category in 2013			No. of taxpayers in each Categ in 2014			
		A	B	C	S/total	A	B	C	S/total	A	B	C	S/total	A	B	C	S/to
1	Ayder	11	49	529	**589**	24	78	658	**760**	106	163	691	**960**	141	176	808	**1**
2	Hadnet	105	150	1012	**1267**	153	67	2500	**2720**	169	130	2165	**2464**	250	153	1820	**2**
3	Q/ Weyane	460	2800	3783	**7043**	274	1307	5893	**7474**	1370	1782	4918	**8070**	1580	865	3999	**6**
4	Hawelti	9	178	1344	**1531**	97	121	3761	**3979**	141	555	4205	**4901**	183	727	3763	**4**
5	Quiha	10	11	537	**558**	19	24	584	**627**	22	69	1023	**1114**	36	70	964	**1**
6	A/Haqi	60	4	863	**927**	77	65	951	**1093**	110	103	1410	**1623**	166	170	1235	**1**
7	Semen	169	180	1600	**1949**	148	210	819	**1177**	169	198	1782	**2149**	202	235	1532	**1**
Total in Mekelle Zone		824	3372	9668	**13864**	792	1872	15166	**17830**	2087	3000	16194	**21281**	2558	2396	14121	**19**
8	Adigrat	33	92	3315	**3440**	96	135	3546	**3777**	178	254	3311	**3743**	273	252	3764	**4**
9	Wukro	14	31	2010	**2055**	53	234	1779	**2066**	105	225	1715	**2045**	150	341	1876	**2**
10	Gulemekeda	8	9	488	**505**	7	11	502	**520**	21	-	603	**624**	26	3	652	
11	Irob	1	0	162	**163**	1	0	227	**228**	5	2	242	**249**	7	9	241	
12	G/afeshum	0	0	315	**315**	1	0	415	**416**	7	1	481	**489**	15	18	526	
13	Hawzen	1	1	660	**662**	16	7	697	**720**	28	13	823	**864**	12	51	856	
14	S/T/Emba	3	3	1200	**1206**	32	13	1182	**1227**	39	18	1227	**1284**	50	66	1450	**1**
15	A/wonberta	6	4	600	**610**	8	45	878	**931**	7	45	926	**978**	41	2	1049	**1**
16	KilteAwlaelo	0	1	479	**480**	0	39	557	**596**	9	43	632	**684**	24	88	852	
Total Eastern Tigray		66	141	9229	**9436**	214	484	9784	**10481**	399	601	9960	**10960**	598	830	11266	**126**
Total at Tigray Region		**890**	**321**	**18897**	**11385**	**362**	**694**	**10961**	**28311**	**568**	**3601**	**26154**	**32241**	**3158**	**3226**	**25387**	**317**

Source: *Tigray Regional State Revenue Authority*

VI. EVALUATION OF THE EFFICIENCY OF STANDARD ASSESSMENT FOR CATEGORY C TAXPAYERS IN THE TIGRAY REGIONAL STATE

Evaluation of the practice of income tax assessment of Category C taxpayers in the Tigray regional state looks in a better position compared with the other regions and city administrations in some aspects. One of the striking quality of the region in carrying out tax assessment is its tendency, at least as a plan, to introduce daily estimation on twice a year basis, apart from the practice of other regional states and city administrations which conduct the daily estimation once to serve a year or more. But this doesn't mean that this is the reality on the ground as there are many taxpayers who even complain the tax authority for its failure to conduct the daily estimation properly once per a year. [96]

Generally, despite the successive efforts of the authority to handle the sector in a way that brings a healthy tax system, the practice of standard assessment of Category C taxpayers in Tigray region is inhibited by many problems, inter alia, inefficiency of the tax assessment, which will be discussed below. This problem is partly attributable to the manual assessment made at least twice a year - which is not cost effective, and the lower satisfaction of taxpayers, which in turn reduces compliance rate of taxpayers. As it is dictated under Article 22 of the Income Tax Regulation No. 78/2002, any type of manual assessment is not required except for the assessment of the taxable income of category C taxpayers based on the tables annexed with the regulation.

Efficiency of an income tax system stands for delivering maximum results from limited resources.[97] With this standard, the amount of revenue to be gained needs to be fair considering the administrative cost spend on both the labor force, and expenses for related governance of the sector. Not only the amount of revenue collected but other intrinsic factors that determine the level of efficiency of the tax system need due protection in the course of income tax assessment. However, when we evaluate the efficiency of income tax assessment of category C taxpayers in the Tigray regional state, we can easily observe that it is far from the variable of efficiency. The manifestation of inefficiency is attributable for one thing to the number of staffs deployed for the sake of administrating these specific category taxpayers. In this respect, out of the total number of around 1154 staffs of the six departments of the tax authority, one third of them (over 27%) made up the estimation committee members mainly comprised under the data collection team.[98]

This would not be the problem but the fact that firstly, these staffs are not adequate enough, even considering the total concentration in the daily estimation task, to carry out the assessment.[99] The daily estimating committee members not only count the taxpayers income but also carry out many particular activities such as studying location of the business, amount

[96] Most category C taxpayers from *Wukro* City and *Kielte Awlaelo* woreda (two of the 52 woredas in the regional state) have complained in the collected data claiming the estimating committees of the tax authority in their locality didn't even estimate their daily turnover once a year properly. Rather they state that most of the time the estimating committees take an estimation of one taxpayer in that area and apply it to the other taxpayers without taking in to consideration the actual activity of the remaining taxpayers.

[97] Helaway Tadesse, & Günther Taube, *supra* note 12, at 9.

[98] Human Resource Data report of the Tigray Regional State in the Fiscal Year of 2014.

[99] The total ratio of the number of staffs to the number of category C taxpayers to be assessed shall be 1:371; whereby one staff shall study the daily estimation of taxpayers, turnover, thereby income tax liability of 371 Category C Taxpayers twice a year (a total of 742 visits per year) for an assessment of a single tax period.

of turnover, number of employees, size and content of stores, and other subsidiary factors that overburden the work of the estimating staffs.[100] In carrying out the task of estimation, it has been difficult, if not impossible, for the committees to estimate daily sale of the targeted businesses. It has been reported that the main problems in the estimation were lack of technical knowledge on estimation, limited training, non-appearance of some assessors at business premise, lack of voluntary cooperation by taxpayers to give information and underreporting.[101] Due to the large number of businesses location in 'Category C'[102], the task remained difficult for the members of the estimating committee to deliver comprehensive and effective estimation for all the targeted businesses, at least in the required and planned manner. Accordingly, due to the arbitrary completion of the daily estimation, the tax system suffers from inefficiency, tax burden, and dissatisfaction of taxpayers.

