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Editorial – A Message from the Editorial Committee

Dear authors, reviewers, and readers:

It gives us immense pleasure to wish you all a Happy New Year 2022 from the *International Journal of Ethiopian Legal Studies* (IJELS). We feel honored and fortunate to be a part of this peer-reviewed international journal and are working as a highly effective team to ensure it continues to be a trusted source in the field of legal science.

We are delighted to publish Volume 6 No. 1 of the IJELS. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us in various ways. Importantly, we are grateful to all manuscripts contributors, reviewers, and layout editors who did the painstaking editorial work of this issue. As in our previous issue, the Committee would like to amplify that the IJELS is destined to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome. The Editorial Committee makes a call to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. The past few years have shown an increase in scholarly papers from different legal practitioners. However, more needs to be done for the research and writing community to put their imprints on the legal and institutional reforms that are still underway in Ethiopia and beyond. It is highly praiseworthy to conduct a close scrutiny of the real impacts of old and new laws upon the social, political, economic and cultural life of our society today. It is equally important to study and identify areas that really demand legal regulation and to advise the legislature to issue appropriate legal instruments in time. In this process, the IJELS serves as a forum to make meaningful contributions to our society and to the international community at large.

As we move forward, we expect our readers to provide us feedback that will inform us on how we are satisfying their needs and the extent to which they feel we are fulfilling our mandate to publish a scientific journal that provides the highest quality literature that is both informative and practical for students, researchers and practitioners in the field.

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DIVERGENCE BETWEEN THE LAW AND THE PRACTICE ON THE RIGHT TO SELL OF RURAL HOUSES IN ETHIOPIA: EVIDENCE FROM THE AMHARA NATIONAL REGIONAL STATE

Melkamu Belachew Moges*

Abstract

In Ethiopia, rural land holders as well as practitioners are left with uncertainty regarding the right and freedom to sell properties they produced on their land–holding for dwelling purposes and like. The message conveyed by the FDRE Constitution and rural land legislations in this respect has not been clearly understood and applied. This paper aims to investigate the real content of the legal provisions and the practice with respect to the sale of rural houses in Ethiopia by providing empirical evidence from Amhara National Regional State (ANRS). The research applied both qualitative and quantitative research methods. The qualitative method was used to analyze data collected through focus group discussion (FGD) and key informant interviews. 5 FGDs were conducted with a total of 85 rural land-holders in each of the Five selected woredas and with Nine judges selected from the Bahir Dar Area High Court and the Supreme Court of ANRS. To analyze relevant laws, I applied doctrinal analysis. I also applied comparative law method to compare the Ethiopian land transfer regime with that of China and Vietnam. The quantitative method was applied to present data collected through questionnaire. Questionnaire survey was applied to collect information from two groups of respondents: 50 rural land administration and use staff in the selected Five woredas (districts) and a total of 30 judges working in courts representing the Five selected woredas. The data obtained was presented by a simple statistical tool using figure, tables and percentages. The study has found out that the law does not prevent the sale of rural houses in Ethiopia as it is the case in Vietnam and China. However, the study showed that the law has been understood by both the people and experts to prohibit the practice of sale of rural houses. The study suggests that a clearer and more complete legislative coverage as well as an active and better oriented staff in land administration and use offices and courts should be ensured in order to enforce existing land policy properly.

Keywords: Rural houses, sell practice, land law, ANRS, Ethiopia

INTRODUCTION

Land right or real property right gives the individual a number of rights. Schlager and Ostrom provided a model for understanding the different powers or actions a land right can entitle the owner. According to them, these powers are access, withdrawal, management, exclusion and alienation or land transfer.[1] A comprehensive model to property rights especially to the

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[1] Schlager, E. & Ostrom, E, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 (3) Land Economics, 249−254 (1992). Other authors have updated these rights who identify eight rights under three major

ownership right has been provided by A. M. Honore who listed 11 'incidents of ownership' that have come to be known as 'the bundle of rights': the right to possess, the right to use, the right to manage, the right to the income, the right to the capital value of the object, the right to security against expropriation, the right of transmissibility or transfer through sale, gift, bequest, the right of absence of term, the duty to prevent harmful use, liability to execution and the incidence of residuarity.[2] Anthony Scott identified a minimum of six fundamental characteristics of property rights: duration, flexibility, exclusivity, quality of title, transferability, and divisibility.[3] O'Driscoll and Hoskins[4], on their part, consider that the two essential elements of property rights are the exclusive right of individuals to use their property and the ability of individuals to freely transfer it. From these works, one can understand that the right to transfer property is considered as one of the fundamental characteristics or attributes of property rights.[5] Many countries in the 'developed world' have created a property institution system for the free and convenient transfer of land among their citizens.[6] Exercising a right of transfer of a property right also known as the right to alienation involves the right to sell or lease out the property object and associated rights to the sale or lease.[7] However, the ability to bequeath property is better treated outside the right to transfer.[8] The most obvious justification for the right to transfer land is to provide the possibility of transferring resources to their highest or best valued use.[9]

The jurisprudence with regard to rural property transfer in particular has not been well–settled in Ethiopia. With respect to rural lands, there is a question of whether the land laws permit sale of rural houses, which are mostly used for residential purpose and animal keeping. As will be evident in later discussions, legal framework on real property rights is not detailed; understanding of relevant legislation is low; and political orientation is not in terms of existing legislation and policy. The key questions are whether rural land parcels on which houses are constructed can be seen differently from those without construction, and, whether, in the case of rural lands, the land on which a house is constructed may be treated differently from the house constructed. These questions become relevant because the Constitution of Federal Democratic Republic of Ethiopia (FDRE) has a provision which states that urban and rural land is owned by

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sets of property rights. The three sets of rights are use rights, control rights and authoritative rights. Use rights include two rights, namely, use of direct benefits and use of indirect benefits; control rights include management, exclusion and transaction, and monitoring rights; authoritative right includes definition and allocation of rights. See Thomas Sikor, Jun He and Guillaume Lestrelin, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis Revisited*, 93 World Development, 338−340 (2017).

[2] Honore AM (1961), Ownership, Making Law Bind: Essays Legal and Philosophical cited in Muireann Q, *Property and the Body: Applying Honore*, 33 (11) Journal of Medical Ethics, 631− 634 (2007). See also Jeremy Waldron, *What Is Private Property?* 5 (3) Oxford Journal of Legal Studies, 313−349 (1985).

[3]Anthony, Evolution of Individual Transferable Quotas as a Distinct Class of Property Right (Edited version of a paper presented at the NATO Conference on Rights-Based Fishing, Reykjavik, 1988) cited in John Sheehan & Garrick Small, Towards a Definition of Property Rights (Paper presented at the Pacific Rim Real Estate Society (PRRES) conference, Christchurch New Zealand, 2002)19.

[4] Gerald P. O'Driscoll Jr. & Lee Hoskins, Property Rights: The Key to Economic Development (Policy Analysis, No.482, 2003).

[5] See also Jean-Philippe, P *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment*, 27(1) Development and Change, 29 − 86(1996).

[6] See generally Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere else?(Black Swan Publisher, 2000) 160–218.

[7] Schlager and Ostrom, *supra* note 1, at 251.

[8] Id. at foot note 8.

[9] Id. at foot note 8.

the state and the people and hence not subject to sale and other forms of transfer.[10] On the one hand, the Constitution has provisions which stipulate that private property is protected.[11] Further it is provided that an individual can transfer property developed on his land (private property) through sale or other means.[12] On the other hand, this research has revealed that in practice rural houses may not be sold in ANRS because their sale may be treated as the sale of rural land (See Section 3). So there is an apparent diversion between the general practice and the law. This diversion creates conundrum on the question of whether selling investments on land is constitutional and legal in Ethiopia. This conundrum might open the room for varied application of the same matter in different areas and with regard to different experts or agencies in the region especially the `agencies which deal with rural land administration and use. Further, this diversion between the law and practice may limit the great potential that the transaction in real property has in accruing economic, social, and moral values to society (See Section 5). The negative impact that this situation impinges on the economic development of Ethiopia in general and ANRS in particular can never be underestimated.

The objective of this study is to see critically into the practice of rural house transfer in Ethiopia and investigate whether such practice is in conformity with the rules in the FDRE Constitution (1995) and the relevant land administration and use laws at Federal and regional level. The issue of sale of rural houses has not been addressed in previous research which means this research is of paramount importance both in its own merit as well as initiator for debate and further research on the issue of land transactions in rural Ethiopia. The paper explores the dilemmas, arguments and disputes on the question of whether sale of rural houses is a lawful practice in Ethiopia. It explores the legislative framework, evaluates the practice on the sale of rural houses and, finally shows the gap between the content of the law and the practice by providing empirical evidence from ANRS, one of the largest regional states in Ethiopia. To this end, the researcher framed four specific research questions in order to obtain results. These questions relate to (1) whether or not rural house sale is deemed legal in ANRS in particular and in Ethiopia in general, (2) whether or not the attitude on sale of rural houses is in terms of the spirit of the law, (3) whether or not there exists any practice of rural house sale and the challenges impacting on it, and (4) how sale of rural houses can be justified legally and economically.

The paper is organized into five main sections. The first part deals with the research method employed in the paper. The Second Section espouses the status and scope of the right to transfer rural property in present day Ethiopia. This part furnishes a bird's eye view of the land ownership and policy features in the country. It also provides for the land ownership legislation of China and Vietnam with the view to infer the similarities and differences with respect to the scope of land rights as compared to Ethiopia. The Third Section deals with the perceptions and attitudes on the law regarding sale of rural houses. That is, the interpretation of the law and the level of interests and demands on the sale of rural houses. The Fourth Section deals with on the practice of sale of rural houses and the challenges faced on the attempt to sale rural houses in

[10] Constitution of the Federal Democratic Republic of Ethiopia Proclamation,1995, Proc No 1/1995, *Fed Neg Gaz*, Year 1, No.1, Art. 40 (3).
[11] Id. at Art. 40 (1). A private property is defined as a thing which has value and is produced by the labor, creativity, enterprise or capital of a person: At Art. 40 (2).
[12] Id. at Art. 40 (7).

ANRS. The Fifth Section part deals with the justifications for allowing the practice of sale of rural houses in Ethiopia in general and in ANRS in particular.

1. RESEARCH METHODOLOGY

Ethiopia is presently divided into 11 regional states and 2 city administrations. The ANRS has pioneered rural land registration in Ethiopia.[13] Land registration has already been carried out in most parts of the region like several other regions in the country.[14] The practice of sale of rural houses can best be traced through the system of registration. This is because, first, one of the well-known functions of land registration or formal property systems is the fostering of real property transactions including sale.[15] Second, sale practices that are conducted outside of the land registration system are generally not given state protection and are generally considered as unlawful. There are two reasons why ANRS is purposely selected as case study. First, the land registration system in the different regions of Ethiopia including ANRS is generally similar at policy level. This is because regions undertake land registration under a similar overarching legal and policy framework envisaged in the FDRE Constitution and the national and administration and use law.[16] The law gives the regions the power to administer land located in their region in line with Federal legislation.[17] Therefore, an exaggerated difference is not expected among the regional land administration laws. Second, ANRS is facing many land disputes. Although in principle the recent land registration reforms in Ethiopia have resulted in the reduction of disputes as compared to the previous times when there had been no formal land registration[18], this does not mean that land dispute has decreased significantly. In fact, there are situations whereby the land registration system itself could generate more disputes especially when the system is not up–to–date and efficient.[19] The disputes include the ones arising in relation to sale and other transactions with respect to rural houses (See Section 4). The author himself, as legal practitioner (Since 2009), has witnessed a large flow of court cases on land in general and land transactions in particular in ANRS.

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[13] Abab, S. A. An Assessment of Rural Land Registration and Land Information System in Amhara Region, Ethiopia: A Land Administration Perspective (Unpublished MSc Thesis, the Royal Institute of Technology (KTH), Stockholm, Sweden, 2007) 29; Shibeshi, G. B.. Cadastral Procedure and Spatial Framework for the Development of an Efficient Land Administration System for the Rural Lands of ANRS (Amhara National Regional State) of Ethiopia (PhD Dissertation for Obtaining a Doctorate Degree at the University of Natural Resources and Life Sciences Vienna, Austria, 2014) 27.

[14] Abebe, G., Gebremeskel, T. and Bennett, R. Implementation Challenges of the Rural Land Administration System in Ethiopia: Issues for Land Certification and the Information System (Paper presented at the World Bank Conference on Land and Poverty, Washington DC, 2015); Adenew, B. & Abdi, F. Land Registration in Amhara Region, Ethiopia (Research Report 3, Central Research Department of the UK's Department for International Development, 2005); Persha, L., Greif, A., Huntington, H. Assessing the Impact of Second-Level Land Certification in Ethiopia (Paper presented at the World Bank Conference on Land and Poverty, Washington DC,2017).

[15] De Soto, supra note 6, at 36–38.

[16] Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proc. No, 456/2005, *Fed Neg. Gaz*, Year II, No. 44.

[17] Id. at Art. 17 (1).

[18] Holden, S.T., Deininger, K., Ghebru, H. *Tenure Insecurity, Gender, Low-cost Land Certification and Land Rental Market Participation in Ethiopia*, 47 (1) The Journal of Development Studies, 31–47 (2011).

[19] Berhanu Adenew and Fayera Abdi, Land Registration in Amhara Region, Ethiopia (Research Report 3, Central Research Department of the UK's Department for International Development, 2005) 24; Zerfu Hailu, Land Governance Assessment Framework Implementation in Ethiopia Final Country Report Supported by the World Bank (2016) 40.

ANRS has 216 *woredas* and Five representative *woredas* were selected as study sites because they are the easiest to gather information in terms of their being near in distance from where the researcher works and lives (convenience sampling). The *woredas* selected as study sites were Bahir Dar Zuria *woreda*, Gondar Zuria *woreda*, Fogera *woreda*, Gozamen *woreda*, and Guangua *woreda*. *Woreda* rural land administration and use offices and courts are located in the towns of Bahir Dar, Gondar, Woreta, Debre Markos, and Chagnie where rural land administration and use offices of Bahir Dar Zuria *woreda*, Gondar Zuria *woreda*, Fogera *woreda*, Gozamen *woreda*, and Guangua *woreda* respectively are located. Given the nature of the research being highly founded on legislative analysis in relation to sale of rural houses, the practice in these Five *woredas* is believed to represent the practice in ANRS. This is because, as we mentioned earlier, all *woredas* administer land according to uniform legal framework[20], institutional apparatus and leadership under the auspices of the Bureau of Rural Land Administration and Use.

The research applied quantitative and qualitative research methods of data analysis. The quantitative method was used to analyze data obtained through questionnaire. The questionnaires were distributed for land administration staff and judges in the sample *woredas*. 50 land administration staff were selected to respond to the questions in the questionnaire survey. The sample respondents were selected using purposive (non-probability) sampling with the view to contact staff with better training background in land administration and surveying and have longer experience in office in this field. The sampling population that is the total number of land administration and use staff in ANRS was 822. Similarly, 30 sample judges were chosen purposely from the sampling census of 1300 judges in all *woreda* courts of ANRS. An effort was made to get the judges with better exposure to land matters by talking to the respective Presidents of the courts.

In order to investigate the question of whether rural house sale is deemed legal in ANRS, I have employed a special qualitative research method known in the legal field as doctrinal analysis. Being a distinct social science, 'law' has developed its own research approach based on the doctrinal methodology. Doctrinal analysis principally involves the critical reading of statutes and court judgments with little or no reference to the real world.[21] The pure doctrinal analysis has however been criticized for its 'intellectually rigid, inflexible and inward-looking' approach of understanding law and its operation.[22] Therefore, it has become necessary to support this method by empirical analysis involving questionnaires and the like.

The questionnaires were applied to collect data in order to answer especially the 2nd, 3rd, and 4th research questions identified in the Introduction. Further, three FGDs were conducted first with 85 randomly selected rural land–holders coming from Bahir Dar Zuria *woreda*, Fogera *woreda*, and Gozamen *woreda.* The second FGD was applied with respect to Nine purposely selected high profile judges in ANRS working in Bahir Dar Area High Court and the Supreme Court.[23]

[20] Currently, the Proclamation being applied in the region is: The Revised Rural Land Administration and Use Determination Proclamation, 2017, Proc No 252/2017, *Zikre Hig*, Year 22, No 14.
[21] McConville, M., Chui, W. H., (Eds), Research Methods for Law (Edinburgh University Press, 2007).
[22] Vick, D. W. Interdisciplinary and the Discipline of Law, 31 *Journal of Law and Society*, 163−193 (2004). Waldron, supra note 2, at 313−349.
[23] FGD with Kegne Bezabeh, Getaye Admas, Kasahun Yehunie, Ato Mulu, Solomon Goraw and others (total Nine), National Regional State Supreme Court and High Court Judges (Bahir Dar, 2018)

The FGDs were applied as a supplementary tool in order to support and validate (triangulate) the data obtained from the questionnaires.

I have taken additional measures to enhance the reliability or validity of the conclusions obtained in this study. With respect to analysis of what Ethiopia's law says on the scope of the right to sell of rural houses, I have applied a comparative law method. Comparative law method was applied by taking two countries, namely, China and Vietnam, for comparison in the context of international experience with regard to land transfer. These countries were selected because of their similar, if not identical, land ownership policy to Ethiopia, i.e., collective ownership of land.[24] It is good to see the different approaches on the right to transfer real property taken by jurisdictions with related land ownership policy. Further, I have undertaken key informant interviews with three selected judges with long experience in the courts working in Bahir Dar and Debremarkos area to support the FGDs with judges.[25]

2. THE STATUS AND SCOPE OF THE RIGHT TO TRANSFER RURAL PROPERTY IN ETHIOPIA

2.1. Ethiopia's Land Policy on Land Ownership and Transfer

Sale of land was a lawful practice before the change of regime in 1974 and the coming into force of landmark land nationalization proclamations[26] following the change. After the coming into force of these legislations the regime of private property ownership to land was abrogated and entirely replaced by the regime of public or collective ownership of land. The reform introduced by these legislations brought about the first uniform tenure system in Ethiopia whereby all rural and urban land was declared to be the property of the state. The system of public ownership of land continued unabated during the post–*Derg* era. Land policy derives from the FDRE Constitution and the proclamations arising from it. The FDRE Constitution prescribes that the right to ownership of rural and urban land, as well as of all natural resources, is vested in the State and in the peoples of Ethiopia.[27] Theoretically, the State and the peoples, together, have all rights of property. Just as in the case of the *Derg* era, individuals are prohibited from indefinitely transferring land by sale and other means of transfer and exchange.[28]

In Ethiopia, unlike the practice in the majority of countries in the world, there are distinct land administration systems as well as legal frameworks for urban and rural lands although the overarching land policy is the same. In addition to the rural–urban dichotomy in land administration, there is, in fact, one major difference between the land tenure in rural areas and that in urban areas. That is the land tenure of rural areas, as will be discussed later, is called 'land

[24] Holden, S. & Bezu, S. Land Valuation and Perceptions of Land Sales Prohibition in Ethiopia (Conference, Milan, Italy, International Association of Agricultural Economists, 2015).
[25] Interview with Mr. Habtamu Wuletaw and Mr. Berihun Adugnaw, ANRS Supreme Court Judges (Bahir Dar, 2018); Interview with Mr. Abush Waga, Awabel *Woreda* Court, East Gojjam Zone (Debre Markos, 2018).
[26] These proclamations are known as the Public Ownership of Rural Lands Proclamation No 31/1975 and Government Ownership of Urban Lands and Extra Houses Proclamation, 1975, Proc No 47/1975, *Neg Gaz*, Year 34, No 41.
[27] FDRE Constitution, supra note 10, Art.40 (3).
[28] Id.

holding' whereas the land tenure of urban lands is called 'leasehold system'. Proclamation No. 80/1993 introduced the leasehold system for the first time and leasehold system became the only officially recognized urban land holding system. Urban Lands Lease Holding Proclamation No.721/2011 which replaced previous lease legislations (Proc. No.272/2002 and Proc. No.80/1993) is the law being enforceable at present.[29] Transfer of urban leasehold right is, in principle, a right. Accordingly, the urban leasehold law allows a transfer of lease right in the form of sale, mortgage and contribution in Share Company which is common practice in urban areas.[30] That is, the matter of sale of urban buildings is relatively clearly governed.

The present applicable rural land administration and use law, which replaced the Federal Rural Land Administration Proclamation No. 89/1997, introduced the concept of 'land holding right'.[31] The concept of 'holding right' has been directly applied by the rural land use and administration laws of South,[32] Afar[33], Somali[34] and ANRS[35] while other regional states use the term 'possession right' instead.[36] The meaning attached to the term 'land holding right' sheds light on the scope of rural land rights in Ethiopia in the present era. FDRE land law defines land holding right as:

> The right of any peasant farmer or semi-pastoralist and pastoralist to use rural land for purpose of agriculture and natural resources development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.[37]

The analysis of this definition and other provisions of federal rural land administration and use proclamation depicts that land-holders have various rights on their land. Thus, they have the right to use and enjoy rural land; the right to lease or rent land to fellow farmers or to investors[38]; the right to pass it through inheritance or donation to members of their family[39]; the right to undertake development activity solely or jointly with an investor[40] and the right to acquire and

[29] Urban Lands Lease Holding Proclamation No.721/2011.
[30] Id at Art. 24.
[31] Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proc. No, 456/2005, *Fed Neg. Gaz*, Year II, No. 44. The legislation generally recognizes three types of land holding, namely, state/government holding, communal holding and private holding. See Art. 2 (11), (12) and (13). The ANRS land legislation puts this classification succinctly. See ANRS Rural Land Proclamation No 252, *supra* note 20, Art.6.
[32] The State of Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007, Art. 2(6).
[33] The Afar National Regional State Rural Lands Administration and Use Proclamation No 49/2009, Art. 2(6).
[34] The Ethiopian Somali Regional State Rural Land Administration and Use Proclamation No 128/2013, Art. 2(4).
[35] ANRS Rural Land Proclamation No 252, *supra* note 20, Art 2(24).
[36] See the Benishangul Gumuz Regional State Land Administration and Use Proclamation Number 85/2010, Art. 2(4); ''The Proclamation to Amend the Proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration Proclamation No. 130 /2007, Art. 2(7). However, it is better to use the word 'holding' instead of 'possession' because first the former term is in line with the Federal law's use of the term and second possession has a different meaning in the Ethiopian Civil Code as an 'actual control which a person exercises over property'(Articles 1140−1150). Also there has to be a uniform application of terms within the land laws of all regions in the country as much as possible.
[37] FDRE Rural Land Proclamation Proc. No, 456/2005, *supra* note 31.
[38] Id. at Art. 8(1).
[39] Id. at Art. 8(5) & Art. 5(2).
[40] Id. at Art. 8(3).

transfer property produced on land. Further, an investor land holder who has leased rural land may present his land right as collateral/mortgage.[41] This mortgaging right is now being extended to other rural land holders. Thus, the ANRS Proclamation No 252/2017 provides that any rural landholder may mortgage his land use right to a financial institution for not more than Thirty years.[42]

The regional rural land administration and use proclamations provide similar stipulations on the content of the rights on land. The ANRS Proclamation No 252/2017 provides that:

> "holding right" means the rights of any farmer, semi-pastoralist or any other person vested with rights on land to be the holder of land, to create assets on the land, to transfer an asset he created, not to be displaced from his holding, to use his land for agricultural and natural resource development and other activities, to rent his land, to transfer it in the form of donation, succession and includes the like.[43]

The South, Somali and Afar land proclamations define 'holding right' as the right of any peasant or semi–pastoralist and pastoralist to use rural land for the purpose of agriculture, animal husbandry, and natural resource development, to lease and bequeath to members of his family or other lawful heirs, the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.[44] The Oromia proclamation provides for the right to use and lease land holding, transfer it to his family member and dispose property produced thereon, and to sell, exchange and transfer the same.[45]

While in the *Derg* era, sale, lease, land exchange, and mortgage of land were prohibited, in the post–*Derg* era, only sale of land is unequivocally prohibited. Other forms of alienation are slowly being permitted. Rent right (sometimes called lease) is a common right in all land legislations; land to land exchange is specifically permitted such as in Article 20 of the ANRS Rural Land Administration and Use Proclamation No. 252/2017; mortgage, as we mentioned earlier, is now extended to all land–holders in ANRS, since the coming into force of the new Rural Land Administration and Use Proclamation No.252/2017.

In the eyes of the law, prohibition of sale of land does not imply the prohibition of sale of other immovable. Despite public opinion and practice in the country discussed in later sections, the constitution and the land administration proclamations generally stipulate the right to private ownership and the sale of the private belongings. Indeed, the constitution stipulates clearly that '[e]very Ethiopian citizen has the right to the ownership of private property' and that this right includes the right to dispose of such property by sale.[46] While such stipulation is general, for immovable property, the constitution specifically stipulates that '[e]very Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include *the right to alienate*, to

[41] Id. at Art. 8(4).
[42] Id. at Art. 19 (1).
[43] ANRS Rural Land Proclamation No 252, *supra* note 20, Art. 2(24).
[44] South Land Administration and Use Proclamation, *supra* note 32, Art. 2(6); Somali Land Administration and Use Proclamation, *supra* n 34, Art. 2(4); Afar Land Administration and Use Proclamation , *supra* note 33, Art.2 (6).
[45] Oromia Land Administration and Use Proclamation, *supra* note 36, Art. 6(1).
[46] FDRE Constitution, *supra* note 10, Art. 40 (1).

bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it.'[47] In this provision, the term 'full right to the immovable property' and 'the right to alienate' the property, taken together, may be interpreted to mean private ownership of the property.

In most regional proclamations too, the sale of rural houses and other developments is lawful. As we just mentioned above, the ANRS, South, Somali and Afar regional states' proclamations provide for the right to sell developments on land that includes rural houses. In this regard, the Oromia state land proclamation is exceptional. It provides for more restrictive scope of land rights as compared to the others. It stipulates that 'any peasant or pastoralist, or semi pastoralists who has the right to use rural land shall have the right to use and lease on his holdings, transfer it to his family member and dispose property produced there on, and to sell, exchange and transfer the same without any time bound'.[48] This apparently looks fine and consistent with the idea in the Federal land legislations and other regions' legislations. It is also normal when it clearly stipulates that, in any condition, the right to sell property does not include the land.[49] However, what is worrying is the fact that it prohibits the selling of fixed assets like coffee, mango, avocado, papaya, orange etc. Worse yet, it holds that 'any individual or organ who bought houses and other buildings built on rural land shall be obliged to take off his property'.[50] This implies that the sale of rural houses or buildings is deemed unlawful, contrary to the rule in the FDRE Constitution as well as the Federal rural land legislation.[51]

In conclusion, we can see that, in Ethiopia, an individual farmer or communal land user group is entitled to private property or ownership for the property he builds on the land such as houses, trees, crops, and so on. That is, he has an ownership right. Therefore, the individual has all bundles of rights over this private belonging including the right to sell the immovable built on his land. The Civil Code provisions on sale of immovable property[52] will, therefore, apply in this case to govern the contractual relationship between the seller and the purchaser.

2.2. REAL PROPERTY TRANSFER IN CHINESE AND VIETNAMESE LEGAL SYSTEM: SOME LESSONS FOR ETHIOPIA

No single nation can remain an island with absolutely a distinct type of property regime. Accordingly, Ethiopia's collective/state ownership regime has resemblance to other countries' property regime in the world. China and Vietnam are one of the countries to which Ethiopia's property ownership region has similarity. The Chinese Property Rights Law categorizes property ownership into three: State (Public) Ownership, Collective Ownership and Private Ownership.[53]

[47] Id. at Art 40(7) [emphasis added].
[48] Oromia Land Administration and Use Proclamation, *supra* note 36, Art. 6(1).
[49] Id. at Art. 6(6).
[50] Id. at Art 6(8).
[51] For a discussion on issues relating to Federal–State power division on rural land administration and legislation making and possible recommendations, see Melkamu, B. *Critical Gaps in Land Governance with Respect to the Land Registration System in Ethiopia*, 15(2) Mizan Law Review, 419–454 (2021).
[52] The Civil Code of the Empire of Ethiopia Proclamation, 1960, Title X, Proc. No. 165/1960, *Neg. Gaz*, Extraordinary Issue, No. 2. Title 18, Ch. 1.
[53] Chinese Property Rights Law (2007), Ch.V.

The rules show that individual ownership embraces mainly houses to which the right of inheritance and other legal rights and interests are attached.[54] Further, a legal person such as an enterprise or other entity shall have the right to possess, utilize, obtain benefit from and dispose of its real properties.[55] More provisions on what the owners can do with respect to houses are provided. The Law states a fundamental principle that a person has the right to 'the use of land for construction' in rural and urban areas.[56] The person has the right to possess, utilize and obtain profits from such land and has the right to build buildings on it. Further, he has the right to transfer, exchange, make as capital contribution, donate or mortgage the land.[57] Such land may be acquired by means of assignment or transfer by auction or invitation to bid and not by sale from others.[58] It is stated that the ownership of the building and similar structure built by the person with the right to 'the use of land for construction' shall belong to such person be it individual, collective or even the state.[59] The Law also states that a transaction with regard to the land for construction use includes the buildings and related structure on the land and vice versa.[60] As we mentioned earlier, the right to the use of land particularly for construction of residential housing use belongs to the collective owners; but the person with the right to use such land has also the right to build residential houses.[61]

It should be noted that the right to transfer or sale houses is not clearly provided in the Chinese Law. But it may be gathered from various rules which indirectly address the matter. For example, Article 147 provides that where the buildings and similar structures on land for construction use is transferred, exchanged, made as a capital contribution or donated, the right to the use of such land for construction use as being occupied by such buildings shall be disposed of together. We can therefore see that houses are saleable both in rural and urban areas.

In Vietnam, the land resource is owned by the entire people as represented by the state as stipulated in the Constitution.[62] Articles 54, 167 and 179 provide for the bundle of rights of land use for organizations and individuals over real property.[63] These include land assignment, land lease, recognition and protection of the land use right, the right to exchange, transfer, bequeath, donate, mortgage and to contribute as capital. The word 'transfer' of land use rights is defined as the transfer of land use rights from one person to another by ways of exchange, transfer, inheritance or donation, or capital contribution.[64] So the word is applied both narrowly and broadly. In its narrow sense, it seems to include the right to sell houses and 'other land-attached assets' to land. Although the law is not clear enough to recognize the right to sale of rural houses, the right may be inferred from other provisions. Thus, it is provided that one of the cases of land

[54] Id. at Art.64.
[55] Id. at Art.68.
[56] Id. at Art. 135.
[57] Id. at Art.143.
[58] Id. at Art.137.
[59] Id. at Art. 142.
[60] Id. at Arts. 146–7.
[61] Id. at Arts. 152–5.
[62] Vietnam Constitution (2013), Art. 53.
[63] Id.
[64] Vietnamese Land Law (2013), Art. 3 (10).

use whereby a certificate of land use rights is granted to persons is when ownership of houses and 'other land-attached assets' through purchase is obtained.[65]

The other important issue in the Vietnamese Land Law is the status of the right with respect to houses and 'other land-attached assets' to land: is the right ownership right or land use right? The answer is not clear. On the one hand, there are provisions which do not seem to entitle ownership of house. For instance, the Law stipulates a fundamental principle that the State guarantees 'the lawful rights to use land and land-attached assets of land users'.[66] Further, Article 104 dictates that a certificate granted for 'land-attached assets' which include houses, other construction facilities, production forests, and perennial crops is not an ownership certificate per se but 'a certificate of land use rights and ownership'. From these latter provisions, it seems that houses are not privately owned. On the other hand, there are different provisions which mention the right of ownership of these properties. For instance, Article 95(1) states that land registration is voluntary in the case of 'ownership of houses and other land-attached assets'. When we see this and other similar provisions it seems that houses can be indeed privately owned.

The moment is now ripe to have a few words as a matter of comparison among the Chinese, Vietnamese, and Ethiopian real property rights regime. The Chinese Law provides more elaborated types of ownership of real property as individual ownership, collective ownership and public ownership. Ownership to the land and to the permanent assets or houses on the land as well as various rights both on the land and such assets is clearly presented. The right to the sale of houses may also be easily implied from the Law. The Vietnamese Land Law recognizes only public ownership of real property; citizens having only land use right. Of course, they are provided with various bundles of rights with regard to this land use. The ownership as well as the right to sale of houses is permitted albeit in a vague manner. In Ethiopia, land ownership is only public ownership.[67] The status of ownership of permanent assets like houses attached on the land is, relatively, the most confusing one. Indeed, there is clear provision giving the right to private property on these properties but I consider that this means private ownership, at least, a special type of private ownership within the overarching frame of public ownership of land. As we have discussed already, the various bundle of rights with regard to this private property including sale are clearly provided both with regard to rural and urban lands. It can be concluded that the Chinese property rights regime is the most advanced as compared to the Vietnamese and Ethiopian real property rights regime. The latter countries need to do more to come up with clearer and more advanced real property rights. Especially, Ethiopia should come up with detailed provisions on the types of real property ownership. The finding to be presented in the following parts of the paper strengthens the need for clear and elaborate property rights legislation as the key to enhanced real property transfer in rural areas.

3. SALE OF RURAL HOUSES: PERCEPTION ON ITS LEGALITY AND THE EXTENT OF ITS DEMAND

[65] Id. at Art. 99(1)(g).
[66] Vietnamese Land Law (2013), Art. 26 (1).
[67] State, communal, and private holding should not be confused with state ownership of land because all land held by communal groups and individuals as well as state entities is owned by the state and the people as per FDRE Constitution Art. 40 (3).

Perceptions and the resulting interpretations of rules in legislation may affect the practice with respect to that specific legislation. Thus, it is useful to view the attitudes different persons have on the issue of what the legislation says about sale of rural houses. The land administration and use staff (50) and judges (30) were asked a few questions as to what their office believes regarding the legality or otherwise of sale of rural houses and policy support for the activity. All land administration and use staff respondents (100%) and 43 % of the judges said that sale of rural houses is unlawful, i.e. existing legal framework and policy does not support it. As compared with the response of land administration staff, the judges' response for 'yes' and 'no' is proportional.

In a similar manner, FGD with land–holders also indicated that most land–holders believed the sale of rural houses is unlawful.[68] There is, they responded, strong control by the *kebele* officials on the construction of rural houses and transactions relating to them. FGDs and interviews with judges also showed similar opinion.[69] Therefore, it can be concluded that the overall opinion regarding sale of rural property in ANRS is against the actual terms and meaning of the law. As we discussed before, the Constitution prohibits the sale of land; however, prohibition of sale of land does not actually tantamount to the prohibition of sale of developments or constructions on land. The FDRE Constitution as well as most rural land legislations permit the right of land holders to private property and the full right to alienate the immovable property they built on their land-holding. This right is part of the concept of bundle of 'land holding right'. Surely, a rural house is a typical immovable property that a rural land–holder builds or permanently improves on his land by employing his labor, capital and skills. As such, the individual has a full private property or ownership right on this immovable and, as a result, can transfer it through sale and other means.

From among the judge respondents who replied that the sale of rural houses is lawful (57%), about half (47%) held that the sale of rural houses is consistent with the FDRE Constitution, the Civil Code (1960), rural land administration and use laws and Federal Supreme Court cassation division decisions. According to these respondents, since sale of urban houses is lawful, by analogy, the sale of rural houses is also lawful. The other half of the respondents (53%) provided that transfer of rural houses is possible in the case of mortgage and sale following court order with respect to attachment for claim security.

The respondents who held the position that the sale of rural houses is unlawful and devoid of policy support were asked to add their own justifications and explanations according to their interpretation of existing land law. The majority of the land administration staff (42%) clearly holds the position that the sale of rural houses is not lawful as the legislative framework does not allow or clearly stipulate the right to sale rural houses. According to some respondents (30%), the sale of rural houses amounts to the sale of rural land on which the house is constructed which is clearly prohibited by law. The respondents strengthened their argument by saying that enforcement institutions are not ready to process applications for registration of contracts on sale

[68] FGD conducted with land–holders in Woreta, Debre Markos and Bahir Dar, 2018.
[69] FGD, *supra* note 23; Interview, *supra* note 25.

of rural houses, if any, in ANRS (28%). The justifications and explanations given by 13 judges (43%) who responded that sale of rural houses is prohibited are similar. Among these, 46% of the judges replied that the Ethiopian legal system, that is, the FDRE Constitution, the federal and regional land proclamations do not permit and address the sale of rural houses; 39% replied that the sale of rural house amounts to the sale of land on which the house is constructed which is prohibited by law; 15% held that there is no enforcement institution which accepts and formalizes sale of rural houses through effecting registration and authentication, issuance of title certificates, maps and land use plans, etc. The assertion that land administration institutions do not carry out tasks of house sale registration is absolutely true. This is even contrary to Ethiopian land legislation which puts a mandatory requirement of registration for transactions on immovable property.[70] Asked if any rural land–holder has come to their office to demand service of registration or other similar service, most of the land administration and use staff respondents (94%) responded that no land-holder has come to their office to seek the support of their office for transfer of rural house through sale. Only 6% of the respondents replied that rural land–holders visit their office to get service such as registration. Even then, the respondents confessed that they would tell the land–holders that they would not accept their application on the ground that sale of rural houses is unlawful and that there is no institutional procedure to process the transaction. But this weakness of enforcement institutions is not surprising because we cannot expect institutions to enforce sale while actually they believe that the sale of rural houses itself is not permitted by the law. For institutions to carry out their duties, they must first be in a position to understand and apply the existing law which permits sale of rural houses. Similarly, this understanding is needed if land–holders have to visit the land administration and use offices for the service of enforcing rural house sale. It is clear that the prevalent public and expert understanding against sale of rural houses has negatively affected the practice of land administration offices. On the contrary, the existence of aware institutions and staff has a positive impact on the increase of the practice on rural property transfer and the corresponding increase in economic productivity accruing from formal property market system.

Not only is there misinterpretation of the law on sale of rural houses, the demand and appetite for the transfer of rural houses is also generally low. Land–holder respondents indicated that they have low demand on the sale of rural houses for fear of displacement, fear of eviction from other land not part of the sale, and the like.[71] Similarly, the majority of land administration staff (76%) believes that the sale of rural houses should not be allowed by the law whereas only 24% believe it should be allowed. Judges' responses on the same issue were generally similar to those given by land administration staff. 70% of the judges responded that sale of rural houses should not be lawful whereas 30% said the sale of rural houses should be lawful. Another study about perceptions of land sales prohibitions in Ethiopia taking study sites from Oromia region and Southern Nations, Nationalities and Peoples (SNNP) revealed strong resistance to allowing land sales in Ethiopia[72]which may imply disinterest on sale of rural houses too.