Secondly, the amount of revenue the tax authority is collecting is insignificant with or without considering the cost of administration of the income tax assessment. In the previous year, out of all Category C taxpayers in the region, 41% of them have a daily estimation below 50 Birr, which means the possible income tax revenue to be collected shall only be from the remaining 59% Category C taxpayers (Table 2).[103]

Table 2: *Daily estimation of below 50 birr per day of Category C Taxpayers in Eastern and Mekelle Zones of Tigray Regional State Tax Authority in 20014 Budget Year*

S/N	City/*Woreda*	Taxpayers assessed below daily sale of 50 Birr				
		0-20	**21-50**	**Subtotal**	**Percentage**	**Total**
Eastern Zone						
1	Wukro	44	406	450	21%	**2131**
2	K/Awlae'lo	124	311	435	57%	**764**
3	Adigrat	1044	1489	2533	58%	**4400**
4	Gantaafeshum	25	125	150	27%	**556**
5	Hawzen	83	286	369	44%	**845**
6	A/wenberta	57	288	345	31%	**1105**
7	Gulemekeda	161	280	441	56%	**784**
8	Irob	73	71	144	55%	**262**
9	Sae'sietsaedaemba	131	447	578	37%	**1583**
Mekelle Zone						
10	Qedamaywoyane	11	387	398	11%	**3723**
11	Hadnet	219	567	786	43%	**1820**
12	Adihaqi	206	565	771	62%	**1235**
13	Hawelti	82	424	506	14%	**3606**
14	Ayder	59	330	389	43%	**910**
15	Semen	115	356	471	32%	**1474**
16	Quiha	56	397	453	49%	**917**
	Total	**8964**	**21034**	**29998**	**41%**	**76,794**

Source: Tigray Regional State Tax Authority

From Table 2, we can see that 76,794 category taxpayers from the total of 115,309 category C taxpayers are relieved from a tax liability though they are within the tax net. Not

[100] *Mrs. Alganesh Birhane*, *supra* note 90.

[101] Annual 2014 feedback report to the Zonal Revenue Offices by the Tigray Regional State Revenue Authority, (Mekelle, Tigray), at 56.

[102] According to different sources of data from the Tigray Regional State Revenue Authority *(see table one above)* more than 90% of the whole taxpayers in the regional state are category C taxpayers.

[103] *Id.*

only the insignificant figure of taxpayers subject to tax compared with the number of estimating staffs deployed towards its administration, but also assessment of the taxpayer's income in a way that relieves such number of taxpayers from tax liability is indicating inefficiency by itself.[104] Having such number of taxpayers as subjects of taxation, the total contribution of these taxpayers is very minimal not exceeding 10% to the whole business income tax comparing to the massive administrative costs of the sector.

Apart from the exclusion of substantial taxpayers from tax liability, the incapacity of the below 50 Birr daily estimation to diminish from time to time is additional setback behind the inefficiency of the sector. Tax centers within the tax authority are manifesting a tendency whereby there is an increasing rate of taxpayers that escape the tax liability. If we can take the case of *Mekelle* zone's recorded data of 2013 and 2014, specifically, with respect to the number of category C taxpayers whose daily estimation is below 50 Birr, there is an increment of the numbers which are treated under the group with daily estimation below 50 Birr.

Table 3: *List of taxpayers below 50 Birr daily estimation in different Woredas /Municipalities/ of Mekelle Zone Tax Office*

***Woreda* /Municipality/**	**2005 E.C**	**2006 E.C**	**Increase**	**Decrease**
Qedamay woyane	11%	11%	0%	
Hadnet	37%	43%	6%	
Adihaqi	57%	62%	5%	
Hawelti	22%	14%		8%
Ayder	46%	43%		3%
Semen	22%	32%	10%	
Quiha	43%	49%	6%	

Source: Tigray Regional State Tax Authority

According to the above statistics (Table 3), daily estimation of category C taxpayers below 50 Birr in *Adi-haqi*, *Hadnet*, *Semen*, and *Quiha* Woredas have an increasing projection at 6%, 5%, 10%, and 6% respectively between 2013 and 2014.

The other pitfall of assessment of the sector with respect to efficiency is its inability to ensure fairness among taxpayers with in, and taxpayers in different tax centers. In Table 3 above, we can see the daily estimation made for the two tax centers, *Qedemay-woyane* and *Adi-haqi* in *Mekelle* zone is not justified on any cause, save for the arbitrary estimation of the estimating staffs of each tax centers.

Therefore, the practice of income tax assessment for category C income taxpayers is far away from achieving efficiency viewed in light with the number of employees of the tax authority deployed for estimation and the amount of return collected.

Thirdly, inefficiency of the tax system could be inferred from the contribution of the tax revenue to the whole GDP whereby income tax revenue is one constituent factor is too small. The tax to GDP ratio of Tigray region is around 7% during this time, which makes you concerned if you could normally talk about the efficient collection of tax in the real sense of

[104] Shallow differences among neighbor *Woredas*, 62% of 1235 taxpayers in *Adi-haqi* to 11% out of 3723 taxpayers in *Qedamay-woyane*, with more or less similar conditions are manifested during their income tax assessment.

the taxation.[105] These category C taxpayers take their share in the diminishing role of the income tax revenue to the whole GDP. As can be shown in Table 4 below, the tax to GDP ratio of the region is at the foot level to put a significant influence.

Table 4. *Tax GDP ratio of the Tigray Regional State*

Budget revenue	**Region revenue/state revenue**	**RGDP at current factor coast**	**Tax to GDP ratio**
2012	1,233,596	28,001,997	4.4
2013	2,157,911	34,065,637	6.3
2014	2,464,840	34,065,637	6.3

Source: Bureau of Finance and Planning of Tigray Regional State

According to the authority, partial inefficiency of the assessment of the tax liability of these taxpayers is attributable to the estimating committee members/staffs to some extent. Since most staffs of the authority who conducted the surveys are fresh graduates.[106] They were young, inexperienced, and ill-prepared and, thus either placed them in the wrong classification or negotiate for corrupt practices, many businesses complained. Other concerned authorities have also expressed their doubt on the graduates to estimate daily sale of businesses. Considering the limited short training offered for the graduates for estimating daily turnover of businesses, it has been found doubtful whether the employment of the young force as daily estimation committee members is comparatively advantageous or not.[107] As we have discussed under the preceding chapter; nature, location, and size of businesses do have significant role in the estimation of business turnover and hence the daily sale of such businesses can only be determined by the one who has experience in business world. The issue may be worsened if one considers the determination of daily sale for many of the businesses with one or two times a year visit as complained by many taxpayers.