Land administration and use staff who replied that the sale of rural house should be unlawful (76%) were also asked about their justifications as to why they believe that the sale of rural

[70] Melkamu, B. & Alelegn, W. *Issues on the Role of Formal Requirements for Validity of Immovable Transactions in Ethiopia: the Case of Amhara Region*, 6(1) Bahir Dar University Journal of Law, 49−86 (2015).
[71] Id.
[72] Holden & Bezu, *supra* note 24 at 23.

houses should be unlawful. The most common justification (37%) was that sale of rural houses, if permitted, would displace land–holders from their ancestral origin, from their family, and from their remaining land (unsold properties). They held that sale of rural houses would cause migration, tenancy, and monopoly of holding by the few, rich and powerful individuals and families. This would create unfair distribution of wealth and poverty. They also believe that it would result in an improper use or wastage of sale money. In addition, the practice of sale of rural houses would prevent a fair and efficient use of the land resource. The second justification the respondents (10.5%) provided was that the sale of rural houses would promote illegal construction especially along roads and around cities and towns such as Bahir Dar. Their fear is that the land–holders would, if allowed, construct substandard and unplanned houses in rural areas with the purpose merely of gaining money. This practice would create bad–looking houses as well as promote illegal or unplanned settlements. The same number of responses (10.5%) indicated that sale of rural houses should not be allowed because land–holders do not have knowledge of valuation of the house to determine its proper price and how to use the sale money. In this way, once they relinquish their land, they would be harmed socially and economically. Less common explanations include sale of rural houses would cause bad governance and boundary conflict (8%), reduce farm land productivity (8%), cause the sale of rural lands in the name of sale of houses at all (5%), and sale of rural houses should not be allowed because there is no demand for the sale and purchase of rural houses (5%). 8% of the respondents held that to be lawful, the sale of rural houses should be practiced or allowed only as per the Rural *Kebele* Centers Land Provision Administration and Use Directive No. 8/2012. The directive, which was latter incorporated in the current rural land administration and use law,[73] was adopted to prevent land sale including what it calls illegal constructions or houses. Hence, houses built in the rural *kebele* centers cannot be sold, mortgaged as well as transferred to a third party in any means unless the requirements of design and building quality are ascertained by the pertinent *woreda* rural land administration and use office.[74] Other less important responses (8%) include if a house is sold, land fertility would be damaged, the buyer would close the passage routes for neighbors contrary to previous peaceful relations, and there is no awareness of the use of sale of rural houses. The justifications the judges provided as to why they do not support sale of rural houses is generally similar to the reasons given by land administration staff.[75]

4. SALE OF RURAL HOUSES IN ANRS: THE PRACTICE AND ITS CHALLENGES

Despite contrary practice with respect to sale of rural houses and prevailing low appetite for sale, it became clear that there is an informal practice of sale of rural houses in particular circumstances.[76] Typical indicators were found in Debre Markos and Woreta. In Debre Markos, the respondents mentioned that sale is practiced with respect to security for the debt they have with the Amhara Credit and Savings Association (ACSI). This, for example, happened in Abesheb *Kebele* in Elias *Woreda*, Lai Dega Amsteya *Kebele* in Senan *Woreda*, etc. When the land-holder fails to return the loan ACSI sells the house, according to the respondents. ACSI which was established in 1997 has a long practice of holding the land use rights of land-holders

[73] ANRS Rural Land Proclamation No 252, *supra* note 20.
[74] Id. at Art.31 (7).
[75] FGD, *supra* note 23.
[76] FGD *supra* note 68.

as security (mortgage) in ANRS even before the adoption of Proclamation 252/2017 which officially allowed collateral on rural lands for all land-holders for the first time in Ethiopia. In Woreta, respondents mentioned that a wide practice of sale of rural houses exists in the case of rural lands adjoining rural towns and *kebele* centers such as in places known as Kenti Marwa, Euls Maksegnt, Aba Gunda, Amba Beleda Maksegnt, Marwarka, and Asika. This was mostly done with the intention of selling the land in a disguised manner.

Court practice also revealed the existence of such practice. Asked as to whether they entertained land disputes, 67% of the judge respondents responded affirmatively. From among these respondents, 45% responded that the most common cause of dispute is the claim to enforce or execute the ownership of rural house transferred according to the contract of sale. This occurs when another party, i.e., the seller moves to invalidate the sale by alleging that the sale contract is unlawful. This is caused by the gap created between the common understanding that an individual can make money out of any of his property and the wrongly understood law and policy that the sale of rural house is unlawful.[77] Those who are aware of this gap induce others to buy their property through contract and after some period of time they move to invalidate the same contract in order to get the property back at the expense of the buyers. The other causes of dispute are related to rural houses attached due to the execution of court judgment and mortgaged as security for loan (20%), and contracts with respect to houses in rural towns with no document of title and plan (20%). Other remaining causes accounted together for 15%: demolishing of house constructed on rented land, dispute on the issue of whether the sale includes a piece of land which is part of compound in which a sold house is situated, nuisance to a neighbor after buying the house, division of houses during divorce, and dispute caused during division of property built through (money and land) contribution by different persons.

Although most respondents were not in favour of rural house sale (Section 3), they were asked to express their experience with regard to the major factors they identify as negatively impacting on the practice of sale of rural houses in ANRS including the low demand for the activity. 70% of the land administration and use staff (35) and 86.7% (26) of judge respondents replied to the question. As well as assisting to check the reliability and integrity of the position they held against sale of rural houses, this question was helpful to know the gaps in the consciousness level of respondents and land–holders about the real property rights, duties, rules, laws and policies, and institutional or bureaucratic mechanisms for the enforcement of these real property rights. According to the land administration and use staff, the most common problem (46%) is the lack of awareness on the existing rules, laws and policies and the rights and restrictions these laws impose. This means, at least, there is a great deal of problem on the understanding and interpretation of the rules on the sale of rural houses as enshrined in the FDRE Constitution and other proclamations. The other responses include lack of settled practice on sale of rural houses (23%), lack of complete legal framework to address the issue of sale of rural houses (17%), and the absence of an institution for enforcing sale of rural houses and for raising awareness about the right to sell real property (14%). On the part of judges, lack of awareness on the legal framework and the land rights, lack of settled practice on sale of rural houses, lack of complete legal framework, and absence of enforcement institutions accounted for 42%, 23%, 8%, and 27% respectively.

[77] FGD, *supra* note 23.

Finally, judges were asked if they observed problems regarding the meaning, definition or interpretation of the term 'rural houses'. I asked this question in order to know the difference between undeveloped land and developed land because, the law, as we discussed before, attaches different consequences for each of these properties with regard to sale. The majority of the judges, i.e. 20 judges (67%) believed that there is such problem. They provided two most common explanations. First, the rural land legislation lacks clear definition of rural houses and rural lands. Second, because the FDRE Constitution prohibits sale of land which may, according to them, by interpretation, include the land on which houses are built, land holders may not find it feasible to sell only the building, i.e. the roof and walls. Other less important explanations were given. One reason is that the law does not give adequate clarity on whether sale of rural houses is permitted or prohibited although the issue of sale of land is clearly provided by the law. This can be illustrated by the fact that the rural land administration and use laws in ANRS do not include sale as a mechanism of acquiring rural house or as a mode of transfer of land rights while inheritance, donation and public grant or distribution are clearly mentioned as modes of real property transfer in the law.[78] Even if the proclamations recognize the right to sell the developments or improvements on rural land, they should also have governed the mechanisms of transferring developments on land parcels from one person to the other rather than limiting themselves with provision of modes of transfer with respect to undeveloped land only.[79] It is quite possible that some land administration and use staff and judges would assume that the sale of rural houses is unlawful, among other things, because the law is not clear or complete on this issue. As we discussed earlier, there is attitudinal or awareness problem with regard to the issue of the sale of rural houses. Lack of complete and clear law permitting or prohibiting sale of developments on rural land is one cause of the knowledge gap. Similarly, the awareness problem regarding the existing legal framework on real property rights could be the main reason as to why the land administration and use staff, judges, and land–holders hold the opinion that the sale of rural houses is or should be prohibited.

The clarity problem that exists in the legal framework itself can be expressed in other ways. Our jurisprudence has very little and vague coverage of the meaning of the terms 'rural houses' and 'rural lands'. The Ethiopian Civil Code (1960), the landmark legislation on defining legal terms in the Ethiopian legal system, provides that an immovable property includes land and buildings. But neither of these terms is defined separately and clearly. Registration of permanent improvements on land including rural houses is also not addressed in the rural land registration legislation.

Also the relationship between a house and the land on which such house is built is merely poorly defined as intrinsic and accessories in the Civil Code (1960). It is very difficult to decide, based on these rules, that houses are intrinsic elements of the land on which they are built or vice versa. In fact the Cassation Bench of the Federal Supreme Court has decided that the land is an intrinsic element of the house which is built on it.[80] This case involved an issue of whether the applicant can own the land jointly with the defendant in the same way as she can jointly own the house

[78]ANRS Rural Land Proclamation No 252, *supra* note 20, Art.11.
[79]See eg. Id, Art. 2(4) which allows sale of property produced on land but no other provision is included in the legislation regarding this right.
[80]Meseret Fisseha vs. Kelbesa Abew, *Federal Supreme Court Cassation Bench*, File No. 25281, 2008.

built on this land. The court decided that joint ownership of the house implies joint ownership of the land as the land is an intrinsic element of the house. However, although decisions of the Cassation Bench are binding on other courts in the country,[81] a single court decision may not establish a settled jurisprudence with regard to the relationship between land and building built on it. In the face of this, it is not surprising if some judges, as we just mentioned earlier, believe that 'because the Constitution prohibits sale of land persons may not find it feasible to sell only the house or building, i.e. the roof and walls' as, for them, sale of rural building means sale of the land on which the building is laid.

The position of respondents to the effect that the sale of rural houses is prohibited might have also been influenced by the behaviors and cultures in the political field in Ethiopia. There are things which low–class politicians or cadres perform for political reward and acceptance by their bosses. Observation reveals that when a higher political official sets a certain direction for a task in a particular forum, the lower political cadres perform the task even in a manner more intended by the former. So the categorical position that sale of rural houses is prohibited might have well followed from the Federal Government's strong political statements that land can never be sold or transferred. The Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) led government strongly opposed private ownership as well as marketability of land as it frequently expressed it in its strategies and political election debates.[82] Privatization, EPRDF argued, would lead to the concentration of land into the hands of a few urban based unscrupulous capitalists, evictions of land-holders, as well as it leads to other disastrous economic, social and political consequences.[83] The hard and fast position that rural houses may not be sold is the result of a radical and extreme interpretation and application of the ideological and constitutional premise that land cannot be sold, a policy which EPRDF promised to maintain until its peril. Worse yet, the sale of rural houses has been understood as synonymous with the sale of rural lands. It is feared that if allowed, the sale of rural houses, can be used as a pretext to sell the land, a phenomenon which might really occur.[84] But allowing sale of rural houses is one thing; preventing sale of land in the pretext of sale of houses is another thing.

Overall, these problems could negatively impact on the practice of and appetite for sale of rural houses in ANRS and beyond.

5. SALE OF RURAL HOUSES OR NO SALE?

As we discussed in the previous sections, the majority of respondents not only misinterpret or misunderstand the law, but also they do not support sale of rural houses. Most reasons they provided such as displacement, tenancy, improper use of sale money, etc. imply the unfair judgment on rural land–holders on the ground that they have no knowledge of the consequences of sale of property and of knowledge of use of money. But, these are just unwarranted assumptions. The peasants and pastoralists have accumulated a greater knowledge as to how best

[81]Federal Courts Proclamation Reamendment Proclamation No.454/2005.
[82]EPRDF is now changed into Prosperity Party (PP) but the latter has not yet shown any changes in the land policy.
[83]See e.g. Getahun, B. T., *Historiographical Review of the Current Debate on Ethiopian Land Tenure System*, 7(2) African Journal of History and Culture, 48 (2015); Holden & Bezu, *supra* note 24, at 23.
[84]Maria Cederborg Olsson och Karl Magnérus, Transfer of Land Rights in Rural Areas A Minor Field Study in the Amhara Region, Ethiopia (unpublished MSc Thesis, The Royal Institute of Technology (KTH), 2007) 33.

they can use their land from a generations–old practice and wisdom. They know which property should be sold and which should not, and at what price it should be sold. They also know what money can do better for their lives. However, at the moment, land–holders do not find pressing economic need to sale their rural houses.[85] This study also showed that if they wanted, the land–holders often found ways of transferring their property in a disguised manner. The research has found out that both land administration and use staff and judges witnessed disguised property transactions in the form of long rental, land exchange, donation, succession, informal sales, contribution, exchange land with movable property, debt security and so on.[86] We can, therefore, safely conclude that the fundamental factor driving land holders to decide to sell or not to sell rural houses is not the lack of knowledge of the benefits and consequences of sale but the economic principle of supply and demand based on their inherent rational thinking. Any human being should be assumed to be rational; and, knowledge comes from experience as well. The values or rationales of property such as liberty or freedom, security, happiness, efficiency, equity, sustainability, utility, prosperity, and stability[87] require that land–holders be free to decide on the use and management of their property. Yet, clear and elaborate property rights legislation coupled with efficient property enforcement institutions should be in place to play positive role in reducing any problem of bargaining position between rural property sellers and strong buyers.

The other justification that the sale of rural houses would promote illegal construction especially along roads and around the peripheries of cities and towns has some grain of truth in it. But the solution to this problem should not be the prohibition of one of the fundamental rights of citizens to property.[88] Rather, the state should devise mechanisms of controlling illegal and substandard property constructions and transfers without however negating that basic right to sell developments on land. For that matter, a right is not without limits. Rather, rights are accompanied by restrictions and obligations such as planning and design restrictions.[89] So ANRS must allow sale of rural houses in practice and properly put in place the proper restrictions and obligations such as the need to construct rural houses in compliance with certain socio-economic and planning conditions. The other reason provided which says that the sale of rural houses reduces household land farm size and productivity is not a strong reason. First, the land–holders are, as we mentioned earlier, rational in that they can decide what amount of property to sell. Second, when a house is sold, the seller may do some more productive activity with the money and the buyer may invest with the new property he purchased. The reason that the sale of rural houses would encourage disguised sale of rural land is true but the state has to devise means to control illegal or disguised land sales without, however, barring the fundamental right of property, i.e., the right to transfer real property.

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[85] Holden & Bezu, *supra* note 24, at 23.
[86] FGD, *supra* note 23.
[87] Gary Chartier, Economic Justice and Natural Law (Cambridge University Press, New York, 2009) 33−40; Elinor O., Private and Common Property Rights (2000) 332; Gregory S. Alexander et al, *A Statement of Progressive Property*, 94(4) Cornell Law Review, 743−744(2009); Waldron, *supra* note 2, at 332, 349.
[88] See generally Gebreamnuel, D. B., Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework (eleven international publishing, Hague, Netherlands, 2015)182–192.
[89] Pamela, O'Connor; Sharon Chirstensen & Bill Duncan, *Legislating for Sustainability: A Framework for Managing Statutory Rights, Obligations and Restrictions Affecting Private Land*, 35(2) Monash University Law Review, 233−261(2009).

The study has already found out that, still, in the eyes of a fair number of judges, the sale of rural houses is permitted by law (Section 3). We have also seen that the percentage of judges who are in favour of sale of rural houses (30%) is greater than the percentage of land administration and use staff who support sale of rural houses (24%). This implies that persons with greater knowledge on the meaning of property rights legislation (i.e., judges) tend to understand the right to sale much better than land administration and use staff implying that continuous relevant training should be essential in this regard to enhance full awareness on the legislation.

Indeed, as far as the sale of land is prohibited by law, the practice of sale of land in other covers or in a disguised manner, in a way that defeats the very notion of the prohibition of sale of land, must be prohibited. That is quite convincing and in conformity with sound jurisprudence. The first problem, however, is when the sale of an improvement on land is equated with the sale of the land. An undeveloped land is different from a developed land because of the difference in economic value between the two. Investment is made by way of labor, money or skills to change undeveloped land to a developed land. Second, it is equally important to understand that the sale of improvements on land such as house is a useful economic activity, a fact which, in Ethiopia, has not yet been properly appreciated. A sale of rural property or its prohibition has to be seen in light of its benefit in economic and social terms also. As De Soto accurately described, the concept of property will have full meaning when it is determined in legal and economic terms.[90] De Soto has demonstrated that the major stumbling block that keeps the Third World, as clearly opposed to the West, from benefiting from capitalism is its inability to produce capital from land asset through an active land market system.[91] It has been proved that the free transfer of property with the help of a regular, formal, integrated system of property representation by different means (mainly cadaster and land register) can generally be useful for the purpose of generating capital and economic growth.[92] The benefits of free and formal property transfer may not be different in Ethiopia. The sale of rural houses should be seen in this perspective. Although, as we mentioned before, the demand for sale of rural houses is low, this would certainly change as the economic and livelihood system changes. Further, sale of rural houses should not be confused with the sale of land. That is, any practice to sell a house by rural land–holders should not be construed automatically as the means to sell the land itself. As the sale of rural houses is lawful under the Ethiopian legal system, the land laws in ANRS and throughout the country should be properly understood and applied to exercise this right. Indeed, there was some, although to quite a lesser extent compared with the opposite position, sound position in favour of sale of rural property. Out of the land administration and use staff who supported the activity (24%), 42% hold that the sale of rural houses can change the life style, increase social status, enhance movement, and increase the income and wellbeing of rural land holders. 17% hold that the sale of rural houses, if permitted in practice, would help solve crisis and hardships in the life of households through bringing alternative source of money. The same number of respondents (17%) provided that sale of rural houses should be allowed in the same way as transactions with respect to personal properties is allowed because land-holders have put their labor and capital on the property. Other respondents hold that the sale of rural houses encourages development on property (8%), strengthens the bundle of rights (8%), and enhances economic efficiency by saving the demolishing of houses following the movement of the user

[90] De Soto, *supra* note 6, at 215.
[91] Id. at 5.
[92] See generally Id.

to towns or other places in order to change residence or for other reason (8%). Judge respondents who supported sale of rural houses (30%) provided two important justifications. First, they argued that sale of rural houses should be treated like personal properties and that this practice brings economic benefits such as facilitating mortgage and other real property transfers to third parties and get more income to improve livelihoods (44%). Second, they state that it widens the scope of bundle of rights for the land holders (33%). Some of the judges (23%) provided additional justifications: sale of rural house enhances urbanization, allowing sale of rural houses is a matter of rule of law to actually implement the law, allowing sale of rural houses might reduce the chance for disguised land sales, and sale improves the value of the property.

CONCLUSION AND POLICY OPTIONS

In Ethiopia, there is a wide perception that sale of rural houses is unlawful despite a legal and policy framework which permits the activity. In the land legislations and the Constitution, the two major forms of rights which embody the right to sale of rural houses are 'land-holding right'; and 'private property' developed on a private land-holding. The most common problem is that the FDRE Constitution and the land administration and land use laws are wrongly interpreted as prohibiting the practice of rural house sale in Ethiopia in general and ANRS in particular. It is believed that the sale of rural houses amounts to the constitutionally prohibited sale of rural land. According to respondents, the sale of rural houses, if permitted, would, among other things, displace land–holders from their ancestral origin, and would create unfair distribution and use of wealth and exacerbate poverty. It is also feared that the sale of rural houses would promote illegal construction especially along roads and around cities and towns such as Bahir Dar.

The result on the question regarding opinion of the land–holders indicated that, generally, the demand on the side of the people to sell rural houses is low. However, it was observed during the FGD with land holders that few expressed their need for freedom to sell their rural houses, if they want to for any reason. Despite all reasons and justifications in favor of prohibition of sale of rural houses by most respondents and generally existing low demand and considerable challenges for rural house sale, in practice, land–holders sometimes exercise sale of rural houses. This is carried out in the form of collateral agreements with ACSI, in relation to court judgment and so on. These activities were, surprisingly, carried out informally outside of the land administration and use institutions especially before the adoption of ANRS rural land administration and use proclamation number 252/2017. Further, no land–holder has visited the land administration and use offices for the registration of house sale transactions; nor does such an office accept applications for registration of rural property sales.

The knowledge and awareness problem on the part of land administration and use institutions is a visible problem too. No institution is ready to execute or enforce the sale of rural houses in Ethiopia such as by registration. It was found out that there is strong control by the *kebele* officials on the construction and sale of rural houses. In addition to the most common gap of awareness on the existing rules, laws and policies and the rights and restrictions they impose, lack of clear and comprehensive legal framework governing the matter, lack of established practice or system on sale of rural houses, and lack of clear definitions on key concepts such as 'land' and 'building' and lack of clarity on the relationship between these concepts affected the

practice of sale of rural houses in ANRS in particular and in Ethiopia in general. Coupled with the absence of jurisprudential works on the clarification of such terms and rules embodying the terms, these problems would create a negative impact on the protection and management of the property rights of citizens. In addition, these problems would highly reduce the potential which our land resource would have on economic development and prosperity. So ANRS in particular and Ethiopia in general should allow sale of rural houses in practice and properly put in place the proper restrictions and obligations such as the need to construct rural houses in compliance with certain socio-economic and planning conditions to avoid unwanted activities such as unplanned constructions along roads and on peri–urban areas. While at present the demand for sale of rural houses is low and the majority of respondents believe that the sale of rural houses should not be allowed, this demand will certainly increase in short time in line with the fast social and economic changes in the country. Towards this end, the Government should revise the land laws to clearly provide the types of immovable ownership and the bundle of rights this ownership shall entail by taking the example of China. Awareness and incentive mechanisms should also be set to motivate the community to exercise their right to sell their property in line with changing socio–economic conditions in the country. Similarly, increasing the capacity and awareness of land administration and use staff will also play a crucial role in fostering rural property transfer.

THE GRAND ETHIOPIAN RENAISSANCE DAM — FILLING AND ANNUAL OPERATION: ISSUES OF LEGALITY AND EQUITABILITY

Tariku Taddele Lake*

Abstract

The Grand Ethiopian Renaissance Dam (GERD) first stage filling that retained 18.5 BCM of water of the Blue Nile River in two years filling plan of 2020 and 2021 has escalated disputes among riparians of Blue Nile sub-Basin, especially between Ethiopia and Egypt. The dispute attracted international attention owing to Egypt's hegemonic tactics in securitizing the issue by filing to the UN Security Council (UNSC). Egypt disparages the filling as 'unilateral' and detrimental to its survival; while Ethiopia firmly stands on realizing equitable and reasonable utilization of its chief river via the GERD filling. Therefore, the main objective of this article is to analyze the legality and equitability of the GERD filling and annual operation in milieu of the international water law regime as well as the Declaration of Principles on the GERD (DoP). It also interrogates validity of accusations and claims of downstream states in their submissions to the UNSC, especially Egypt's, against the filling from perspectives of the international water law regime. In doing so, the article argues that the GERD's filling and operation are clear reflections of Ethiopia's recognized and undeniable right to equitable and reasonable utilization in the Nile River Basin. In this regard, the article also argues that Egypt's past unilateral water developments that established its existing uses in the Nile and its current antagonistic position against the GERD at its filling and successive operational stages construed as acts causing significant harm on Ethiopia's right to equitably use the Nile. Further, as a concluding remark, the article forwards suggestions for policy makers and negotiators to consider in the way forward to galvanize Ethiopia's interest on the GERD and beyond in future GERD negotiations.

Keywords: Blue Nile, GERD Filling, Equitable Utilization, No Significant Harm, UN Security Council

INTRODUCTION

In the Nile River Basin, water developments by riparians have long been determined predominantly by their respective financial and technical capabilities which brought to the enduring disparity of existing uses among riparians.[1] Typically, Egypt and Sudan with no contribution dominated utilization of entire flow of the Nile; while Ethiopia has insignificant

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[1] *See* YACOB ARSANO, ETHIOPIA AND THE NILE: DILEMMAS OF NATIONAL AND REGIONAL HYDROPOLITICS 84-85 (PhD Thesis presented to the Faculty of Arts, the University of Zurich) (2007). *See generally* also Cascão, A.E. *Changing power relations in the Nile river basin: Unilateralism vs. cooperation?,* 2(2) WATER ALTERNATIVES 245 (2009). Mainly, Egypt's hydro-hegemonic influence on the Basin incapacitates attempted cooperative initiatives that aimed realizing equitable water sharing among riparians. In this regard, *see generally* Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?*, 21(2) EJIL 421 (2010).

recorded use despite supplying 86% to 95% of flow the Nile.[2] The Blue Nile River/Abbay alone contributes 49 billion cubic meters (BCM) or 59% of the average annual flow of the Nile.[3] Thus, due to the second to none contribution of the Blue Nile, dispute in the Nile is quintessential in the Blue Nile Sub-Basin (hereinafter, BNB).[4] Evidently, the construction of the GERD on the Blue Nile has been the source of disputes since its commencement among the three riparian countries particularly between Ethiopia and Egypt.

Egypt takes the GERD as a threat to its survival and 'water security';[5] while Ethiopia claims that the GERD is within its right to equitable utilization in BNB and that it is mutually beneficial to the downstream states in flood control and trading cheap electricity.[6] The dispute escalated vigorously since 2019 when first filling and annual operation of GERD was initiated including the first-stage-filling that aimed to retain 18.5 BCM of water in two phases/years.[7] In 10 April 2020, Ethiopia offered its first stage filling plan to Egypt and Sudan; however, both rejected the proposal.[8] Albeit the rejection, Ethiopia successfully conducted the GERD first year/phase filling in June 2020 where 4.9 BCM of water was retained in the reservoir.[9] Prior to and post the first year filling, there has been tough internationalization and securitization of the matter by Egypt

[2] ARSANO, *supra* note 1, at 25. In the flood seasons its share hikes 95% while only 5% comes from the White Nile. Daniel Kendie, *Egypt and the Hydro-Politics of the Blue Nile River*, 6 (1-2) NORTHEAST AFRICAN STUDIES (New Series), 141, 143 (1999).

[3] *See Elias N. Stebek, Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus*, 1 MIZAN LAW REV. 33, 34 (2007). Ethiopia is the source of Abbay/Blue Nile, Tekezie-Atbara and the Baro-Akobo-Sobat rivers providing, respectively, 59%, 13% and 14% of the entire annual floods of the Nile. *Cf.* ARSANO, *supra* note 1, at 82. Noting, the contribution of the Blue Nile shows increases due to seasonal variability of rainfall in the Nile Basin.

[4] The Blue Nile Basin comprises the upstream Ethiopia and the two most downstream states of Sudan and Egypt. Kendie, *supra* note 2, at 143.

[5] *See,* Permanent Rep. of Egypt to the U.N., *Letter dated 19 June 2020 from the Permanent Rep. of Egypt to the United Nations addressed to the President of the Security Council*. UN Doc., S/2020/566 (19 June 2020). [Hereinafter: Egypt's letter to UNSC (19 June 2020)] *See also* Permanent Rep. of Egypt to the U.N., *Letter dated 4 May 2020 from the Permanent Rep. of Egypt to the United Nations addressed to the President of the Security Council*. UN Doc., S/2020/355 (4 May 2020). [Hereinafter: Egypt's letter to UNSC (4 May 2020)]

[6] Permanent Rep. of Ethiopia to the UN., *Letter dated 14 May 2020 from the Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2020/409 (15 May 2020), Aide Memoir at 8-9. [Hereinafter: Ethiopia's letter to UNSC (14 May 2020).]

[7] The "First Filling" is initial filling of the GERD reservoir up to 625 meters above sea level (m-asl) or 49 BCM of water. The first stage filling plan is part of this initial filling targeted to fill the GERD up to 595 m-asl to be carried out in two phases/years. It aimed to retain a total volume of 18.4 BCM (the 4.9 BCM in the first year and 13.5 BCM in the second year). In this regard, *see generally* Ethiopia's Draft (Confidential), *Guidelines and Rules for the First Filling and Annual Operation of the Grand Ethiopian Renaissance Dam* (10 June, 2020), Article 1 & 5. In Permanent Rep. of Ethiopia to the UN., *Letter dated 26 June 2020 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council,* UN Doc. S/2020/623 (7 July 2020). [Hereinafter: Ethiopia's Draft Guidelines on the GERD First Filling.]

[8] *See* Permanent Rep. of Ethiopia to the UN., *Letter dated 22 June 2020 from the Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2020/567 (22 June 2020) at 10, para. 16. [Hereinafter: Ethiopia's letter to UNSC (22 June 2020)]; *Cf.* Egypt's Letter to UNSC 19 June 2020, *supra* note 5, Annex I, at 2.

[9] BBC News, *River Nile dam: Reservoir filling up, Ethiopia confirms* (15 July 2020). Available at: https://www.bbc.com/news/world-africa-53416277 (Accessed on 20 May 2021).

beside Sudan that engendered intense political pressure on Ethiopia.[10] Similarly, the second year filling in July 2021[11] also piled on the riparian controversy and tension on the GERD.[12]

Egypt's reports to the UN Security Council (UNSC) concerning the GERD filling and annual operation stand out as the first ever water issue referred to the Council.[13] In general, Egypt, supported by Sudan, accused the first stage filling as a 'unilateral' action that will reduce the flow of the Blue Nile, their 'water security' and survival in violation of international law.[14] Conversely, Ethiopia firmly upholds the filling as a legal path towards realizing equitable and reasonable utilization of its chief river under international water law and agreements it is a signatory with the two riparians particularly the DoP.[15] Therefore, by using a doctrinal approach, this article establishes the legality and equitability of GERD's filling and operation and examine the ramifications of Egyptian position against the dam vis-à-vis relations of BNB riparians under international law.

The article has six sections. Section 1 recalls the riparian relations and asymmetrical existing uses of the Nile waters among the three states (Egypt, Sudan and Ethiopia) and highlights the context Ethiopia launched construction of GERD. Section 2 shows developments in the first filling and operation of GERD, and the controversies among the three riparians along the way. Section 3 gives an overview of the international legal framework that governs utilization of transboundary waters putting GERD's filling and operation in context vis-à-vis the agreements Ethiopia is a signatory with one or two of downstream states particularly the 2015 DoP.[16] Section 4 analyzes the validity or otherwise of the allegations brought against the GERD filling and operation focusing on official letters submitted to the UNSC by Egypt. Section 5 analyzes legality of the filling on Ethiopia's side having regard to 'unilateralism' and equitability issues under international water law perspectives and the DoP. Section 6 evokes the legal implications of Egypt's past water works on the Nile and its current antagonistic position on the GERD filling and operation in relation to Ethiopia's right to equitably utilize the Blue Nile. Finally, the article presents concluding remarks by suggesting concerns for future negotiations on the GERD fillings and annual operation, and the ramifications on Ethiopia's interest in the GERD and beyond.

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[10] See the discussion in Section 2 *infra.* (This includes Egypt's unilateral invitation to the US and the World Bank in the trilateral negotiations concerning the GERD filling and latter its report to the UN Security Council.)

[11] Dr Eng Seleshi Bekele [@seleshi_b_a] (2021, July 19). *Today, 19th July, 2021, the GERD reservoir reached overtopping water level* [Tweet]. Twitter. Retrieved from: https://twitter.com/seleshi_b_a/status/1417077665681584128?s=20 (Accessed on 27 October 2021).

[12] *See,* Permanent Rep. of Ethiopia to the UN., *Letter dated 23 June 2021 from the Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2021/600 (25 June 2021) at 13. [Hereinafter: Ethiopia's letter to UNSC (25 June 2021)];

[13] United Nations (2021, 8 July), *Ethiopia on the Grand Ethiopian Renaissance Dam (GERD) - Media Stakeout* [Video], Youtube. Retrieved from https://www.youtube.com/watch?v=QqfPMFVZ4bk (Accessed on 27 October 2021 (Media stakeout of Seleshi Bekele (*former* Minister of Water, Irrigation, and Energy of Ethiopia) on the GERD).

[14] *See* Egypt's Letter to UNSC (4 May 2020), *supra* note 7; Egypt's Letter to UNSC (19 June 2020), *supra* note 7.

[15] *See generally* Ethiopia's letter to UNSC (14 May 2020), *supra* note 6; Ethiopia's letter to UNSC (22 June 2020), *supra* note 8.

[16] The other agreements (the 1902 Border Treaty and the 1993 Cooperative Framework Agreement) will also be highlighted.

1. THE BED-ROCK OF THE CURRENT DISPUTE: RECALLING ASYMMETRIC EXISTING USES IN BLUE NILE BASIN AND ETHIOPIA'S PATH TOWARDS THE GERD

1.1 Egypt's Long-time Hegemony in Utilizing the Nile: from the Aswan Low Dam to Desert Land Reclamation

In Egypt, modern uses and dam buildings in the Nile River traced back to the late 19th and early 20th centuries when it was under British colonial domination.[17] Britain brought irrigational revolution into Egypt from traditional flood irrigation to "all-year irrigation on a large scale" and built the first dam ever built on the Nile –Aswan Low Dam (ALD) – in 1902.[18] After its partial independence,[19] Egyptian ambition to control the Nile got blessing from Britain in the 1929 Nile Agreement according it with 'historic and natural right' to 48 BCM of the Nile mean annual flow while Sudan got 4 BCM.[20] This agreement denies interests of all other upstream countries, particularly Ethiopia, who declared it void.[21]

Nevertheless, as a superior beneficiary of the 1929 Agreement, Egypt was not able to harness the 48 BCM with ALD's limited storage capacity that triggered it for another dam project, the Aswan High Dam (AHD), to store the surplus water.[22] The AHD project instigated Sudan to demand revision of the 1929 Agreement for reallocation of the Nile waters.[23] This brought to a

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[17] TVEDT TERJE, THE RIVER NILE IN THE AGE OF THE BRITISH: POLITICAL ECOLOGY AND THE QUEST FOR ECONOMIC POWER 20-21 (2004).

[18] *Id*., at 90 & 114. ALD was raised to meet increasing water demands. *See also* Karen Conniff et al. *Nile water and agriculture: Past, present and future.* In THE NILE RIVER BASIN: WATER, AGRICULTURE, GOVERNANCE AND LIVELIHOODS 11-12 (B. Awulachew et al. eds., Abingdon, UK, 2012).

[19] Though got its partial independence in 1922, Egyptian foreign affairs and the Suez Canal were controlled by Britain that sparked anti-British movements in Egypt. Britain tried to soften it by the 1929 Agreement. ARSANO, *supra* note 1, at 87-88. *See also* Kinfe Abraham, *Imbalance in Water Allocation Stability and Collaboration within the Nile Basin,* ATPS SPECIAL PAPER SERIES No. 24, 4 (Nairobi, 2006).

[20] Britain represented its colonies of Sudan and other East African countries (Kenya, Uganda and Tanganyka). *See* Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes, Cairo May 7th, 1929. Available at: http://gis.nacse.org/tfdd/tfdddocs/92ENG.pdf (Accessed on 10 May 2021). (Hereinafter, the 1929 Nile Agreement).

[21] As a sovereign country free from any colonial domination including from Britain, the Agreement does not bind Ethiopia as it was never a party. Former upstream colonies of Britain refuted state succession by the clean-slate doctrine or *tabula-rosa* and revoked the agreement. Dereje Z. Mekonnen, *From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy - The Stumbling Block against Resolution of the Nile Waters Question* 4(2) MIZAN LAW REV. 232, 238-41 (2010); *see also* Korwa G. Adar, *The Interface between National Interest and Regional Stability: The Nile River and the Riparian States*, 11(1) AFRICAN SOCIOLOGICAL REVIEW 4, 6 (2007). Available at: http://www.jstor.com/stable/24487582 (Accessed on 12 May 2021).; *see also generally* Arthur Okoth-Owiro, *The Nile Treaty: State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties,* Occasional Paper No. 9 (Konrad Adenauer Stiftung & Law and Policy Research Foundation, Nairobi 2004); *see also* Aaron Tesfaye, *The Politics of the Imposed and Negotiation of the Emerging Nile Basin Regime*, **7**(1&2) INTERNATIONAL JOURNAL OF ETHIOPIAN STUDIES 57, 62-64 (2013). Available at: https://www.jstor.org/stable/10.2307/26586231 (Accessed on 13 May 2021).; ARSANO, *supra* note 1, at 88.

[22] Because, despite concrete rises, the ALD failed to effectively control the Nile waters as Egypt needed. *See* TERJE, *supra* note 17, at 90.; Conniff et al., *supra* note 18, at 11; *see also* AHMAD ABU-SHUMAYS, ECONOMICAL AND TECHNICAL ASPECTS OF EGYPT'S HIGH ASWAN DAM, 6 (1962).

[23] For the Sudanese, the 1929 Agreement denied their summer cultivation and made the country an Egyptian reservoir. Opposition against the AHD project grew in Sudan denying the dam building without compensation in water. Sudan had its own plan for future utilization of the Nile and demanded a minimum of 200 MCM additional

bilateral treaty between Egypt and Sudan for the full utilization of the Nile – the 1959 Agreement – where they, respectively, shared 55.5 BCM and 18.5 BCM of the Nile mean annual flow.[24] To secure this self-granted water share, Egypt self-assumed 'veto'[25] over all upstream dam buildings. Egypt also created a unified block with Sudan as long as water reallocation questions of upper riparians including Ethiopia are concerned.[26] However, this agreement is only effective as between the two states and does not bind other riparians including Ethiopia.[27]

After concluding the 1959 Agreement, Egypt unilaterally, without ever notifying upstream countries except Sudan, began the AHD construction in 1960 and completed it in 1970.[28] The AHD is one of world's highest dams having one of world's largest artificial lakes –Lake Nasser– whose storage capacity is 164 BCM of water, as twice big as the annual flow of the Nile.[29]

Thus far, Egypt remains to be "the main regional water user, withdrawing far higher levels of water from the basin."[30] Notably, Egypt's huge desert land reclamation projects (*e.g.* the North Sinai and South Valley/Toshka) withdraw over 20 BCM of water of the Nile beyond its annual flow, outside its natural course and beyond Egypt's self-assumed 55 BCM of water.[31] These projects are unilaterally developed,[32] which further complicates the Nile waters question. These projects perpetually increase Egypt's dependence on the Nile waters which it uses in defense to and in extending its 'acquired historic right' to the extreme beyond the *status quo* that shatters potential uses of other riparians particularly Ethiopia.[33]

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water for its vital development, though it's concrete project by the time was *Roseires* Dam. TERJE, *supra* note 17, at 280-283.; *see also* Conniff *et al*., *supra* note 18, at 12.

[24] Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo, 8 November 1959, Article 2(4) (hereinafter, the 1959 Agreement).

[25] *Id*., Art. 4(c). However, it should be noted that no such power is legally bestowed to Egypt in to other upper riparian states including Ethiopia.

[26] *See* the 1959 Agreement, *supra* note 24, Art. (d) and Art. 5. *See also* ARSANO, *supra* note 1, at 89; Biong Kuol Deng, *Cooperation between Egypt and Sudan over the Nile River Waters: The Challenges of Duality*, 11(1) AFRICAN SOCIOLOGICAL REVIEW 38, 46 (2007). Available at: https://www.jstor.org/stable/24487585 (Accessed on 13 May 2021).

[27] *See* Mekonnen, *From Tenuous Legal Argument, supra* note 21, at 242-4; Mohammed Abdo, *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin*, 9 PERCEPTIONS, 45, 56 (2004); Deng, *supra* note 26, at 46.

[28] Tesfaye, *supra* note 21, at 66; *see also* Conniff et al., *supra* note 18, at 12.

[29] The dam realized Egypt's ambition to control the Nile. *See* Conniff et al., *supra* note 18, at 14; Abraham, *supra* note 19, at 5; ABU-SHUMAYS, *supra* note 22, at 11-16. TERJE, *supra* note 17, at 322; Tesfaye, *supra* note 21, at 67.

[30] Cascão, A.E. *supra* note 1, at 247; *see also Cf.* DAVID K. CHESIRE, CONTROL OVER THE NILE: IMPLICATIONS ACROSS NATIONS 21 (Thesis, Master of Science in Defense Analysis, Naval Postgraduate School, Monterey, California, 2010). Egypt's has the highest irrigated agricultural land of 3.4 million ha or 99.8% of its total cropland.