VII. CONCLUSION

In principle, presumptive taxation presupposes a system where the required tax base is inferred from proxies other than records of taxpayers. Most of the proxies employed are the size, quantity, level, location, and other similar parameters.

Regarding its implementation in Ethiopia and specifically the regional state of Tigray, presumptive taxation has been exercised through standard and estimated assessments. Under this assessment practice, tax liability is being assessed based on a daily estimation of an annual turnover for each taxpayer taking some surrounding circumstances. This has been advantageous for taking in to account the prevailing conditions of the business thereby making its own effort to bring about equity. The other approach, standard assessment, determines tax liability at occupational level without regard to the other many factors. The main advantages with this approach are simplicity, certainty, comprehensiveness, and efficiency.

The power of taxation of category C taxpayers is vested to regional states and city administrations; so that the mandate is given to the Tigray regional state tax authority in the case of Tigray region which in turn is carried out and administered at a *Woreda* level. Within

[105] The total revenue collected in 2013 was only 2,464,840 Birr (6.3%) out of 3,887,685 GDP of the regional state. *See* Table 4 above.

[106] Out of the 1140 staffs of the authority (until 2014), 89% of them are young staffs of below 35 years of old.

[107] *An Interview with Ato Nigussie Muruts*, *supra* note 69.

this context, the regulatory framework for category C taxpayers has been varying from the estimated assessment to the standard assessment. In this regional state, estimated assessment was in its place since the introduction of modern income tax system in the 1940's up to the year 2010. This approach has been mainly known for its susceptibility to corruption, inefficiency, uneconomic, less simplicity, and unpredictability. Therefore, the approach is obliged to shift from the year 2010 onwards. The standard assessment is introduced for category C taxpayers to provide fixed taxes for small businesses in consideration of size, type and location of businesses. Because of the presence of fixed taxes, it was an expectation that role of tax officers could be limited to categorizing businesses in the appropriate category on the basis of indicators like size and location of businesses, to minimize tax authority intervention, bring about simplicity and efficiency, and other basic principles. However, the practice with the new standard assessment couldn't come with the expectation due to the improper implementation of Proc. No. 286/2002.

One of the shortcomings was instead of setting mechanisms/factors that would immediately enable to locate the proper place of the taxpayers; it has employed similar procedures with that of estimated income tax assessment. Under the standard assessment, two different schedules which were prepared based on turnover, and indicators in schedule one and schedule two respectively. In the first schedule, indicating parameters other than the turnover was not provided, while in the second schedule which comprises attorney, flour mills, and transport there are indicators of level, number of seats, and other factors.

Despite the introduction of standard assessment post 2001 to bring administrative simplicity and stability, the use of estimation of daily sales in assessment has made the very objective of standard assessment unachievable. The absence of indicators or other turnover verifying mechanisms for most of the categorized businesses in the schedule are the main failures that restore back estimated assessment. As a result, income tax assessment of category C taxpayers in Tigray region has manifested the problems varying from inequitibility to the lack of comprehensiveness. Due to the excessive discretionary power of the estimating committees to assess income tax liability of these taxpayers, the tax authority and taxpayers enter in to frequent dispute and lack of satisfaction. One of the typical principles of tax systems, equity, is not maintained due to the subjectivity of income tax liability assessment among similar earning taxpayers. Secondly, the tax assessment manifests lack of efficiency which can be observed from the insignificant contribution of the sector to the economy in spite of the large deployment of work force to it. Not only this, inefficiency can also be inferred from the lower tax revenue to GDP ratio and lack of building the required trustworthiness among the taxpayers and the tax authority.

Based on the above findings, with respect to the pitfalls of category C taxpayers, the following recommendations should be employed to significantly reduce the problems;

For the general problems arising from the application of estimated tax assessment approach, the tax authority should make amendments to the regulatory tables annexed with the income tax regulation in a manner that provides the implementation of ideal standard assessment.

Secondly, for the problems being manifested in relation to lack of efficiency, especially under an unchanged circumstance of the current assessment trend, some objective measurements, to be identified by further assessment and trainings, should be given to

promote the capacity of estimating committee members, and thereby reduce the problem of inefficiency.

Thirdly, in order to minimize the prevailing unfair treatment of taxpayers from different tax centers /*Woredas/*, specific variables of profitability rate should be given on a well studied basis. Even a minimum ceiling of tax should be set to reduce the number of taxpayers escaping tax liability.

In addition to this, since the main goal of the regional tax authority in relation to category C taxpayers is boosting up of their experience in extending culture of paying tax and increasing compliance behavior instead of mere collecting tax revenue, satisfaction of the taxpayers should be maintained through privileged treatment and wise grievance handling.

Finally, in order to build trustworthiness and, at the same time minimize the number of grievances from such category C taxpayers, representatives of the business community should be made part of the daily estimation persistently.

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URBAN LAND ACQUISITION AND SOCIAL JUSTICE IN ETHIOPIA

Legesse Tigabu Mengie*

Abstract

As urban land could be used for manifold purposes, urban residents look for such land enthusiastically to serve their enormously diverse interests. Thus, urban land use laws and policies should be flexible, apt and transparent to respond to such various and complex land demands. An inflexible form of land transfer and management system may drive some section of the society out of the land deal and an extremely flexible urban land permission and use system could result in a pervasive corruption and that in turn could lead to bad governance. In this work, the author argues that the existing urban land acquisition system of Ethiopia has resulted in social injustice by denying the poor from access to urban land; and creating discriminatory environment while enforcing the new lease system.

Keywords: access to land, land lease, social justice, tenure security, urban land policy

I. INTRODUCTION

Man's life cannot be thought of in the absence of land. Land is everything for a person. Land laws, policies and strategies should be framed in a way that they could accommodate the land related interests of all sections of a society.[1] The right to privacy, freedom, full development of one's personality and the very existence of a person, in one way or another, depend on land as land and improvements overland are so important in maximizing human satisfaction. Hence, the right to access to land cannot be seen separately from other basic rights. It is overwhelmingly interrelated with other fundamental rights of individuals as full realization of these rights is impossible without real properties (land and buildings)[2]. Access to urban land, in particular, needs special consideration as urban land is so scarce and the competition over it is so stiff.