[31] Egypt launched these projects since 1990 in three regions (West Delta, North Sinai, and South Valley/Toshka) which divert water from the Nile outside its natural course via canals. *See* Conniff et al., *supra* note 18, at 14.; Cascão, *supra* note 1, at 249.; CHESIRE, *supra* note 30, at 21 & 60.; Tesfaye, *supra* note 21, at 68.; Mengistu Woube, *The Blue Nile River Basin: the Need for New Conservation-based Sustainable Measures*, 20(1) SINET: ETHIOP. J. SCI. 115, 122 (1997).; ARSANO, *supra* note 1, at 85-86.

[32] Egypt launched and implemented these projects against the expressed objection of Ethiopia. *See* Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 3, para. 10 & at 6, para 25, & Annex III.

[33] Cascão, *supra* note 1, at 249; *see also* Deng, *supra* note 26, at 46-47; CHESIRE, *supra* note 30, at 21; TERJE, *supra* note 17, at 325.

1.2 Sudan: the second biggest user of the Nile waters

In Sudan, like it was in Egypt, modern recorded use of the Nile waters dated back to the colonial period under Britain colonial control.[34] Britain built the *Sennar* dam on the Blue Nile in 1925 and the *Gebel Aulia* dam (on the White Nile) in 1937.[35] In particular, the *Sennar* dam[36] irrigated the *Gezira* scheme which Britain established with a colonial desire to develop world's biggest cotton plantation on the Nile.[37] In the 1929 Nile Agreement, Britain desired, while balancing its political needs in Egypt, to secure enough water for the *Gezira* scheme in Sudan that was at the bedrock of its revenue for its colonial administration.[38] However, the 4 BCM water share based on 22:1 ratio in the agreement was not fair even to Sudan.[39]

Hence, after its independence in 1956, Sudan needed more irrigated land to maximize irrigational projects that inspired its demand for revision of the 1929 Agreement which brought to the 1959 Agreement.[40] This Agreement increased Sudan's previous share from the Nile to 18.5 BCM;[41] however, Sudan sought even more water.[42] Apart from securing enough water for its irrigated lands, the Agreement enabled Sudan to build the *Roseires* Dam on the Blue Nile (in 1966) with storage capacity of 2.4 BCM for irrigation and hydropower generation.[43] The dam was later raised unilaterally by Sudan to increase its water impounding capacity.[44] Further, as part of nourishing its 'acquired right', Sudan also built the *Merowe* Dam (in 2008) on the main Nile with the storage capacity of 12.5 BCM of water (about 20% of the Nile's annual flow)[45] unilaterally without consulting or notifying to any of upstream countries including Ethiopia.[46]

In sum, Sudan has the greatest arable potential in the Nile Basin and it is the second biggest water user next to Egypt. However, compared to its potential, its recorded use is said to be low

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[34] Britain's grand project was expanding the *Gezira* Cotton plantation into the biggest cotton farm on earth. *See generally* TERJE, *supra* note 17, at 105-112.

[35] Abraham, *supra* note 19, at 6; Cascão, *supra* note 1, at 247.

[36] Completion of the *Sennar* Dam, referred by the Sudanese as 'a dam of God', in 1925 has important implication concerning riparian relations in utilization of the Nile as it "showed that the time had come when other countries than Egypt could build large dams in stone on the Nile." TERJE, *supra* note 17, at 112.

[37] Conniff et al., *supra* note 18, at 13. The *Gezira* scheme produced and exported cotton to British textile mills generating 60% of the foreign income to the colonial administration of Sudan. *See also* TERJE, *supra* note 17, at 323.

[38] *See* the 1929 Nile Agreement, *supra* note 20, para 23-40; s*ee also* Deng, *supra* note 26, at 44.

[39] Deng, *supra* note 26, at 44; *see also* Mekonnen, *From Tenuous Legal Argument, supra* note 21, at 238-9.

[40] TERJE, *supra* note 17, at 283.; ELIAS ASHEBIR, THE POLITICS OF THE NILE BASIN 73 (MA Thesis, University of the Wit Waters Rand, Johannesburg) (2009); ARSANO, *supra* note 1, at 88; Deng, *supra* note 26, at 50-51.

[41] *See* the 1959 Agreement, *supra* note 24, Article 2(4). However, Sudan has not fully used its "share" due to water loan arrangement Egypt sought. CHESIRE, *supra* note 30, at 23.

[42] Sudan, in the 1950s, during its negotiation with Egypt to reach at the 1959 Agreement, claimed for 35 BCM for its grown demands from the Nile waters to immune itself from water shortage operation of the HAD that would leave Egypt with 49 BCM. Egypt could take only 1 BCM additional to its share in the 1929 Agreement, i.e. 48 BCM. Egypt virtually rejected Sudan's demand. *See* TERJE, *supra* note 17, at 283.; CHESIRE, *supra* note 30, at 32.

[43] *See* Connif et al., *supra* note 18, at 13.; Deng, *supra* note 26, at 45. Before *Roseires,* in 1964, Sudan also built the *Khashm El-Girba* dam on the Blue Nile to irrigate 100,000 ha of land. *See,* Abraham, *supra* note 19, at 6.

[44] *See* Cascão, *supra* note 1, at 247 & 257; Connif et al., *supra* note 18, at 20.

[45] *See* Mahemud Rashad Yousef, *Grand Ethiopian Renaissance Dam and its effect on the Water Budget of Egypt,* 441 Al-Alam Magzine. p. 13 (2013.); Cascão, *supra* note 1, at 261.; *also* Connif et al., *supra* note 18, at 20.

[46] Sudan only consulted Egypt which demanded the dam to be limited only to hydropower generation. *See* Dereje Z. Mekonnen, *Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern*, 11(2) MIZAN LAW REV. 255, 269 (2017).

(1.8 million ha.).[47] According to Cascão, this shows future demands of Sudan for reallocation of the Nile waters where it would turn to "become the biggest challenger to the current hydro political regime and pose a threat to Egypt's hydro hegemonic position."[48]

1.2 Ethiopia's Path to the GERD: changing the *status quo* towards ensuring its potential use

Ethiopia has gross annual surface water of 123 BCM from 12 river basins, of which only 3% of the water remains in the country, the rest 97% flows out of the country's territory via eight cross-boundary river basins.[49] The Blue Nile Basin in Ethiopia alone comprises annual runoff of 52.6 BCM that is over 43% of the country's annual surface water resource.[50] Ethiopia has over one million ha of irrigable land in the Blue Nile Basin; however, only 20,000 ha have been developed.[51] In the Blue Nile and its tributaries, Ethiopia's estimate of hydropower potential is staggering 20,000 MW; from which 13,000 MW is found in the main Blue Nile River.[52]

Ethiopia implemented only micro-level irrigational and hydropower generating dam projects.[53] Ethiopia's plan to develop major dam projects to achieve its potential use in the Blue Nile was not successful. Egypt's continued blockage of international monitory funds, not to mention military threats and sponsoring internal instability, kept such plans/project to be only dreams..[54] Besides, water developments in Egypt and Sudan which are deeply rooted in the 1929 and 1959

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[47] *See* Cascão, *supra* note 1, at 257; CHESIRE, *supra* note 30, at 23.

[48] Cascão, *supra* note 1, at 257.

[49] The great bulk of this proportion is covered by the Blue Nile, Tekeze/Atbara and Baro/Akobo rivers which flow into the Nile System. ARSANO, *supra* note 1, at 28-29; *Cf.* Tawfik Amer, *Revisiting hydro-hegemony from a benefit sharing perspective: the case of the Grand Ethiopian Renaissance Dam,* Discussion Paper No. 5/2015, 14-15 (German Development Institute, 2015, *ISBN 978-3-88985-669-2*).

[50] *See* Ministry of Water Resources (MoWR) of the FDRE, *Main Report: Water Sector Development Programme* (Vol. II) 12 (Oct. 2002). Available at: http://extwprlegs1.fao.org/docs/pdf/eth180677.pdf (Accessed on 15 May 2021). (Hereinafter MoWR 2002: 2).

[51] *See* Ministry of Water Resources (MoWR) of Federal Democratic Republic of Ethiopia, *Initial National Communication of Ethiopia to the United Nations Framework Convention on Climate Change (UNFCCC),* 42 (NMSA, Addis Ababa, Ethiopia 2001). Available at: https://unfccc.int/resource/docs/natc/ethnc1.pdf (Accessed on 15 May 2021). (hereinafter MoWR 2001). *Cf. id.,* at 13. (Notes, the Blue Nile Basin has over 5 million ha of irrigation potential.) *Contra,* ARSANO, *supra* note 1, at 29. (Noting, all of the 12 river basins of the country have only 2.5 million ha of potential irrigable lands and only the 0.6 ha is developed in the Blue Nile.) *See also* Conniff et al., *supra* note 18, at 14-15.; *See also* Woube, *supra* note 31, at 122-3; Tesfaye, *supra* note 21, at 71; CHESIRE, *supra* note 30, at 17.

[52] Yousef, *supra* note 45, at 19; Conniff et al., *supra* note 18, at 20; *Cf.,* MoWE 2001, *supra* note 51, at 36; Ministry of Water Irrigation and Electricity (MoWIE) of FDRE, *Highlights of the Grand Ethiopian Renaissance Dam & Regional Interconnection,* Presentation to African Union (Togo, Lome, March 2017). [Hereinafter MoWIE 2017] *see also* Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: a peacefully unfolding African spring?,* 38(1)WATER INTERNATIONAL 17, 24 (2013). [Hereinafter: Salman (2013)]

[53] Though the Blue Nile provides 68 GWh of mean annual electricity in *Tiss-Isat* (Tis-Abay I power plant), no major hydropower dam was built on the river. Woube, *supra* note 31, at 122. The causes for implementing such micro-dam projects on the Blue Nile by Ethiopia are blockage international funds and threats of attack by Egypt against such water works. *See* Conniff et al., *supra* note 18, at 15; Tesfaye, *supra* note 21, at 68 & 71. *Cf.* Deng, *supra* note 26, at 47; CHESIRE, *supra* note 30, at 60.

[54] *See* Mehari Taddele Maru, *A Regional Power in the Making: Ethiopian Diplomacy in the Horn of Africa*, 261 Occasional Paper 21-22 (SAIIA, 2017). Available at: https://www.jstor.org/stable/resrep25906 (Accessed on 20 May 2021).

Agreements intensely restricted Ethiopia from implementing large scale water developments on the Blue Nile.[55] Ethiopia has been continuously objecting to these Agreements as well as downstream unilateral and monopolistic water developments.[56]

In attempt to avert such downstream hegemonic influence, Ethiopia took a leading role in the Nile Basin Initiative (NBI) negotiations for a multilateral basin wide cooperative framework within the "Shared Vision" for equitable utilization of the Nile waters among the riparians.[57] However, committed to the 1929 & 1959 Agreements, Egypt and Sudan negated the long-time negotiated agreement on the Nile River Basin Cooperative Framework (CFA) and refuted the rights of upper riparians to equitably utilize the Nile.[58] In the negotiation, though, Ethiopia restated its right and plan to develop water work projects in the Basin including the Blue Nile.[59]

Following impasse of the CFA negotiations to change the *status quo*, when Egypt and Sudan froze their membership of the NBI in 2010, Ethiopia had no alternative except commencing the GERD construction unilaterally in 2011.[60] The fully nationally funded $5 billion GERD project is Ethiopia's first ever major dam project on the Blue Nile for hydropower generation power with a reservoir impounding capacity of 74 BCM of water and installed capacity of 5150 MW per annum.[61] The GERD construction is regarded to be a "potent counter-hegemonic measure"[62] and a *fait accompli* to Egypt and Sudan "which has brought about a *de facto* change in the *status quo*"[63] which the CFA failed to achieve *de jure*. However, compliance producing mechanisms have still been posed on Ethiopia on the GERD including its filling and annual operation.[64]

Egypt and Sudan protested asserting that GERD will seriously affect their respective water shares they assumed in the 1929 and 1959 Nile Agreements; however, Ethiopia's public diplomacy missions played a huge role in positively changing position of Sudan who considered the economic benefits the dam offers.[65] The public diplomatic step on GERD was taken by Egypt

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[55] Tesfaye, *supra* note 21, at 71.
[56] *See* Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 6 & Annex III.
[57] *See generally* Dereje Zeleke Mekonnen, *Flight into Obscurity or a Logical Cul-de-sac?*, *supra* note 1. *See also* Maru, *supra* note 54, at 23.
[58] *See* Mekonnen, *From Tenuous Legal Argument, supra* note 21, at 246-248; *see also* Tesfaye, *supra* note 21, at 73.
[59] Deng, *supra* note 26, at 56.
[60] Ethiopia launched the dam after signing the CFA. *See* Mahemud E. Tekuya, *Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute*, 59:1 COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 65, 78 (2020); Amer, *supra* note 49, at 14-15.
[61] International Panel of Experts (IPoE) on Grand Ethiopian Renaissance Dam Project (GERDP), Final Report, 7 (2013). The reservoir's active storage is 59 BCM (1.2 times the Blue Nile's mean annual flow). Its estimated mean annual energy production is 15,692 GWh (around 16 TWh) that would be Africa's largest and world's fifth. *See* Kevin G. Wheeler *et al.*, *Understanding and managing new risks on the Nile with the Grand Ethiopian Renaissance Dam, 11:5222* NATURE COMMUNICATIONS 2 (2020). Available at: https://doi.org/10.1038/s41467-020-19089-x. (Accessed on 15 May 2021).
[62] *See* Mekonnen, *Declaration of Principle, supra* note 46, at 266.
[63] *See* PETER ENGELKE & HOWARD PASSELL, FROM THE GULF TO THE NILE: WATER SECURITY IN AN ARID REGION 11 (Atlantic Council, 2017). Available at: https://issuu.com/atlanticcouncil/docs/from_the_gulf_to_the_nile_web_0322 (Accessed on 15 May 2021).; Tekuya, *Sink or Swim, supra* note 60, at 105.
[64] *See generally,* Mekonnen, *Declaration of Principle, supra* note 46, at 266-274 The current dispute on the filling and operation, as discussed in Section 2 *infra* is also the reflection such hegemonic efforts by Egypt.
[65] Ethiopia public diplomacy with Sudan further aimed to "enhance economic integration of the two countries in terms of trade, investment, infrastructure to the public" and to create awareness on GERD's contribution for such

on the same month of the GERD launch when its first ever diplomatic delegation visited Ethiopia, to discuss the GERD project and CFA.[66] This marked a turning point in the basin because Egypt that is known in securitizing the Nile questions turned its face to public diplomacy and applying soft power.[67] In later years, Ethiopia also engaged public diplomacy in Egypt to attract support from people and influential figures of Egypt.[68]

On the same year of the dam launch, Ethiopia invited the two countries into the GERD discussion to form the International Panel of Experts (IPoE) to examine the dam. This invitation is regarded to be Ethiopia's wrong turn enabling Egypt to plan another hegemonic strategy "to entrap Ethiopia in an agreement" that would maintain the *status quo* of inequitability.[69] As subsequent sections of this article unfold Egyptian audacity to demand prior agreement before filling and operation of GERD found its root from this invitation.

The IPoE, in May 2013, submitted final report of its finding concerning, *inter alia*, impacts of the GERD size and the filling on downstream states.[70] It confirmed that the dam size is consistent with inflow of the Blue Nile at the project site; and the filling will not seriously reduce Egypt's hydrology if conducted in the flood season (June-September).[71] Yet, the Panel recommended further impact studies on the GERD, which gave rise to formation of the Tripartite National Committee (TNC).[72] During the TNC's meetings, however, Ethiopia rejected Egypt's demand to base impact studies on existing uses as provided in the 1929 and 1959 Agreements.[73]

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endeavors. *See* Henok Seifu Merid, Grand Ethiopian Renaissance Dam and Changing Power Relations in the Eastern Nile Basin (MA Thesis, Institute for Peace and Security Studies, School of Graduate Studies, Addis Ababa University, 2016), p. 69 citing his interview with Zerubabel Getachew: Expert of Boundary and Trans-Boundary Resource Affairs Directorate General in Ethiopian Ministry of Foreign Affairs: Interviewed at Ghion Hotel, on16 March 2016. *See* Tekuya, *Sink or Swim, supra* note 60, at. 78.

[66] In the discussion Ethiopia agreed to delay ratifying the CFA until Egypt elects new government. This was followed Egypt's interim president Essam Sharaf official visit to Addis Ababa to discuss about the dam. Amer, *supra* note 49, at 22 & 53 (*see* annex 1).

[67] Merid, *supra* note 65, at 67.

[68] Led by speaker of the HPR, in 2014, Ethiopia's public diplomacy also brought a leveraging counter-hegemonic mechanism in promoting its stance on the GERD that the dam is for hydro-power generation and does not harm downstream states but offers win-win and equitable use of the Nile. Merid, *supra* note 65, at 69; *see also* Amer, *supra* note 49, at 35.

[69] *See generally* Dejen Yemane Messele, *The Mystery of the GERD Negotiations: From Coercion to Obligation of Treaty Conclusion*, 15(2) MIZAN LAW REVIEW 523, 526-8 (2021).

[70] Thus the Panel's mission was to review the GERD report (studies), which Ethiopia conducted prior to the launching, on benefits and potential impacts of the dam on the downstream riparian states. IPoE, *supra* note 61, at 3. The Panel's report is said to be the most comprehensive and careful examination of all available preliminary studies of the GERD. Abdelazim, Nourhan et al., *Operation of the Grand Ethiopian Renaissance Dam: Potential Risks and Mitigation Measures,* 27 JOURNAL OF WATER MANAGEMENT MODELING 1 (2020).

[71] *See* IPoE, *supra* note 61, at 36-38.

[72] *Id., at 37-38.* Formed in 2014, the TNC is a committee of 12 experts (four from each of the three states) formed to guide and follow up on conducting impact assessment studies based on recommendations of the Panel. *See* Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 8, para 33.

[73] Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 8, para 33.

Later in 2015, after a long lane of negotiations where Sudan played a positive role,[74] Egypt acknowledged the GERD construction by signing the trilateral Declaration of Principles on the GERD (the DoP).[75] In this period, the DoP had been considered to have marked a historic de-escalation of riparian tensions on the GERD.[76] The proponents mainly accentuate the DoP's recognition of the two major principles of international water law (i.e., equitable utilization and no significant harm)[77]; however, its provisions and recognition of the principles are criticized to be problematic.[78] Moreover, as upcoming sections address, the DoP also stipulates general rules on the GERD first filling and operation that eventually incite the current disputes on filling.

2. THE TURBULENT ROAD TO THE GERD FIRST FILLING

The riparian tension on the GERD began to revive in August 2017 when the dam reached 60% of completion ready to retain water in the reservoir.[79] Egypt demanded its share of 55.5 BCM of water be unaffected as a result of the GERD filling; which Ethiopia rejected for a reason that it is based on the colonial agreements to which Ethiopia does not bound to respect.[80] In turn, Ethiopia initiated formation of the National Independent Scientific Research Group (NISRG) to study potential impacts of the GERD first filling plans and annual operation on downstream developments and propose rules of guideline for the filling.[81] The NISRG's major finding is to conduct the initial filling in stages (stage based filling).[82] On the September 2018 meeting, the Ministers of Water Affairs of the three states agreed on findings of the NISRG; however, Egypt

[74] *See* Permanent Rep. of Sudan to the U.N., *Letter dated 2 June 2020 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council,* S/2020/480 (2 June 2020). [Hereinafter: Sudan's Letter to UNSC (2 June 2020)]; *See also* Tekuya, *Sink or Swim***,** *supra* note 60, at 78-79.

[75] Agreement on the Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia and the Republic of Sudan on the Grand Ethiopian Renaissance Dam Project, signed at Khartoum, Sudan, 23 March 2015 (hereinafter the DoP).