As Mattew Robinson put it correctly, social justice embraces virtues including "share of common humanity by all people, having a right to equitable treatment, support for human rights and fair allocation of community resources."[3] McCarrick and Darragh have also considered the fair allocation of common resources as one of the core elements of social

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[1] IFAD, IMPROVING ACCESS TO LAND AND TENURE SECURITY, (2008) Palombi e Lanci, Rome, at .1-10

[2] Wickeri, Elisabeth & Kalhan, Anil, Land Rights Issues in International Human Rights Law, (2010) Institute for Human Rights and Business. Available at http://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf

[3] Robinson, Matthew. 2016. What is Social Justice? Department of Government and Justice Studies Appalachian State University. Available at http://gjs.appstate.edu/social-justice-and-human-rights/what-social-justice

justice.[4] Needless to say, the widely accepted conception of social justice requires objective distribution of wealth, privileges, responsibilities and opportunities within a society. This work endorses such conception of social justice and approaches it through analyzing the existing system of allocation of urban land in Ethiopia.

Contemporary literature on Ethiopian urban land lease system has unearthed most of the salient problems with the existing urban land allocation system. Zelalem Yirga has, for example, identified some of the bottlenecks in the existing lease system including those related to land valuation, registration, transfer and compensation.[5] Zemene Haddis has approached transaction of land use rights in Ethiopia from the perspective of sustainable development and social justice.[6] Nonetheless, his work focused on rural land transaction in general and rural land lease in particular. Takele Necha, Kwame Serbeh and Melese Assefaw have, on the other hand, asserted that lack of effective implementation is among the worth considering problems with the existing urban land lease system while they parenthetically indicated that the lease system is formulated in a way to ensure the benefit of the government and the rich. One can, however, hardly find a scholarly work which has directly embarked on acquisition of urban land and social justice in Ethiopia. This work aims primarily at filling this gap in scholarship. It will also address related issues including the Ethiopian Integrated Housing Development Program (IHDP) in urban centers, regularization of illegal holdings and conversion of old possessions to the lease hold system.

For better understanding, this work is designed to have five sections. Section one provides general explanation on urban land policy and social justice. Section two examines the Ethiopian urban land lease system, the Integrated Housing Development Program and social justice. Section three addresses conversion of old possession to the lease holding system and its implication on social justice. Section four addresses regularization of illegal holdings and the treatment of land holders. Finally, section five provides concluding remarks.

This work has concentrated on analyzing the relevant laws with some account of the practice to examine the implications of the Ethiopian urban land acquisition system on social justice. It is, therefore, primarily research in law than reach about law (law in context).

II. OVERVIEW: URBAN LAND POLICY AND SOCIAL JUSTICE

Ethiopia has not so far adopted a single and unified land use policy. One has to look into the different land legislations and development related policies to fully understand the county's land policy. However, as long as urban land is concerned, the country has introduced urban land development and management policy in 2011 before the adoption of the existing lease system in October 2011. Among the major objectives of this policy are ensuring access

[4] Pat Milmoe McCarrick & Martina Darragh, *A Just Share: Justice and Fairness in Rosource Allocation*, Bioethics Research Library, the Joseph and Rose Kennedy Institute of Ethics, Georgetown University, USA (1997), available at https://repository.library.georgetown.edu/bitstream/handle/10822/556888/sn32.pdf?sequence=1

[5] Zelalem Yirga, *Critical Analysis of Ethiopian Urban Land Lease Policy Reform Since Early 1990s*, FIG Proceeding, on Engaging the Challenges–Enhancing the Relevance, Kuala Lumpur, Malaysia 16-21 June 2014. (2014). Available at http://www.fig.net/resources/proceedings/fig_proceedings/fig2014/papers/ts07k/TS07K_adamu_6825.pdf

[6] Zemene Haddis, *Towards improved land use transactions in Ethiopia,* Annual World Bank Conference on Land and Poverty (2013), at 1-12.

to urban land to the poor; and fostering sustainable urban land use.[7] The laws enacted later have, however, overlooked these objectives as will be explained in this manuscript.

Ordinary citizens, business men, associations, governmental organizations, NGOs and other forms of institutions eagerly look for urban land for different purposes. There are different sections of the society with different interests in urban areas would mean that the urban land use laws and policies should be accommodative and responsive to various land demands. A rigid form of land transfer and management system may force some section of the society out of the land market and a tremendously flexible form of landholding permission may result in endemic corruption and that in turn could result in bad governance.

Flexible and appropriate urban land laws and policies would allow the poor to participate in land development and this in turn can minimize illegal settlements and foster sustainable urban land development. On the other hand, inflexible and non-holistic urban land administration[8] may encourage illegal settlement and is a threat to sustainable land development. As UN-Habitat explained it, non-accommodative and rigid urban land administration systems would result in unauthorized settlement.[9]

Well advanced urban land administration system may ensure tenure security as it can provide integrated land information system through cadaster and land register. But such tenure security will not, by its own, reduce poverty and bring about sustainable development.[10] Providing both access to land and tenure security are the two preconditions that should be met to achieve efficient and equitable urban land development. Tenure security is an incentive for urban residents to bring about perpetual and valuable improvements over a piece of land as no one dares to invest a lot on a plot of land in vain. Hence, efficient urban land development cannot be ensured in the absence of tenure security. Tenure security makes no sense in the absence of access to land. Nor access to land in the absence of tenure security. Urban land development could not be equitable unless it is inclusive and it could not be inclusive so long as urban land is not accessible to the public at large. Sustainable urban land development, therefore, requires both tenure security and inclusive land acquisition system. UN-Habitat has rightly explained the importance of both tenure security and access to land stating that there has to be commitment to:

> *providing legal security of tenure and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies.*[11]

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[7] Urban land development and management policy of Ethiopia, May, 2011, Addis Ababa. This policy was introduced before the enactment of the Ethiopian urban land lease holding proclamation No. 721/2011 to guide the adoption process of this proclamation. Yet, a number of provisions under the proclamation stand against the objectives set under the urban land policy.

[8] Non-holistic urban land administration system directly or indirectly excludes a significant portion of a society from getting access to urban land and land related services.

[9] Dale, Peter. 2000. *The importance of land administration in the development of land markets - a global perspective*, University College London, England, at. 35.

[10] Ibid.

[11] Ibid.