[76] Jenny R. Kehl, *Water Security in Transboundary Systems: Cooperation in Intractable Conflicts and the Nile System,* 63. in JEAN AXELRAD CAHAN (eds.), WATER SECURITY IN THE MIDDLE EAST, (Anthem Press, 2017) Available at: https://www.jstor.org/stable/j.ctt1jktqmk.8 (Accessed on 15 May 2021); *see also,* Salman M.A. Salman, *The Declaration of Principles on the Grand Ethiopian Renaissance Dam: An Analytical Overview,* In ETHIOPIAN YEARBOOK OF INTERNATIONAL LAW (Zeray Yihdego et al., eds., Springer International Publishing AG, Switzerland, 2017). [Hereinafter: Salman, 2017].

[77] *See generally* Salman, *the DoP, supra* note 76, at 210-218. Noting that the DoP adequately recognizes basic principles of International water law particularly equitable utilization based on sovereign equality of the three riparians. And, the no-harm principle as provided in the DoP is stated in subordination to equitable utilization.

[78] D.Y Messele, *supra* note 69. Mekonnen, *Declaration of Principle, supra* note 46, at 267-274. Mekonnen asserts that the DoP, in legalizing the inequitable status quo, limits use of the GERD only to non-consumptive hydropower generation purpose though Egypt's and Sudan's unilateral water consumptive irrigational projects are kept immune from such limitations. Besides, the DoP eroded the principles of international water law when it recognizes the "no significant harm" rule (in Principle III) omitting its underlying element, i.e. giving due regards to the factors and circumstance of equitable utilization (as provided in Principle IV) in consideration of the harm as significant or otherwise. As a result, DoP preserves the status quo by denying upstream equitable utilizations especially consumptive uses against any harm, the two downstream states may claim, without having regard to factual considerations as the DoP blended factual injuries with legal injuries.

[79] Michael Asiedu, *The construction of the Grand Ethiopian Renaissance Dam (GERD) and geopolitical tension between Egypt and Ethiopia with Sudan in the mix*, 50 GPoT PB 3 (2018). Available at: http://www.jstor.com/stable/resrep14136 (Accessed on 10 May 2021). Noting: the speech of Egyptian President Abdel Fattah al-Sisi that "no one can touch Egypt's share of the water."

[80] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, at 12.

[81] The NISRG is formed in 15 May 2018. *Id.,* at 13.

[82] Sudan's Letter to UNSC (2 June 2020), *supra* note 74, *enclosure,* at 11.

backed-off from signing.[83] Though no consensus reached, the NISRG studies required Ethiopia to release 35 BCM of water (about 75% of annual flow of the Blue Nile) during the filling.[84]

While NISRG's studies were underway, in August 2019, Egypt came up with its own plan on the first filling by totally disregarding the NISRG's progresses and 11 months of negotiations.[85] In its plan, Egypt demanded Ethiopia: to conduct the first filling in more than seven years period with minimum annual release of 40 BCM of water; to secure the flow keeping AHD level at 165 m-asl; to obtain approval from Egypt for future filling stages;[86] to release 49 BCM (the whole natural/ mean annual flow of the river) during the GERD operation; and to allow Egypt open its office at the GERD site.[87]

Ethiopia rejected these demands and insisted to return to the NISRG to finalize its studies on agreed points in guiding the first filling and operation of the GERD. However, the trilateral talk in the NISRG studies had to be interrupted in stalemate due to Egypt's stubborn immobility on requiring agreement on all demands of its plan.[88] In the meantime, upon Egypt's invitation of the US and World Bank (WB) into the trilateral technical meetings on the GERD filling and operation, which Ethiopia accepted, the three countries jointly agreed on the observer role of the US and WB in December 2019.[89]

In the tripartite technical meetings, the US expected the three riparians reach at an agreement by the end of February, 2020 on outlined subjects of negotiations.[90] Meanwhile, the US turned its status from an observer of the tripartite talks to formulating the agreement –'the Washington Document'– under the guise of "facilitating preparation of the final agreement."[91] Further, stating Egypt's readiness to sign, the US demanded Ethiopia also to sign 'the Washington

[83] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13; Ethiopia's letter to UNSC (25 June 2021), *supra* note 12, at 13. *Cf.* Egypt's letter to UNSC (04 May 2020), *supra* note 5, Aide Memoire, at 11.
[84] William Davison, *Calming the Choppy Nile Dam Talks*, Commentary-Africa, International Crisis Group (23 Oct. 2019). Available at:. https://www.crisisgroup.org/africa/horn-africa/ethiopia/calming-choppy-nile-dam-talks (Accessed on 21 May 2021).
[85] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13; Ethiopia's letter to UNSC (25 June 2021), *supra* note 12, at 13. *see also* Tekuya, *Sink or Swim, supra* note 60, 85-86; *see also ibid.*
[86] *See* Egypt's letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1. This, in other words, based from Egypt's self-authorized 'veto right' that Ethiopia may not conduct the filling without 'prior-agreement' in unfounded interpretation of the 1902 Anglo-Ethiopian Border Treaty and the 2015 DoP.
[87] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13; *see also* Tekuya, *Sink or Swim, supra* note 60, 85-86; Davison, *supra* note 84.
[88] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13.
[89] *See* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States, and the World Bank (Dec. 9, 2019). Available at:. https://home.treasury.gov/news/press-releases/sm851 (Accessed on 19 May 2021).
[90] The meetings outlined subjects of negotiations on: staged based filling of the GERD under conditions of the Blue Nile hydrology and "the potential impact of the filling on downstream reservoirs"; filling to take place during wet seasons (July to September) with mitigating mechanisms in dry seasons (including draught and prolonged draught periods); and to undertake initial filling stage of the GERD up to 595 m-asl. *See* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank (Jan. 15, 2020)
[91] *See* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank (Jan. 31, 2020). Available at:. https://home.treasury.gov/news/press-releases/sm891 (Accessed on 13 May 2021).; *see also* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank (Feb. 13, 2020). Available at:. https://home.treasury.gov/news/press-releases/sm907 (Accessed on 19 May 2021); *see also* Tekuya, *sink or swim, supra* note 60, at 71.

Agreement', with its unwarranted interpretation of the DoP that "final testing and filling (of the GERD) should not take place without an agreement."[92] Ethiopia rejected the US demand and withdrew from the last meeting.[93]

In turn, on 10 April 2020, Ethiopia proposed to the two downstream states the first stage filling plan of the GERD reservoir to retain 18.4 BCM of water in two years plan: 4.9 BCM (in the first year) and 13.5 BCM (in second year/phase).[94] As a drought mitigation plan, Ethiopia stated to postpone the second year filling plan to the next hydrological year if inflow of the Blue Nile is below 31 BCM.[95] Denouncing the proposal, Egypt took the matter to the UNSC (on 4 May 2020) by alleging the GERD negotiation on the filling that threatens its security is in deadlock.[96] In the meantime, Ethiopia completed the first year filling plan in June 2020 retaining 4.9 BCM of water.[97] Further, the second year filling plan was anticipated in the flood season of 2021 following, reportedly, 80% completion of the GERD construction in the same year.[98] In 19 July 2021, the first stage filling was completed by the second year plan.[99] Once more, as it happened in the first year filling, Egypt and Sudan reacted to the second year filling in securitizing and internationalizing the matter by reporting to the UNSC in 2021.[100]

In sum, completion of the GERD first-stage filling has important implication in the BNB water sharing questions. Egypt's accusations against the filling highlight its long-standing 'acquired right' claim in securing absolute control over the Nile waters mainly in securing ultimate storage in the AHD. Besides, Egypt's robust securitization and internationalization of the first stage filling are figurines of its hegemonic strategies to prolong its absolute control of the Nile waters.[101] However, international law does not forsaken Ethiopia to such hegemonic tactics of Egypt without an effective counter-hegemonic strategy.[102] In this regard, as Dereje Zeleke

[92] Press Release, U.S. Dep't of the Treasury, Statement by the Secretary of the Treasury on the Grand Ethiopian Renaissance Dam (Feb 28, 2020). Available at: https://home.treasury.gov/news/secretary-statements-remarks/statement-by-the-secretary-of-the-treasury-on-the-grand-ethiopian-renaissance-dam (Accessed on 19 May 2021)

[93] Tekuya, *Sink or Swim***,** *supra* note 60, at 71.

[94] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Memorandum: at 1, para 4.

[95] The hydrologic year is the period from July 01 to June 30 of the following year. *See* Ethiopia's Draft Guidelines for the GERD First Filling, *supra* note 7, Article 1 cum. 5; *see also id.,* Memorandum: at 3, para. 10.

[96] Egypt's Letter to UNSC (4 May 2020), *supra* note 5, Annex I, at 2.

[97] Wheeler et al., *supra* note 61, at 3.

[98] On May 2021, the GERD became ready to store more 13.5 BCM of water in the second year/phase totaling the first stage filling to 18.4 BCM enough to operate two turbines the same year. *GERD construction reaches over 80 percent completion,* The Ethiopian Herald, (May 21, 2021). Available at: https://www.press.et/english/?p=35147# (Accessed on 10 June 2021)

[99] Dr Eng. Seleshi Bekele, *supra* note 11.

[100] *See* Security Council Report, *What's in Blue: Meeting on the Grand Ethiopian Renaissance Dam and Regional Relations* (7 July 2021). Available at: https://www.securitycouncilreport.org/whatsinblue/2021/07/meeting-on-the-grand-ethiopian-renaissance-dam-and-regional-relations-2.php. (Accessed on 11 July 2021) (Hereinafter, UNSC Report 2021). *See also* Sudan's Letter to UNSC (2 June 2020), *supra* note 74, *Enclosure* at 6**;** Egypt's Letter to UNSC (4 May 2020), *supra* note 5; Egypt's Letter to UNSC (19 June 2020), *supra* note 5.

[101] *See* Mekonnen, *From Tenuous Legal Argument, supra* note 21.

[102] At this juncture, however, critiques show that international law is played by hegemon states in the furtherance of their hegemonic interests. *See* D.Y Messele, *supra* note 69, 524-5. Nonetheless, in the international arena, with due consideration of the matter at hand by negotiators and legal advocates in due course, Ethiopia has a big take in putting international law to secure its interests in the Nile. This is what the international water law scholars as well

Mekonnen rightly noted the "chink in the armour of the [Egyptian] hydro-hegemon is the grotesquely inequitable nature of the *status quo* which stands out in stark transgression of the fundamental principles of international water law."[103] Thus, the following section explores the international regime that governs non-navigational uses of shared waters and the agreements Ethiopia is a signatory with one or two of downstream states particularly the 2015 DoP. As for the 1929 and 1959 Agreements, as pointed out in previous sections, they do not legally bind Ethiopia and the GERD as well.[104]

3. OVERVIEW OF THE INTERNATIONAL WATER LAW REGIME AND EXISTING NILE AGREEMENTS: THE GERD FILLING AND OPERATION IN CONTEXT

3.1 The UN Watercourse Convention and the Two Basic Principles

Adopted in 1997 and entered into force in 2014, the UN Watercourse Convention[105] is the first and main international instrument that codified most important principles of international water law.[106] Although none of the BNB riparians are parties to it, the Convention has significance in setting the rights and duties of the riparians since its provisions reflect fundamental customary norms and general principles of law.[107] The concerned riparians also stated these provisions of the Convention on the same parlance.[108] Most importantly, rules of "equitable and reasonable use right" and "not-to-cause significant harm" which stem from "community of interest" and equality of sovereignty of riparians, are the two most fundamental customary norms that define the rights and obligations of riparians in the utilization of internationally shared waters.[109]
Enshrined under Article 5 of the Convention is "the basic right"[110] of riparians to equitable and reasonable utilization of international watercourses in their own territories.[111] It provides that all

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as case laws unfold in the utilization of international watercourse. In this regard Sections 4 and 5, *infra,* address such concerns as well.

[103] *See* Mekonnen, *From Tenuous Legal Argument, supra* note 21, at 254-255. For Ethiopia the best counter-hegemonic strategy is to keep the path of legal claims based on international law as its highest leverage.

[104] *See id.,* at 240.; Mekonnen, *Declaration of Principle, supra* note 46, at 260. This has also been admitted by Egypt in its letter to the UNSC. Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5, Annex I, at 2.

[105] UN Convention on the Law of Non-navigational use of International Watercourse (1997) (hereinafter the UNWCC). The UNWCC is framework convention consisting of general substantive and procedural rules on utilization, development and management of international watercourses. It leaves details for riparian states to complement it with specific treaties considering the contexts of the watercourse in question. *See*, *id.,* Article 3 (3).

[106] Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 61 HARVARD INTERNATIONAL LAW JOURNAL 135, 150 (2020).

[107] McCaffrey, Stephen C, *The Need for Flexibility in Freshwater Treaty Regimes*, 27 NATURAL RESOURCES FORUM 156, 156-7 (2003); *Stebek, supra* note 3, at 43; Mekonnen, *Declaration of Principle, supra* note 46, at 261; *Id*., at 180-1.

[108] In this regard, Sudan reiterated that the convention is reflection of customary international norms in regulating utilization of international waters. Egypt also admitted that the two principles, as depicted in the Convention, are customary norms. *See* Sudan's Letter to UNSC (2 June 2020), *supra* note 74, at 5-6. *Cf.* Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5, Annex I, at 3.

[109] *See Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (*Sweden vs. Poland) September 10th, 1929 Seventeenth (Ordinary) Session 36, Judgment № 16, PCIJ, Ser. A., No. 23, 1929, at 21; *Case concerning GabCikovo-Nagymaros Project (Republic of Hungary v. Slovakia Federal Republic),* International Court of Justice, Case No. 92, September 25, 1997*,* at 56, para. 85; *see* Mekonnen, *Declaration of Principle, supra* note 46, at 261; *see also* Meshel, *supra* note 106, at 148-149.

[110] *See GabCikovo-Nagymaros Case, supra* note 109, at 54, para. 78.; *see also* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSE, 411 (2007).

the relevant factors and circumstances enlisted under Article 6 of the same Convention are considered holistically.[112] From proviso of Article 5(1) that: "states *shall* ... utilize an international watercourse in equitable and reasonable manner", the Convention stipulates a right as well as an obligation on all riparians to equitably utilize shared waters.[113] This rule is regarded as "basic right" of all riparians of shared waters in the utilization of the same.[114]

The other fundamental rule of the Convention, provided in Article 7, is not-to-cause significant harm that puts obligation on all riparians, both upstream and downstream, to utilize shared waters with due diligence to avoid or minimize potential adverse significant harms other riparians could sustain as a result of their uses.[115] No significant harm principle is one of the most controversial and most debated principles in the international water regime.[116] Downstream riparians strongly favor this principle with a view to protect their existing water developments from new upstream projects which would reduce the flow of shared watercourse.[117] Likewise, the two downstream states, especially Egypt indulges in this principle to secure the flow of the Nile in favor of their existing uses,[118] which has been developed by Egypt in anticipation that the 1959 Agreement would have to be observed by upper riparian states including Ethiopia.[119]

Conversely, scholars duly noted that no significant harm principle is commonly mistaken to only protect downstream states from upstream projects. Downstream states may also cause significant harm on upstream states. This happens when equitable share of upstream states (and their water developments) is affected by massive water developments in downstream states.[120] Furthermore, scholarly works, instruments as well as case laws clearly connote that the rule not to cause

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[111] UNWCC, *supra* note 105, Article 5(1).

[112] *Id.*, Article 6(1). In general, these factors may be summarized as natural (hydrologic factors) and socio-economic (settlement, demography) including influences of public interest considerations, i.e. ecosystem and vital human needs. See, ALISTER RIEU-CLERK ET AL., UN WATERCOURSE CONVENTION USER'S GUIDE, 104 (United Kingdom, 2012); Attila Tanzi, *The UN Convention on International Watercourse as a Framework for the Avoidance and Settlement of Water Disputes,* 11 LEIDEN JOURNAL OF INTERNATIONAL LAW 441, 458 (1998); *Cf.* Aaron T. Wolf, *Criteria for equitable allocation: the heart of international water*, NATURAL 23 RESOURCE FORUM 3, 4 (2009).; Salman M. A. Salman*, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law,* 23(4) WATER RESOURCES DEVELOPMENT 625, 633. (2007).

[113] *See* International Law Commission, Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Groundwater, (1994), p. 101. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf (Accessed on 10 May 2021) (hereinafter UN, ILC Commentary).

[114] *See* Ibid**;** *GabCikovo-Nagymaros Case, supra* note 109; MCCAFFREY, *supra* note 110, at 408.

[115] *See* McCaffrey, Stephen, *The contribution of the UN Convention on the law of non-navigational uses of International Watercourses*, 1(3) INT. J. GLOBAL ENVIRONMENTAL ISSUES 250, 254 (2001). *See also* UNWCC, *supra* note 903, Article 7(1) & (2); s*ee generally* Meshel, *supra* note 106. The rule signifies that if significant harm occurred to a riparian despite the other riparian diligently took measures to prevent or minimize the harm, then these concerned riparian states are required to consult and negotiate to eliminate or mitigate the harm or, where elimination or mitigation is impossible, to discuss issue of compensation.

[116] *See* Andualem Eshetu Lema, *The United Nations Watercourses Convention from the Ethiopian Context: Better to Join or Stay Out?,* 4(1) HARAMAYA LAW REVIEW 1, 15 (2015). The controversy lingers on whether no-significant harm principle is inferior to equitable utilization or vice versa.

[117] *Id*., at 15-16.

[118] This may directly be referred from Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5, Annex I, at 3, para. 2.

[119] Recall the discussions in Section 1 of this article. Further discussion on the ramifications of such Egyptian position and its legality is provided in Section 4 of this article, *infra.*

[120] *See* MCCAFFREY, *supra* note 110, at 408; *See also* Meshel, *supra* note 106, 166-167. Stebek*, supra* note 3, at 52.

significant harm is complementary to "basic right" of equitable use; hence, the right of riparians to equitable use may not be refuted merely because it causes significant harm to other riparians.[121] It rather initiates the duty to cooperate among riparians to extend adequate protection to the rights of other riparian states to an equitable use.[122] Otherwise, depriving a riparian state of its "basic right" to equitable use by another riparian constitutes causing of significant harm.[123]

In the context of the dispute on the GERD filling, as a framework convention with general rules, the UNWCC cannot provide a complete answer to the issues and dilemmas in the Nile including the GERD filling.[124] However, the two fundamental rules of international water law are paramount to guide riparian relations in the GERD. Furthermore, the Convention's procedural rules on notification and consultation of planned measures[125] have important implications on the GERD filling and operation. On this topic, Ethiopia observed basic procedural steps in the first filling where it informed the two riparians; however, Egypt's self-prized 'veto' turned the negotiation process negatively.[126]

3.2 The 1902 Border Agreement[127]

This agreement was signed between Ethiopia and Great Britain to delimit the boundaries of Ethiopia with the British colony of Sudan. However, it inserted a *proviso* that aimed to restrict Ethiopia's potential water uses in the Nile tributaries including the Blue Nile.[128] Egypt, though never represented in this Agreement by Britain, invokes it against Ethiopia in the GERD first stage filling.[129] Yet, in post-colonial period, this agreement may only create legal relationship between Sudan and Ethiopia, instead of Egypt vis-à-vis Ethiopia concerning both border delimitation as well as the latter's uses of the Nile tributaries.[130]

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[121] *See* ILC Commentary, *supra* note at 113; *GabCikovo-Nagymaros Case, supra* note 109; MCCAFFREY, *supra* note 110, at 408.
[122] *See* ILC Commentary, *supra* note 113, at 97, para 2; *see also* MCCAFFREY, *supra* note 110, at 408.
[123] MCCAFFREY, *supra* note 110, at 408. (Explaining that customary international law also "protects a riparian state against the deprivation by another state of the equitable share of the former of the uses and benefits of an international watercourse.")
[124] *See* Stebek*, supra* note 3, at 56. *See also* Meshel, *supra* note 106, at 139.
[125] It obliges riparians to notify other potentially affected riparians as to its planned project. Such prior notifications enable riparians to know at early stages any project which might affect their interest. It further calls upon states to consult and cooperate in response to the possible significant adverse effect a planned project might cause. *See* Articles 11 through 19 of UNWCC, *supra* note 105; ALISTER ET AL., *supra* note 112, at 134.
[126] In this regard, Section 5.1 *infra* discusses this issue according to the case laws and international practices alongside the UNWCC.
[127] Treaties Relative to the Frontiers between the Soudan, Ethiopia, and Eritrea, Eth.-U.K. (May 15, 1902). (Hereinafter, the 1902 Agreement)
[128] *Id*., Art. 3.
[129] Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5**,** Annex I: at 2-3.
[130] During Sudan's independence in 1956, Britain's Foreign Office's legal advisors also stated that the 1902 Agreement "should in principle be regarded as surviving the acquisition of independence by the Sudan and as remaining in force between the Sudan and Ethiopia." Phillips, *Foreign Office to P.R.A. Mansfield*, Addis Ababa 15 May 1956, FO 371/119061. (*Cited in* TERJE, *supra* note 17, at 314.) Moreover, as opposed to Sudan, Egypt never shared any borders with Ethiopia even during Britain colonial domination, nor do the tributaries stated in Article 3 (Tekeze/Atbara, Baro/Sobat and Blue Nile) cross Egypt's territory.

Article 3 of the Agreement particularly requires Ethiopia to enter into prior agreement if it wishes to uses the Nile tributaries. This provision has dual meanings in the English and Amharic versions. In the English version, Ethiopia is obliged "not to construct … any work across the Blue Nile … which would *arrest* the flow" except in agreement with Britain and the Sudan.[131] However, the Amharic version that imposes on Ethiopia "…not to block up/stop up from river bank to river bank…"[132] is equally authoritative and judicially taken to have equivalent meaning with the English 'not to arrest.'[133] Consequently, both terminologies of the English and Amharic versions would only prohibit 'total stopping or complete blockage' of flow of the river without prior agreement. Otherwise, Ethiopia is permitted to construct and execute water work projects without prior agreement with Sudan.

There are numerous legal assertions as to the invalidity of this treaty and as such to not bind Ethiopia. For instance, on ground of material breach of the treaty[134] British recognition of Italian occupation of Ethiopia in 1935/6 in violation of the very purpose of this treaty (i.e., to create friendly relation between the parties) relieves Ethiopia from observing its part of the obligation in the treaty.[135]

As it is the case in the GERD, the first stage filling is not directly predisposed to Article 3 of this Agreement as the flow of the Blue Nile may not completely be blocked as a result of the filling. This holds true for upcoming fillings as well as refilling and annual operations of the GERD alike.

3.3 The 1993 Cooperative Framework Agreements

This Agreement is signed between Ethiopia and Egypt in the utilization of the Nile.[136] It provides set of general rules as to the utilization of the Nile. The purpose of this agreement was to provide a cooperative framework between the two riparian states and recognize their mutual interest in the Nile Basin and realizing their potential uses based on the international law principles.[137] Especially, Article 5 stipulates that "[e]ach 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."

At this juncture, although the provision lowered the threshold of harm from 'significant' to 'appreciable', it imposes similar obligation on Egypt too. Both of the countries assume this obligation mutually. As it has been highlighted in Section 3.1, the principle, even though the threshold of harm seems to be lowered, protects the equitable use right of riparians – both

[131] The 1902 Agreement*, supra* note 127, Article 3 (emphasis mine).

[132] The original Amharic version of the provision in the Agreement reads 'ወንዝ ተዳር እዳር የሚደፍን ሥራ እንዳይሰሩ ወይም ወንዝ የሚደፍን ሥራ ለመስራት ለማንም ፈቃድ እንዳይሰጡ'. *See the original text in* Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, Annex VI.

[133] *See* 1902 Agreement, *supra* note 127, Art. 5; *see* also United Nations, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), Art. 33(1).

[134] Vienna Convention on Law of Treaties, *supra* note 133, 128, Art. 60.

[135] *See* Tekuya, *supra* note 60, at 111.

[136] Framework for General cooperation between the Arab Republic of Egypt and Ethiopia, signed at Cairo, 1 July 1993. (Hereinafter the 1993 Agreement)

[137] *Id.,* Articles 3, 4 and 8. Accordingly, the two riparians commit to the principles of good neighborliness and peaceful settlement of dispute as well as mutual trust and understanding. *See also Id.,* Articles 1 and 2.

existing and potential uses.[138] Moreover, even if principle of equitable use seems to be overlooked in this agreement, Egypt has been committed to it in the 2015 DoP. In this regard, since the GERD is prominently governed by the DoP that incorporates equitable utilization principle, the 1993 Agreement will not be invoked to deny Ethiopia's equitable right in the GERD filling for a sole reason that it might cause significant harm.

3.4 The 2015 Tripartite Declaration of Principle on the GERD

The DoP is the first tripartite agreement among the three riparians signed by the top political figures of the respective states.[139] This shows the special legal significance of this agreement in binding the relations of these coutnries concerning the GERD.[140] The riparians also commits to fully implement provisions of the DoP in their 4th Ministerial meeting that produced "the Khartoum Document"[141] Moreover, major provisions of the DoP –principles of equitable and reasonable use and not to cause significant harm– binds the three countries as endorsements of existing customary norms governing internationally shared watercourses.[142] Yet again, the provisions of the DoP are meant to set a framework for future dialogues and agreements on the GERD.[143]

In its preamble, the DoP, in a very unique way from any other previous agreement on the Nile, emphasizes on significance of the Nile River for Ethiopia as much as the two downstream states.[144] Most importantly, the DoP recognized the two fundamental principles of international water law.[145] Article III deals with "not to cause significant harm" principle[146] that require all the three states to take all appropriate measures to prevent adverse significant harm on the other

[138] Meshel, *supra* note 106, at 154.
[139] The DoP is signed by the heads of governments of the three states. *See* DoP, *supra* note 75., *see also* Salman, 2017*, supra* note 76, at 209.
[140] However, considering the fact that the DoP is not ratified by any of these countries, there are questions as to the status of the DoP whether it is a binding agreement or a declaration of general guidelines for future agreements. In this regard, *see generally* Tekuya, *Sink or Swim, supra* note 60, at 79-81.
[141] They stated to "full commitment to implement the provisions of the Agreement on DoP." The 4th Tripartite Meeting of the Ministers of Foreign and Water Affairs of Egypt, Ethiopia and Sudan on the Grand Ethiopian Renaissance Dam Project, Khartoum, Sudan (27 - 28 December 2015) p. 2, para. 2 & p. 3, Agenda III. This document is signed by the respective Water Affairs Ministers and Foreign Affairs Ministers of the three countries.
[142] These provisions are virtually transported from the UNWCC. *See* DoP, *supra* note 75, Articles III and IV *Cf.* UNWCC, *supra* note 105, Articles 5-7. *See also* Tekuya, *Sink or Swim, supra* note 60, at 81. Meshel, *supra* note 106, 180-181. Salman, 2017*, supra* note 76, at 211-2.
[143] Tekuya, *Sink or Swim, supra* note 60, at 92.
[144] *See* preamble of the DoP, *supra* note 75; Tekuya, *Sink or Swim, supra* note 60, at 79. This may be taken as a great step to scratch a commonly used cliché that Ethiopia is a water rich country with many alternative water resources that the Nile is a luxury to her. *See* this cliché for example in Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5**,** Annex I, at 6.
[145] DoP, *supra* note 75, Article IV and III. The DoP is particularly dynamic in changing Egypt's claim from 'no harm' to the internationally accepted principle of 'not to cause significant harm. Dr. Tedros Adhanom [former] Minister of Foreign Affairs on the Nile Declaration of Principle Agreement (Audio), Aigaforum. Available at: http://aigaforum.com/audiovideo/Dr-Tedros-nile-agreement.php. (Accessed on 1 May 2021).
[146] However, as noted earlier on *supra* note 78, recognition of these principles is criticized as problematic especially the omission of giving due regard to equitability of the use in the determination of the harm. *See also* Mekonnen, *Declaration of Principle, supra* note 46, at 267-274. *Contra* Salman, 2017*, supra* note 76, at 211-2.who holds that absence of such cross referencing to equitability of the use in the determination of significant harm is a reflection that the DoP takes the no-significant harm rule in subordination to equitable utilization principle.

riparian "in utilizing the Blue/Main Nile"[147] This terminology of "Blue/Mean Nile" clearly obliges the two downstream states not to significantly harm Ethiopia in their use of the "Main Nile" as Ethiopia is obliged the same towards them in its use of the "Blue Nile" in the GERD.

With regard to the equitable utilization principle, the DoP under Article IV recognizes the various factors for determining equitability of water uses that are virtually transported from the UNWCC and the 2010 CFA.[148] However, the DoP added two more factors that are neither included in the UNWCC nor in the CFA. These are "contribution of each Basin State to the waters of the Nile River system"[149] and "extent and proportion of the drainage area in the territory of each Basin State"[150] which favor Ethiopia as biggest contributor to the Nile waters and "and is third, after Sudan and South Sudan, in the size of the Nile drainage area in its territories."[151] The equitability of the GERD filling and operation in this regard is discussed in Section 5.2 of this article.

With particular emphasis to the GERD filling and operation, the DoP under Article V stipulates general rule that instructs the filling and operation to base on joint studies in accordance to the recommendations of IPOE in its final report and as agreed by the TNC.[152] On this ground, the three states are required to "agree on guidelines and rules on first filling of GERD" which shall consider all various scenarios "in parallel with the construction of GERD."[153] In this provision, the DoP requires cooperation of the riparians based on "sovereign equality, territorial integrity, mutual benefit and good faith" for optimal utilization of the Nile River.[154]

Article V remains to be a sticking point among the three riparians in the GERD filling and operation. Egypt alleges that the GERD first filling and operation may not be conducted without prior agreement among the parties; hence, for Egypt, the first stage filling Ethiopia conducted in 2020 and 2021 is a unilateral act that violates Article V of the DoP.[155] Conversely, Ethiopia holds that no such prior-agreement is provided as a precondition to the filling and operation of GERD hence the filling is conducted in line with the DoP.[156] In relation to this, Section 5.1 particularly discusses this issue.

4. REVEALING FOUNDATIONS OF EGYPT'S ALLEGATIONS AGAINST THE GERD FILLING AND OPERATION: A VICIOUS CIRCLE OF IN-EQUITABILITY

[147] DoP, *supra* note 75, Article III, para 1
[148] *Id.,* Article IV., UNWCC, *supra* note 105, Articles 5-7. *See also* Tekuya, *Sink or Swim, supra* note 60, at 81. Meshel, *supra* note 106, 180-181. Salman, 2017*, supra* note 76, at 211-2.
[149] DoP, *supra* note 75, Article IV, para 2 (h).
[150] *Id*., Article IV, para 2 (i).
[151] Salman, 2017*, supra* note 76, at 213.
[152] DoP, *supra* note 75, Article V, para 1 & 2.
[153] *Id*., Article V, para 2 (a). The same is provided in para 2 (b)&(c) as to annual operation of GERD which Ethiopia may adjust time to time provided it informs the downstream states as to unforeseen or urgent circumstances.
[154] *Id*., Article V, para 2 & 3 cumulative with Article IX.
[155] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1. *See also* Egypt's Letter to UNSC (04 May 2020), *supra* note 5, Aide Memoire, at 9.
[156] Detailed discussion on whether or not the filling is unilaterally done is made in Section 5.1 *infra.*

As discussed earlier, Egypt adjoined by Sudan robustly securitized and internationalized the GERD first stage filling in the letters to UNSC to which Ethiopia responded. The letters and official statements of the three riparian states represent their respective positions on the GERD. Their statements rely on legal arguments based on the Agreements signed among them particularly the DoP as well as customs and principles that govern internationally shared waters. In this section special emphasis is given on Egypt's letters and official statements to the UNSC as they duly reflect its deeply rooted position against the GERD filling and operation.

For starter, Egypt stated that the GERD filling is governed by "the customary rules of international law including the obligation not to cause significant harm and the principle of equitable and reasonable utilization."[157] This sparks the issue whether or not Egypt is turning its face to the acceptable fundamental principles of international water law (principles of equitable and reasonable utilization and no significant harm) concerning the GERD first stage filling to the eclipse of 'historic and natural right.' At this juncture, it is appropriate to address three important issues: A) Is Egypt endorsing acceptable principles of international water law to the eclipse of the 1929 &1959 Agreements? B) Does it have a point in claiming 'significant harm' against the GERD's fillings? C) Or just another vicious circle to cling to 'natural and historic right'? The following sub-sections address these issues one after the other by critically analyzing Egypt's submissions to the UNSC vis-à-vis international water law regime and existing Nile Agreements.

4.1 Is Egypt Dropping the 1929 &1959 Agreements to Endorse the Two Principles?

In defense to Ethiopia's claim that the 1929 colonial treaty and the 1959 Agreement do not bind the GERD filling and operation, Egypt stated as a matter of "fact" that:

> Ethiopia was never a colony, and all of the Nile waters agreements to which Ethiopia is bound were concluded when it was an independent, sovereign state. The GERD must be governed, as stipulated in the 2015 DoP, by the applicable principles of international law, which require preventing the causing of significant harm to existing water uses.[158]

It further stated that "all treaties that are in force between Egypt and Ethiopia were signed by Ethiopia as an independent, sovereign state ... [t]hese include the 1902 treaty ... the 1993 Framework for General Cooperation ... and the 2015 Declaration of Principles on GERD."[159]

These statements clearly show that Egypt is not asserting the 1929 and 1959 Agreements against Ethiopia and the GERD filling as they do not bind Ethiopia as a nonparty.[160] Thus, it follows that negotiations concerning the GERD filling and annual operation cannot be setup by Egypt or Sudan based on the two agreements or issues of water sharing these agreements imply.[161]

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[157] Egypt's Letter to UNSC (19 June 2020)**,** *supra* note **7,** Annex, at 3.
[158] *Id.,* Annex I: at 2.
[159] *Id.,* Annex I: at 2-3.
[160] Nor did Egypt include these two agreements in the Annexes but only copies of the 1902, the 1993 and 2015 DoP Agreements. *See, id., Annex.* This suggests Egypt's realization of its tenuous arguments on the 1929 and 1959 Agreements. *See generally* Mekonnen, *From Tenuous Legal Argument, supra* note 21.
[161] As pointed out in Section 1.3 of this article, Ethiopia has continuously been stating that such water shares by Egypt and Sudan will not set up against it in its water developments.

Regarding to the 1902 Agreement, as previously discussed, it may not legally be set up against Ethiopia since its validity is seriously questioned.[162] The 1993 Agreement and the DoP mainly provide general rules on utilization of the Nile and, as for the latter, on the GERD. Egypt's intention in the DoP, besides to protecting existing uses, is to foreground its standpoint that Article V of the agreement requires prior-agreement before GERD's filling and operation. (This issue addressed in Section 5.1 of this article).

Further, concerning its relation with Ethiopia in the GERD filling and operation, Egypt stated the following regarding to the two fundamental principles of international water law regime.

> Egypt is entirely supportive of the right of Ethiopia, and other Nile riparian states, to development and to enjoy the benefits of the Nile River. Egypt, however, believes that such a right must be *exercised equitably and reasonably and in accordance with the applicable rules of international law that, inter alia, protect downstream riparians against significant harm*…[163]

This statement as it stands seems like Egypt's admission of principles of customary international law in the utilization of shared waters. It also seems to correlate with the prevailing legal understanding that not to cause significant harm is complementary to equitable utilization rule in qualifying the latter beside to other factors.[164] Thus, what determines legality of GERD's filling and operation the two principles as incorporated in Article III and IV of the DoP in close correlation to Articles 5-7 of the UNWCC. However, to genuinely evaluate and understand foundations of such seemingly legally consistent statements, it is important to appraise Egypt's stance on 'no significant harm' rule in the Nile and particularly in the GERD filling and operation. The following sub-topics address this concern.

4.2 Does Egypt have a Point in Asserting 'No Significant Harm' against the GERD Fillings?

The first issue is whether Egypt's assertion of 'no significant harm' against GERD's filling the way it states in its submission to UNSC is palatable in international water law. Asserting that the GERD filling will cause significant harm on its existing and current uses, Egypt claims that:

> … The obligation not to cause [significant] harm is designed to minimize the adverse effects of new projects, such as the GERD, *on current and existing water uses*. Also, *existing uses are one* of the factors that are used as the baseline to determine whether a new or planned water project is reasonable and equitable.[165]

From this statement, Egypt demands existing water uses, namely the Lake Nasser in the AHD,[166] to be 'protected' against the GERD's fillings and operation.[167] To Egypt, reduction of the Lake

[162] In this regard, recall the discussion in Section 3.2 of this article.
[163] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I: at 6. para. 2. (Italics mine)
[164] MCCAFFREY, *supra* note 110, at 408. UNWCC, *supra* note 105, Article 6; DoP, *supra* note 75. Article IV.
[165] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 3, para. 2. (Italic mine)
[166] As previous discussions of this article especially Section 1.1 show, the Lake Nasser storage at AHD is twice the size of the mean annual flow of the Nile. Besides, new water projects developed by Egypt (like the *Toshka*) that

Nasser storage would reduce its hydrology thence dropping agricultural food production and hydropower generation. According to this assertion, the GERD fillings and operation would not be equitable and reasonable if it adversely reduces storage of Lake Nasser at the AHD. However, putting the first stage filling in perspective, it is essential to address whether the GERD has significantly reduced the flow of the Nile to cause significant impact on Egypt's water supply.

Studies conducted on simulated impact of GERD on AHD show that the GERD filling, coupled with seasonal rainfall pattern of the Nile Basin, would only have short-term or immediate impact on Egypt's water supply and food production.[168] Accordingly, the hydrologic factor on Lake Nasser does not change even if the GERD was never finished or filled. Because, the 2050 projection shows, even though the flow of the Blue Nile is never affected, the water supply in Egypt will inevitably be dwindled.[169] The problem rather lingers on Egypt's ever growing demand/dependence on the Nile,[170] and not on estimated shortage of water following the GERD's filling, that will have long term significant impact on Egyptian food production.[171] This is further exacerbated by Egypt's agricultural policy that does not follow water-saving trends; rather, as studies show, agricultural practices in Egypt are extravagant in water use where they "use more water for irrigation than their total annual renewable supply."[172]

In fact, studies show that serious impact will be sustained by Egypt if the GERD filling is done in the dry season whereby, in the worst scenarios, Egypt's water supply could be reduced by 40%.[173] However, Ethiopia conducted the first stage filling during the flood seasons of June and July where there is lavishing rainfall.[174] As of 24 August 2020**,** after the GERD first year filling, the initial storage level in the HAD Reservoir was nearly full at 178.4 m-asl.[175] In this regard, let

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divert water from the Lake Nasser require more water beyond the entire flow of the Nile. Therefore, here 'existing uses' represents even more water than the 55.5 BCM of water Egypt self-acclaimed to itself in the 1959 Agreement.

[167] Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5, Annex I, at 2, para 3.

[168] *See* ENGELKE & PASSELL**,** *supra* note 63, at 12; *see also* Christopher D. Booth, *the Temperature is Rising, the Fever White Hot: the Grand Ethiopian Renaissance Dam as Flashpoint between Egypt and Ethiopia*, ATLANTIC COUNCIL 3 (2020). Available at: https://www.jstor.org/stable/resrep29331 (Accessed on 9 May 2021).

[169] ENGELKE & PASSELL, *supra* note 63, at 12. "…demand from projected Egyptian population and economic growth will have a much more significant long-term impact on Nile water supply. Lake Nasser could be drained to its dead storage level sometime between 2025 and 2030, even if the GERD never finished."

[170] As it has been discussed in Section 1.1 of this article, Egypt's desert land reclamation projects significantly increase the water demand of the country more than the annual flow of the Nile waters.