Thus, providing tenure security and making land accessible to all - including people who are in economically disadvantageous position like the indigent and women - would be exceedingly important in fostering sustainable urban land development. The principle for urban land transfer is tender[12] which makes land unaffordable to the lower class and the exceptions under the lease holding proclamation No. 721/2011 too do not favor the poor except in case of condominiums.[13] This may signify that the urban land lease reform is not responsive to the demands of the poor in urban areas.

III. ETHIOPIAN URBAN LAND LEASE SYSTEM AND SOCIAL JUSTICE

Social justice in land administration requires participatory land transfer and use system. Whatever the form of land tenure system a country may have adopted, an equitable land market system is indispensable to ensure access to land to everyone. Ensuring social justice in urban land allocation is imperative these days.[14] South Africa, for example, has gone through many urban land policy reforms to rectify the past segregations, ensure tenure security and bring about sustainable development.[15]

The FDRE constitution obliges the government to enact laws which "guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, social origin, color, property…or other status"[16] and formulate policies which ensure that "all Ethiopians get equal opportunity to improve their economic conditions".[17] All resource related laws, policies and measures introduced by the government are expected to be in light of these grand constitutional principles. A legislation which apparently treats individuals equally may indirectly discriminate against a section of the society for it fails to consider prevalent facts and this might have detrimental effect on the livelihood of those discriminated against. 'Equal and effective protection' would require laws, policies and measures which give due attention for substantive and not formal equality.

The existing lease system has introduced transparent and accountable land transfer system and this in turn has minimized corruption. The rent seeking individuals cannot negotiate with and bribe public officials to get large tracts of land which are used to enrich both the officials who get bribery and the rent seekers who further transfer these plots of land to derive excessive money over bare land without introducing any improvement.

Though the existing urban land lease system has made the land acquisition system transparent and accountable, the substantive rules governing acquisition of land have actually

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[12] See Art 7, 8 and 12 of the Ethiopian Urban Land Lease Holding Proclamation No. 721/2011. Cumulative reading of these provisions leads to the conclusion that urban land is unaffordable to the poor as they have to compete with the rich through tender procedures and they rarely acquire urban land through allotment proceedings set under art 12 of the lease proclamation.

[13] Ethiopia, Urban Lands Lease Holding Proclamation No. 721 /2011. FEDERAL NEGARIT GAZETA, 18th Year No. 4, 28th November 2011, Addis Ababa [Urban Land Lease Holding Proclamation No. 721/2011 hereafter]

[14] Paul Hendler & Tony Wolfson, *The planning and "unplanning" of urban space, 1913-2013: Privatized urban development and the role of municipal governments*, (2013) at. 29.

[15] KAROL BOUDREAUX, LAND REFORM AS SOCIAL JUSTICE: THE CASE OF SOUTH AFRICA, Institute of Economic Affairs: Economic Affairs, March 2010, (2010), pp. 13-20. Blackwell Publishing, Oxford http://www.iea.org.uk/sites/default/files/publications/files/upldeconomicAffairs343pdfSummary.pdf

[16] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, FEDERAL NEGARIT GAZETA, 1st Year No.1, ADDIS ABABA – 21st August, 1995, (FDRE CONSTITUTION hereafter), Art 25.

[17] See Art 89 of FDRE CONSTITUTION.

made a significant portion of the society incapable of accessing urban land. This is evident when we see the urban land lease hold rules which prohibit acquisition of land other than through the lease system and the rules on tender which is the principle in the urban land lease and allotment which is open in exceptional cases.

Individual citizens who do not have the financial means to compete in lease tenders nor can make use of the modality of allotment to access urban land (as this is allowed in exceptional cases) are denied equal opportunity with others in distribution of the most important national wealth - land. Those who have been rent seekers and got rich overnight manipulating the previous lease system are now financially capable of offering highest prices in tender procedures and can easily drive out the majority whenever the government offers land lease bids. What is worse, there is no limitation on the number of lease bids an individual may participate in. As long as an individual is competing for different plots, there is no any limitation on the number of bid documents he/she may buy and this allows the rich to push out the lower class in each and every offer. All these would mean that the dealing over the cake is between the rich and government. Thus, the government has failed to adhere to the constitutional economic objectives of the country.

Making urban land unaffordable to some section of the society would have serious implications on social rights[18] of those who cannot access land and this becomes an impediment to progressive enhancement of citizens' access to housing and social security. Thus, the existing urban land lease law, by failing to set an accommodative land acquisition system, has defeated the grand social objectives under the constitution. Though the government claimed to have helping the poor by providing land for free for the construction of condominium houses, the number of individual who benefit from such government controlled scheme are too little to change the overall situation.

It should also be noted that individuals seek land not only to build a resident but also to do other activities for their livelihood. If the poor are looking for secured and long term urban tenure for such purposes, they can get it only through tender procedure and this procedure would obviously drive them out of the game as the rich are able to bid higher land prices and make urban land unaffordable to the poor. In this regard, the new lease system failed to ensure social justice which requires equitable distribution of common resources including land. Art 89(2) of the FDRE constitution declared that "government has the duty to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them."[19] To advance social justice and improve land development, land development policies, laws, programs and plans should be accommodative and consider the land interests of the poor.

IV. THE INTEGRATED HOUSING DEVELOPMENT PROGRAM (IHDP): REMEDIAL MEASURES

The housing development experiences before 2005 revealed that unplanned, informal and private housing development have poorly responded to the housing demand in urban areas. This was partly due to the undesired bureaucracies in getting urban land, nationalization

[18] See Art 41 and the following of the FDRE CONSTITUTION.
[19] See the remaining sub articles of Art 89 too of the FDRE CONSTITUTION.

policy of previous Derg regime that banned construction of extra houses and ever increasing informal housing supply.[20]

Table 1: Houses constructed in Addis Ababa, 1996-2003 *(UN: HABITAT)*[21]

Housing Supplier	No. of Houses	Percentage
Public	7, 409	8.4
Cooperatives	24, 830	28.2
Individuals (Formal)	22, 225	25.3
Real estate developers	3, 520	4.0
Informal sector	30, 000	34.1
Total	87, 976	100

Source: Addis Ababa City Government, 2004.

Such distorted housing scheme has of course resulted in shortage of houses and has made the same unaffordable. Such difficulties have dictated the government to introduce an Integrated Housing Development Program (IHDP) in 2005.

Since the year 2005, Ethiopia has been executing its ambitious IHDP aimed at constructing over 400,000 units (houses) in urban areas to meet the house demands of the low and middle income inhabitants.[22] The projected time of completion was 2010. Out of the total houses, about 175,000 units were planned to be built in Addis Ababa.[23] But, only around 100, 000 were built until 2013.[24] Nationwide about 200,000 units were built, i.e. 50% of the plan until 2013 fiscal year.[25] As this project was meant to be completed in 2010, the delay in the construction process is evident. Considering the ever rising demand for housing, the government has renewed its housing development program in Addis following the adoption of the current lease system. The government has also attempted to expand the housing programs into other major regional cities but met with immense challenges of financing, maladministration and price rising.

After the government renewed its housing program in 2014, close to one million people got registered in Addis alone to get house through 10/90, 20/80 and 40/60 housing programs.[26] Most of the residents (780,000) are registered for the 20/80 program and the remaining for 40/60.[27] The number of people registered for the 10/90 program is insignificant and the government has long claimed that it has achieved this program. The government has provided

[20] UN HABITAT, CITIES WITHOUT SLUMS: SUB REGIONAL PROGRAMME FOR EASTERN AND SOUTHERN AFRICA, SITUATION ANALYSIS OF INFORMAL SETTLEMENTS IN ADDIS ABABA, (2007), at. 11.

[21] ADDIS ABABA CITY GOVERNMENT, HOUSES CONSTRUCTED IN ADDIS ABABA, 1996-2003, (2004) (as cited by UN: HABITAT)

[22] UN HABITAT, CONDOMINIUM HOUSING IN ETHIOPIA: THE INTEGRATED HOUSING DEVELOPMENT PROGRAMME, (2011), at. vii. This integrated housing development plan was introduced in 2005 and the projected time of completion was 2010.

[23] *Id.*, at.11.

[24] ZEMEN MAGAZINE. 2013, interview with Ato Mekuria Haile, Minister of Urban Development and Construction, Ethiopia.

[25] *Id.*

[26] http://ethioconstruction.net/?q=news/bureau-set-speed-housing-construction, Under 10/90, 20/80 and 40/60 programs, individuals are expected to save 10%, 20% and 40% in advance and the remaining balance (including interests) will be paid within defined times. The state-owned Commercial Bank of Ethiopia is stepping up for paying the remaining amount.

[27] *Id.*

about 40,000 units under the 20/80 program in 2014[28] and over 35,000 in 2015.[29] Yet, one can think the time it will take the government to provide housing to close to one million people. Circumstances dictate the government to invite the private sector in housing development. One should keep in mind that in addition to the registered people, we have the young generation joining the world of work every year and looking for similar housing schemes.

Despite the figures depict low performance; the IHDP has, being the first of its kind, made many homeless home owners. As the private sector housing scheme is encumbered with a multitude of problems which could naturally make the market price of houses so expensive, the IHDP has supplied house units at a relatively lower but continuously rising prices. As HABITAT explained it,

> *"Private sector housing supply remains constrained by high costs and time required for title registration, land access and construction material supply, along with cumbersome and expensive procedures for land and property transactions and the shortage of experienced private developers."*[30]

Such a fundamental shift from old and poorly constructed government owned housing to privately owned units, as advocated by IHDP, seems appropriate.[31] However, as the government has controlled the construction process, lack of competition in housing development has serious ramifications. The investigator has, for instance, personally observed incomplete and poor quality houses constructed by government and transferred to citizens in many cities in Ethiopia. Moreover, the fact that such houses are being constructed in the outskirts of the cities would also mean that the poor living far away from their work places, services they need and other activities they do will face very costly life than they can think of and this in turn makes living in condominium units unaffordable.

The new lease proclamation has facilitated the prospective IHDP. As clearly stated under Art 12(c) of the lease proclamation, urban land, up on decisions of the cabinet of the concerned region or city administration may be transferred through allotment for public residential housing programs and government approved self-help condominium housing constructions.[32] If an individual opts to construct his own unit through "public residential housing construction programs and government approved self-help housing constructions" (Art 12), he is not expected to go through the tender procedures to get urban land as his association or a government agency (in case of public residential housing construction) can invoke Art 12(1(c) of the lease proclamation. This would mean that individuals who have chosen such housing schemes can easily escape sky rocketing lease prices of tender proceedings. However, the government has not yet approved and provided land for self-help housing constructions other than its own housing programs.

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[28] Zerihun Getachew, Ethiopia: City to Transfer 20 Thousand Condos. ALLAFRICA.COM, 10 June 2014. http://m.allafrica.com/stories/201406110264.html/

[29] Over 35,000 condominium houses transferred to Addis dwellers; ETHIODEMOCRACY, March 23, 2015 http://www.ethiodemocracy.com/index.php/news/item/372-over-35000-condominium-houses-transferred-to-addis-dwellers.

[30] Supra note 13, at.9.

[31] Zelalem Adamu, *Institutional analysis of condominium management system in Amhara region: the case of Bahir Dar city***,** AFRICAN REVIEW OF ECONOMICS AND FINANCE, Vol. 3, No.2, (201) 1-19.

[32] See Art 12(1(c) of the Urban Land Lease Holding Proclamation No. 721/2011.

It is good that the lower and middle income residents get urban land for construction of condominiums without any payment and that makes the lease system flexible to some extent. Yet, the gaps and ambiguities under the lease holding laws make it uncertain if such lease holders are free of lease prices at all throughout the lease period. The lease payment obligation is evident if one closely reads Arts 5, 16 (2 & 3) and 20(7) of the lease holding proclamation. Art 5 of the proclamation unequivocally prohibited urban land possession and permission other than lease holding.[33] Art 16 requires a lease contract to include payment schedule except for budgetary government entities and religious institutions who pay only compensation in the course of clearing the land (Art 20(7)). If individuals to whom urban land is transferred for construction of condominiums have to pay lease price, then, when, how much and under what conditions they may pay is also not clear.

Hence, the government should clarify the ambiguities in a way that guarantees accommodative and flexible urban land lease and housing development schemes which can serve the poor and ensure sustainable land development.

V. CONVERSION OF OLD POSSESSIONS TO LEASE HOLDING AND SOCIAL JUSTICE

The other issue related with access to urban land and tenure security is the conversion of old possessions into lease holding system. The year 1994 marked the introduction of a lease system (Proclamation No. 80/1993) in Ethiopia to administer urban land.[34] This proclamation declared that once the lease system under the proclamation entered into force, urban land should be administered through lease. But, its enforcement did not go far and we can even find urban areas not administered through the legally prescribed lease system hitherto. This proclamation was later repealed by Proclamation No. 272/2002.[35] This proclamation too remained dormant in most of the urban areas in Ethiopia and got repealed by urban land lease holding Proclamation No.721 in 2011.[36]

Therefore, there are old possessions (non-leasehold land use rights) which predate the introduction of the lease hold system in 1994 and continue as such in urban centers. Accordingly, "old possession" is defined under Art 2(18) of the Lease Hold Proclamation No. 721/2011 as "a plot of land legally acquired before the urban center entered into the leasehold system or a land provided as compensation in kind to persons evicted from old possession."[37] As the previous lease proclamations were not implemented nationwide effectively, most of urban land holdings in Ethiopian cities are acquired through legal arrangements other than the lease system. According to the definition provided under Art 2(18) of the proclamation, such holdings or substitutions given when such holdings are expropriated are considered as old possessions.

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[33] Ibid. See Art 5(4). This particular provision empowered regional cabinets to identify urban centers which will be exempted from the rules set under the lease holding proclamation and its subsidiaries. But, this power is temporary and the proclamation will govern all cities after 5 years.

[34] Ethiopia, Urban Lands Lease Holding Proclamation No. 80/1993. NEGARIT GAZETA No. 40, 53rd Year, 23 December 1993, at. 92-98, Addis Ababa.

[35] Ethiopia, Re-enactment of Urban Lands Lease Holding Proclamation No.270/2002, FEDERAL NEGARIT GAZETA, 8th Year No. 19, 14th May 2002, ADDIS ABABA.

[36] Ethiopia, Urban Lands Lease Holding Proclamation No. 721 /2011. FEDERAL NEGARIT GAZETA, 18th Year No. 4, 28th November 2011, Addis Ababa.

[37] *Id.*, see Art 2(18).

If most of the possessions in Ethiopian cities are old possessions as per the definition discussed above and such old possessions are going to be converted to lease holdings, addressing such conversion is worth considering in appreciating the implications of the conversion to social justice. Article 6 of the new lease proclamation has declared that the old possessions will be converted to lease holding after studies are conducted by the appropriate body. Transfer of urban land holding rights other than through inheritance will also automatically convert the old possession to a lease holding.[38]

Those who have old possessions are paying fixed and relatively low rents hitherto. Such fixed payments are set considering living standards of citizens and are affordable. These people are not paying market prices for the land. On the other hand those to whom urban land is transferred through the lease arrangement have to pay very soaring down payments and periodic lease payments to complete the remaining balance. The researcher found such differential treatment unjust. There is no any substantive ground to treat the old and new possessions differently except the point of time. Two individuals exercising urban land use rights on plots of the same size, place and purpose will have to pay significantly different amounts as the one who received such land through the lease system has to pay the market price while the other with an old possession on a land of the same value has to pay not market lease price but very low and fixed land tax. The people and state should be able to derive appropriate proceeds from old possessions as the owners of land in Ethiopia.[39] Thus, the government has to embark on converting old possessions and should set benchmark lease prices to be imposed on old possessors when it takes such a measure as the lease price to be paid by old possessors cannot be determined through tender procedures.

One may say that the new lease system should not change the real property rights of urban residents retroactively. One of the cardinal principles of law is that no law should affect already existing legal relationships retroactively. This is to ensure certainty and confidence in creating legal relationships. If laws can apply retrospectively and disturb already established legal rights and obligations, individuals will not feel confident while involving themselves in land related transactions. Such retrospective effect of law can also undermine citizens' reliance on legal instruments and institutions. Yet, compelling circumstances (for example, uniform administration of land) may dictate the state to introduce such laws. Under the Ethiopian legal system, it is not totally impossible to enact laws with retrospective effects. What is clearly prohibited is enactment of criminal laws with such effect (Art 22 of FDRE Constitution).

A contrary reading of this particular provision would give us the impression that the government can enact retroactive laws on civil matters when pressing circumstances require so though the general principle is that laws should not have retroactive effect. Thus, converting old possessions to the new lease system could bring about social justice, uniformity in administering urban land and sustainable and healthy development of urban centers. Such conversion process should, however, be flexible to allow the poor continue holding their possession with affordable lease prices. The problems which are caused by the

[38] Ibid, see Art 6 of the urban land lease holding proclamation along with other provisions which set the obligations of someone with urban land holding rights.

[39] Mekasha Abera, *Ethiopian Basic Lease Law Concepts and the problems associated with the lease system*, April 2013, at. 40.

existing lease holding system should, of course, not be allowed recur in the conversion process.

What is rather challenging is the discontent those old possessors will have when government starts implementing such conversion. The country introduced a lease hold system in 1994 and thus the majority of the residents in urban centers got their land use rights under the old possession system and many even have been getting urban land through such system after the adoption of the lease system as the urban lease hold proclamations were inactive in many urban centers until recently as I explained it earlier.

The lease hold proclamation No. 721 is silent on many issues about conversion of old possessions into the lease system. It does not go beyond stating that "the modality of converting old possessions into lease hold shall be determined by the Council of Ministers (CM) on the basis of a detailed study to be submitted by the (concerned) Ministry".[40] The proclamation has not set time framework. It has not also given basic directions on how the CM should determine the modality of conversion. To the author's knowledge, neither a detailed study nor a decision on the modality of conversion to be used is made so far. Institutional, economic and political factors could explain the government's reluctance on this compelling issue. Whatever factor might have caused such a delay, the old possessors are benefiting a lot paying relatively low fixed land tax while the new possessors have to pay the market prices of land.

The other point worth considering here is the change in size of the parcel following conversion. When an old possession is converted into the lease system, the old possessor's land size may increase, decrease or remain unchanged according to the national standard to be approved. The Amharic version refers to the 'national standard to be approved' and the English version employs the phrase 'in accordance with the approved national standard'.[41] As the Amharic versions of the Ethiopian laws practically prevail over the English version when there are inconsistencies between the two versions, we should think of a new standard to be approved to guide implementation of the lease proclamation. The country has not so far approved a new national standard since the enactment of the urban leasehold proclamation and different plot sizes of the same purpose are being transferred to individuals through tender procedure. As any ambiguity in the prospective plans and standards may open room for corruption and defeat the purposes of the proclamation, such delicate issues need to be treated watchfully.

The urban land lease hold proclamation has also a discriminatory effect against those whose old possession size has to be reduced in light of the national standard to be approved. While those individuals who get extra land will only pay the market price of this additional land like other citizens, individuals whose old possession size has to be reduced will get compensation only for the 'property to be removed from the land so reduced'; they will get nothing for losing part of their land use right.[42]

Transfer of any property attached to an old possession through whatever modality except inheritance results in conversion of the old possession into the lease system. This shows how the government is enthusiastic to gradually convert old possessions into the lease system

[40] Art 6(1), Urban Lease Hold Proclamation No. 721/2011.
[41] *Id.*, Art 6(2).
[42] *Id.*, Art 6(2)(a).

making use of the natural course of transaction in real property in urban centers rather than taking a measure which transforms all old possessions at a time. Equally, merging of an old possession with a new lease hold converts the whole holding to lease hold reads.[43]

On the other hand, transfer of a property attached to an old possession through inheritance does not result in conversion of the old possession. The rationale behind this might be to leave the rights transferred through such modality undisturbed as inheritance is not for consideration and doesn't form part of commercial transaction. One thing that we should take note here is that the exemption that the heirs may exercise over transferred old possession will come to end whenever the CM adopts a modality to convert all old possessions into the lease hold system.[44] Thus, this exception under art 6 sub art 3 of the urban land lease hold proclamation is temporary and will become inapplicable after some time. Yet, given the reluctance the government has shown to convert old possessions into the lease system, this exception may last long.

Here, the researcher is not suggesting that the government should swiftly convert old possessions to the lease system. Swift and ignorant measures could result in quite onerous and unaffordable obligations. But the standard at which old possession are converted into the new lease system are haphazard and less convincing, and deserve scientific approach.

VI. DISCRIMINATION AMONG ILLEGAL LAND HOLDERS AND BETWEEN LEGAL AND ILLEGAL LAND HOLDERS

Circumstances have forced some urban dwellers to resort to informal (illegal) land acquisition and that has persisted for years due to government's reluctance to take appropriate administrative measures until very recently. While the proclamation guarantees legalization of illegal holdings which are acceptable in accordance with urban plans and plotting standards under the lease system, it does not provide any compensation for those whose holdings are unacceptable. This is clear discrimination among illegal land holders. Though discriminated illegal urban land holders do not have legal claim against the government, they should be treated alike and compensated in kind or cash once the government has started tolerating previous illegal holdings. It is also very costly to destroy what has been built simply because an old possession is incompatible with the plans and parceling standards and such a measure can have a serious impact on the country's economy. Thus, compelling exceptions and appropriate reparation should have been included under the relevant provision of the proclamation.

> *In order to regularize possessions held without the authorization of the appropriate body, the possessions which have found to be acceptable in accordance with urban plans and parceling standard following the regulations to be issued by regions and city administrations shall be administered by lease holding. (Art 6(4)).*

The provision is poorly crafted as it does not provide a complementary provision which considers the interests of the remaining possessors. This could also open a room for corruption unless utmost care is taken by the government in preparing urban plans and parceling standards. Any ambiguity in crafting such instruments will have undesired ramifications. The

[43] *Id*., Art 6(6).
[44] *Id*., Art 6(3).

illegal land holders could use all the means including bribery to secure their holding and vague standards and plans can exacerbate this as public officials can justify their arbitrary decisions by manipulating vague terminologies. Hence, such delicate issues need utmost good-faith and care.

Besides, the urban lease hold proclamation, by regularizing illegal old possessions which are acceptable in accordance with the plans and parceling standards to be adopted, has taken a position which could disappoint the law observing citizens. While the illegal old possessors are rewarded, those who obeyed the law and left themselves landless have to pass through tough tender procedures to get urban land under the existing lease hold system. This is noticeably uncalled-for handling of the matter. Regularization of illegal holdings might be necessary given its intensity and the country's poor land administration system; yet this could have been done after imposing some form of penalty on those who held land illegally. By failing to do so, the proclamation has encouraged urban residents to keep on holding urban plots illegally. Unauthorized land hold has become prevalent even after the coming to force of the existing urban lease hold proclamation.[45]

Such social injustice under the proclamation does have severe impacts on those who are not lucky old possessors nor financially able to get land through the current lease arrangement. The present lease law has pushed out this class of the society. Addressing this particular problem requires amendment of the lease proclamation to draw exceptions to ensure that land is accessible for the desperate people through a lawful means. Otherwise approach would infringe the grand principle which declares that land belongs to the people and state of Ethiopia.

VII. CONCLUSION AND RECOMMENDATIONS

This work has examined the problems related to urban land acquisition and social justice in Ethiopia. It has depicted that the Ethiopian urban land acquisition system is not flexible enough to respond to the ever increasing demand for urban land. It also uncovered that though the government introduced the Integrated Housing Development Program (IHDP) to help poor urban residents without requiring them to go through tender procedures, the houses offered through such programs are not still affordable to a significant portion of the society, are low quality, and not accessible to all. What is more, individuals look for land not only to build residents but also to do other activities for their livelihood. If the poor are seeking for secured and long term urban tenure for such purposes, they can get it only through tender procedure and this procedure would obviously drive them out.

This work has also revealed how the reluctance on conversion of old possessions to the lease hold system, the regularization of illegal land holdings and the discrimination among the illegal land holders can result in social injustice. Individuals who have urban land use rights on plots of the same size, place and purpose will have to pay significantly different amounts if we tolerate the mutual existence of the old possession and lease holding system. The one who acquired such land through the lease system has to pay the market price while the other with an old possession on a land of the same value will pay not the market lease price but very low and fixed land tax. The people and state, as the owners of land, should be able to derive appropriate proceeds from old possessions. Doing so would not stand against the principle of

[45] THE REPORTER, Widespread unauthorized land holding, Addis Ababa, 03 August 2014.

non-retroactivity of laws as exceptions to this principle are not prohibited in enacting civil laws when compelling circumstances dictate so. The regularization of illegal land holdings and discrimination between the illegal land holdings also resulted in social injustice. Regularization of illegal land holdings has rewarded the law breakers and ignored those who are left landless because they adhered to the law. The lease holding proclamation, by treating the equals (illegal land possessors) substantially unequally (differently), has again resulted in social injustice.

The author, therefore, recommends that the current urban lease holding proclamation and the subsidiary lease holding laws should be amended to adopt accommodative urban land acquisition and transfer system which even, at times, allows the poor acquire urban land for free as land in Ethiopia belongs to the public at large and everyone should be enabled to access it. Secondly, the government should also revise the discriminatory rules on regularization of illegal land holdings and conversion of old possessions.

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