[171] For instance, some reports suggest that the mean annual flow the Nile River is dwindling due to global warming which currently is estimated to be 56 BCM, showing gross reduction of 28 BCM from the common estimate of 84 BCM in the 1960s. *See* Ofir Winter & Yogev Ben-Israel, Water in the Land of the Nile: From Crisis to Opportunity?, INSS INSIGHT (1089) 3 (2018). Available at: http://www.jstor.com/stable/resrep19448 (Accessed on 9 May 2021).

[172] Lawrence Susskind & Yasmin Zaerpoor (2017), *Water in the Middle East: Making Room for Informal Problem Solving* 8(2) BUSTAN: THE MIDDLE EAST BOOK REVIEW *132-150,* (Penn State University Press.), pp. 136-7. Available at: https://www.jstor.org/stable/10.5325/bustan.8.2.0132 (Accessed on 10 May 2021).

[173] Booth, *supra* note 171, at 146.

[174] Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, Memorandum: at 3, para 13. In relation to the first phase filling in 2020 "…both the Blue Nile and White Nile have above normal flow... about 180 meters above sea level (182 m being the full supply level) that is a record high for the past 30 & 40 years."

[175] Wheeler *et al.***,** *supra* note 61, at 3.

alone the first year filling plan, the second year filling plan does not have serious negative impact on Egypt as the country has enough storage of water to rely on in the AHD's reservoir.[176] At this juncture, no significant harm principle requires more than "trivial" or "real impairment of use" rather "substantial."[177] Therefore, in a situation where significant harm is not materialized on Egypt that it failed to show, the principle cannot be triggered against Ethiopia thus legalize the GERD first stage filling.[178] Even though the GERD filling causes significant harm, the legality of the filling, as international experiences and case laws show, may not be determined by the interest of Egypt. This issue will be discussed in Section 5.2.

4.3 Or Just Another Vicious Circle to Cling to 'Natural and Historic Right'?

The third issue, therefore, is whether Egypt's claims in the letters are malicious ways to cling to its 'acquired right' or 'natural and historic right' that it alleges to have based on the 1929 and 1959 Agreements. Especially, the 1959 Agreement that founded Egypt's existing uses in the AHD with the inflow of 55 BCM from the mean annual of the Nile is crucial. Here, the important statement that has been overly stated in the Nile Basin question by Egypt is over again averred in the letters to the UNSC that**:** "Egypt is a country of over 100 million souls that live on approximately 4% of its territory and that suffers from acute water scarcity and is entirely dependent since time immemorial on the Nile for its livelihood and survival."[179]

This statement, apparently, highlights the overly resonated "narrative which portrays the Nile waters as veritable lifeblood even a slight reduction of which would bring mortal harm to Egypt".[180] Appealing to its dependence on the Nile for time immemorial coupled with colonial agreements, Egypt relishes itself with "veritable ownership" over 75% or 55 BCM of the annual flow of the Nile.[181] Thereby, Egypt excessively requires Ethiopia to 'protect' its existing uses from 'significant harm' in conducting the GERD filling.[182] Egypt gages the GERD filling and operation within the needs and requirements of the AHD that sets its existing uses.[183] Given that Egypt built the AHD in tenacity that all upper riparians must adhere to the 1959 Agreement,[184]

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[176] *See The second filling of the GERD will not impact our interests, assures Egypt's FM,* Egypt Independent (May 19, 2021). Available at: https://egyptindependent.com/the-second-filling-of-the-gerd-will-not-impact-our-interests-assures-egypts-fm/ (Accessed on 21 May 2021); *see also GERD's second filing to cause 'water shock' for Egypt: Minister,* Egypt Independent (May 24, 2021). Available at: https://egyptindependent.com/gerds-second-filing-to-cause-water-shock-for-egypt-minister/ (Accessed on 25 May 2021).

[177] Meshel, *Supra* note 106, at 164.

[178] *Id.,* at 167.

[179] Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5, Annex, at 3, para. 2.

[180] Egypt's 'historic right' is associated to Herodotus's use of the term "Egypt is the gift of the Nile" that is distorted as "a codeword for the mythical absolute dependence of Egypt on the waters of the Nile that any reduction thereof would threaten the very survival of the country." Mekonnen, *From Tenuous Legal Argument, supra* note 21, at 237.

[181] *Ibid.*

[182] Egypt's Letter to UNSC (19 June 2020)**,** *supra* note 5, Annex I, at 2, para 3.

[183] **As** discussed in Section 2 of this article*,* in the August 2019 Egypt's proposal demanded Ethiopia to release a minimum of 40 BCM of water during the GERD filling and to release the whole annual flow of the Blue Nile (49 BCM) during the GERD operation. This is aimed by Egypt to keep the AHD at 165 m-asl. *See also* Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 12; Tekuya, *Sink or Swim, supra* note 60, 85-86; Davison, *supra* note 84.

[184] Hisham Eldardiry & Faisal Hossain*, Understanding Reservoir Operating Rules in the Transboundary Nile River Basin Using Macroscale Hydrologic Modeling with Satellite Measurements*, 20 NOVEMBER JOURNAL OF HYDROMETEOROLOGY 2253, 2255 (2019). *See also* the discussion in Section 1.1 of this article.

subjecting the GERD filling to its 'existing uses' reverberates its self-prized 'acquired right' or 'historic right' or 'water security'[185] to which Egypt clung to since the 1929 Agreement.

In a nutshell, the vicious circle of Egypt's claims in the Nile Basin found its way against Ethiopia in the GERD filling and operation: 1) from the outset, the 1959 Agreement established Egypt's self-awarded 'acquired right' that aimed at securing maximum storage of the Nile waters impounded in AHD/Lake Nasser; 2) in asserting 'water security' that existing uses must not be affected by upstream projects (like the GERD) on the Nile aims at maintaining unreduced water storage in AHD; 3) alleging the GERD filling and operation cause significant harm in reducing the Lake Nasser storage symbolizes 'acquired right' since it is the 1959 Agreement that predetermined the storage; and 4) labeling the GERD first stage filling as 'unilateral' made without prior-agreement with the downstream states is a self-grant of 'veto right'[186] which eventually leads to the first thread that started the circle. Thus, Egypt protracted these claims in a foundation of maintaining the *status quo* of inequitability in the Nile Basin. This is a zero-sum to Ethiopia's interest in the Blue Nile and the GERD filling and operation.

In response to such Egyptian approaches, Ethiopia reiterated that Egyptian firmness to base impact assessments on its 'existing water uses' constitutes Egypt's "historic right' claimed that is built on bilateral colonial era treaties against which Ethiopia objected since 1950s.[187] Ethiopia denounced insistence on water developments in Ethiopia particularly the GERD and its filling to be scrutinized and reoriented based on Egypt's unilateral existing uses while the AHD reservoir is beyond doubling the GERD's reservoir size.[188] Thereby, Ethiopia maintains that it "has a legitimate right to develop and utilize its water resources" and that "Egypt's insistence on maintaining unjust colonial based treaties is the overarching impediment to the equitable and reasonable utilization of the Nile waters."[189]

5. GERD FILLING AND OPERATION UNDER THE DOP AND INTERNATIONAL WATER LAW: A 'UNILATERAL ACT' OR REALIZATION OF EQUITABLE USE?

5.1 Context of the First Filling: is Ethiopia Required to Observe 'Prior-agreement' or to "Inform"?

As the storyline of the current dispute on the GERD filling has been shown in Section 2, tripartite negotiations broken down when Egypt reported the matter to the UNSC in May 2020. Meanwhile, in June when the wet season came, Ethiopia conducted the first year filling plan. Egypt once again reported to the UNSC accusing Ethiopia that it acted unilaterally in filling the GERD without prior-agreement in violation of the DoP. Egypt asserted that the DoP only

[185] 'Water security' is another rebranding of the 'acquired right' claim whose roots is "in the 1929 Agreement which was reinforced by the 1959 Agreement." *See* Mekonnen, *Declaration of Principle, supra* note 46, at 258.
[186] See the full discussion in this regard in the next section (Section 5) *infra.* (It analyzes whether the first stage filling is unilaterally conducted or not.)
[187] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 12, para 33.
[188] Rep. of Ethiopia to the UN., *Letter dated 16 April 2021 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2021/376 (16 April 2021), at 10-11, para 27. [Hereinafter: Ethiopia's Letter to the UNSC (16 April 2021)]Ethiopia, in the letters, also claims that such uses foreclosures of its equitable share by illegal and unilateral downstream water works.
[189] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 6 para 5.

allowed Ethiopia "to proceed with the construction of the GERD while the three states parties are negotiating on the rules governing the filling and operation of the GERD."[190] Here, Egypt creates artificial dichotomy between the GERD construction and the filling as "two different things" alleging that the filling may not be carried on until such time that the GERD construction is completed.[191] Ethiopia utterly rejected this Egyptian claim. The following paragraphs assess these contentious views on Article V of the DoP that is at the heart of this dispute.

As highlighted previously, Article V of the DoP stipulates general rules on the GERD first filling and annual operation. It requires the GERD first filling and operation be guided by joint impact assessment studies based on the IPOE's recommendations and the TNC's confirmation. Based on findings of such joint impact studies the three states should "[a]gree on guidelines and rules on the first filling of the GERD which shall cover all different scenarios, in parallel with the construction of GERD."[192] First of all, this provision is sufficiently clear that the first filling can be conducted alongside the construction as long as the filling is in line with joint studies. Hence, where Ethiopia intends to begin the first filling during the GERD construction, Article 5 requires joint studies to involve such a scenario in the construction process. In this regard, from the outset, the NISRG's finding did not involve such restrictions except demanding the initial filling to be stage based to which Ethiopia adhered in the first stage filling.[193]

Going forth to address the 'prior-agreement' requirement Egypt avers,[194] analyzing Article V blended with other provisions of the DoP as well as the international water law regime and case laws is crucial. As a general rule, Article V does not regulate the GERD filling in solitary but in consistency with other provisions of the DoP. Most importantly, it correlates to the two basic principles – "equitable and reasonable use" and "not to cause significant harm" that are based on "sovereign equality" that are provided in the DoP.[195] These principles inherently negate 'veto right' or 'prior-agreement' in the utilization of international shared waters.[196]

Prohibiting Ethiopia from filling the GERD unless with 'prior-agreement' put its sovereignty and right to equitably use the Blue Nile at the veto mercy of the two downstream states. This entails 'win-lose' (lose to Ethiopia) and refutes its basic right to equitable use. This is not the very spirit of the DoP. The DoP rather requires the three riparians to negotiate "with spirit of cooperation,"[197] "common understanding, mutual benefit, *good faith, win-win, and principles of international law.*"[198] In this regard, the DoP remains silent as to what will follow if the three states failed to reach at an agreement on the guidelines and rules on the filling. Thus the DoP is only recommending the three states to agree than to oblige prior agreement.[199] This permits

[190] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1. *See also* Egypt's Letter to UNSC (04 May 2020), *supra* note 5, Aide Memoire, at 9.
[191] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1.
[192] DoP, *supra* note 75, Article V, para. 1 & 2.A.
[193] Recall the discussion on Section 2 of this article.
[194] In this regard Sudan also reiterated reaching at 'prior agreement' before Ethiopia conducted the filling. *See* Sudan's Letter to UNSC (2 June 2020), *supra* note 74, *Enclosure,* at 6 & 12.
[195] DoP, *supra* note 75, Articles: IV, III, IX.
[196] *See* McCaffrey, *The contribution of the UNWC*, *supra* note 115, at 256.
[197] DoP, *supra* note 75, Article V, para. 2.
[198] *Id.,* Article I. (Italic mine)
[199] *See* Tekuya, *Sink or Swim, supra* note 60, at 97; *see also* Mahemud T. Tekuya, *Governing the Nile under Climatic Uncertainty: the Need for a Climate-Proof Basin-Wide Treaty,* 59 NAT. RESOURCES J 321, 342 (2019).

Ethiopia to conduct the filling without an agreement based on the international rules that "everything which is not prohibited is permitted."[200]
Moreover, fundamental principles of international water law, case laws as well as international practices do not guarantee riparians a 'veto right' to infringe equality of sovereignty.[201] Further, in hydropower projects, the international practice does not confers riparian states with 'veto right' in the utilization of internationally shared waters for hydraulic power works by another riparian.[202] Therefore, the GERD filling and operation cannot be subject to prior agreement as "*condition of a prior agreement cannot be established as a custom, even less as a general principle of law*."[203]

As for its assertion on Article 3 of the 1902 Border Agreement,[204] Egypt may not legally invoke this agreement.[205] Though Sudan may invoke it,[206] as it has been addressed previously, Article 3 does not impose 'veto' of Sudan on Ethiopia since GERD filling and operation, particularly the first stage filling do not totally block flow of the Blue Nile. Even though Ethiopia signed the 1902 Agreement and the DoP, existence of such agreements may not be presumed to put the duty to prior-agreement for future projects as this implies loss of right to negotiate for future agreements.[207] Otherwise, interpretation of Article 3 of the 1902 Border Agreement and Article 5 of the DoP cannot be set up against Ethiopia's "basic right" to equitable and reasonable utilization in the GERD filling.[208]

Rather, the obligation of Ethiopia before conducting the GERD fillings is "exchange of information and data"[209] as provided under the DoP. This requirement of "exchange of

[200] Tekuya, *Sink or Swim, supra* note 60, at 97.
[201] Lake Lanoux Arbitration (France v. Spain) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101 Arbitral Tribunal (November 16, 1957), at 25. [Hereinafter, *Lake Lanoux Case*] (Noting, in the utilization of international watercourses where sovereignty of states is equal, "[c]ustomary international law … does not supply evidence of a kind to orient the interpretation of [agreements] … favouring the necessity for prior agreement; even less does it permit … to conclude that there exists a general principle of law or a custom to this effect.") *See also* McCaffrey, *The contribution of the UNWC*, *supra* note 115, at 256.
[202] *See* for example the experience in The 1923 Geneva Multilateral Convention on the Development of Hydraulic Power Affecting More than One State. Article 1 reads: "[the convention] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires." (Bold mine) This is also confirmed in *Lake Lanoux Case***,** *supra* note 201, at 25.
[203] *Lake Lanoux Case***,** *supra* note 201, at 25. (Italic added)
[204] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2-3.
[205] In this regard, recall the discussion in Section 3.3 of this article on the 1902 Agreement.
[206] Since Egypt and Sudan committed to stand together in the 1959 Agreement against upstream developments, Sudan may invoke the 1902 Border Agreement against Ethiopia. *See* The 1959 Agreement, *supra* note 24, Article 5.
[207] *Lake Lanoux Case***,** *supra* note 201, at *28.* "If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed."
[208] The ICJ held that a riparian state may not lose its "basic right" to equitable and reasonable use by entering into an agreement. *See,* GabCikovo-Nagymaros *Case*, *supra* note 109, at 56. para 86, *see also* at 54. para 78.
[209] DoP, *supra* note 75, Article 7. It states that the three countries are obliged to exchange information and data, in good faith and timely, for the TNC joint studies.

information and data" is the key feature of the DoP[210] as opposed to the principle of "notification" in the UNWCC[211] and case laws.[212] Otherwise, action towards "notifying" the two states could imply recognition to colonial agreements and the 1902 Agreement that is not valid.[213] Nor did the two riparians notified or consulted Ethiopia during their unilateral water developments; thereby, in a scenario where there is no legal obligation provided in the DoP or any other binding instrument to do so, Ethiopia cannot be obliged to notify and pass through consultation and negotiation.[214]

In this regard, as pointed out earlier, Egypt as well as Sudan admitted that Ethiopia proposed guidelines and rules for the GERD initial filling up to 595 m-asl on 10 April 2020.[215] This may be taken as "prior notification" made prior to the filling that called for cooperation on the filling and operation; however, it has been broken down by Egypt's demand for 'veto' and 'water security.' In this regard, as long as the two states do not cooperate, what legally expected of Ethiopia is "to continue filling the GERD without an agreement with Sudan and Egypt" while keeping "exchange of information and data" as no legal instrument may preclude it from conducting the filling and annual operation unilaterally.[216]

5.2 Equitability of the GERD Filling and Operation

The other most important issue is equitability of the GERD first stage filling. As encapsulated in Section 3, Ethiopia's right to equitable and reasonable use in the Nile Basin is well recognized in international customs as well as the DoP.[217] In this regard this sub-section analyzes equitability of the first stage filling considering the natural hydrologic, socio-economic and other facts in

[210] Salman, 2017*, supra* note 76, at 215. The DoP in Article 7 follows the path of the 2010 CFA that does not include "notification" obligation on the riparians but only "exchange of data and information" under Article 10. Egypt and Sudan had been insisting the inclusion of "notification" in the CFA while Ethiopia strongly opposed. *See also,* SALMAN M.A SALMAN, NOTIFICATION CONCERNING PLANNED MEASURES ON SHARED WATERCOURSES: SYNERGIES BETWEEN THE WATERCOURSE CONVENTION AND THE WORLD BANK POLICIES AND PRACTICE 4 (BRILL, LEIDEN, Boston, USA) (2009).

[211] In this regard, the UNWCC under Articles 11 through 19 provide details of notification, consultation and negotiation on planned measures. It obliges a state to notify, as to its planned project, other riparians which could significantly be affected by the project. Such prior notifications enable states to know at early stages any project which might affect their interest so that they consult and cooperate in response to the possible significant adverse impact. See UNWCC, *supra* note 105, Articles 11-19. *See* also ALISTER *et al. supra* note 112, at 134.

[212] *Lake Lanoux Case***,** *supra* note 201, at 25.

[213] *See* Salman MA Salman, *Mediation of international water disputes – The Indus, the Jordan and the Nile Basins Interventions*. In: INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 391 (Boisson de Chazourens L, Leb C, Tignino M (eds), Edward Elgar Publishing Ltd, Cheltenham, 2013).

[214] *See Id.,* at 397. Both downstream and upstream states could cause significant harm to each other, this obligation to notify was also required of Egypt and Sudan; however, they never observed it.

[215] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2; Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 10.

[216] Tekuya, *Sink or Swim, supra* note 60, at 115. *See also* D.Y Messele, *supra* note 69, at 540. In a situation where there is no basin wide legal framework, Ethiopia has a legitimate right to build and operate dams unilaterally and other riparians may only bring legal action against it if they sustain significant harm due to operation of the dam.

[217] *See* DoP, *supra* note 75, Article III; UNWCC, *supra* note 115, Article 5. *See also* ILC Commentary, *supra* note 113, at 98 (Noting that equitable utilization is the fundamental right of all riparian states "to the use of the watercourse that are *qualitatively equal to, and correlative with, those of other watercourse States*." (Italic mine)

Ethiopia and the BNB in correlation to the factors that determine equitability and reasonability of water uses as provided in the DoP[218] and the international water law regime as well.

It has been established that there is clear asymmetric recorded existing use of the Nile waters among the three riparians of BNB where Ethiopia has too little use of the Blue Nile despite its enormous hydropower potential.[219] Besides to the fact that over half of the country's population (65 million) has no access to electricity; Ethiopia is currently in huge energy deficit with power demand rising by 19% every year where its existing gross installed capacity of 4425 MW fails to meet such serious needs.[220] To this end, the self-financed $5 billion GERD project would generate 15,692 GWh/yr of clean energy[221] that is crucial for Ethiopia's vital socio-economic development.[222] The country has no alternative means of reliable clean energy production with the required magnitude; nor do any of the river basins in the country have comparable hydropower viability except the Blue Nile.[223] The GERD's size of total storage capacity of 74 BCM of water, with active storage of 59 BCM of water is highly correlated to the aforementioned socio-economic needs.[224] The dam's size is also confirmed by the IPoE to be consistent with the inflow of the Blue Nile at the GERD site.[225]

Aforementioned evidences concerning current and potential uses of the country as well as the hydrologic, geographic and socio-economic facts together coincide with the holistic weighting of factors that determine equitable apportionment of shared waters.[226] Therefore, in correlation to the holistic factors, at least in principle, the GERD first stage filling is within Ethiopia's right to exercise its equitable and reasonable use. However, the DoP's rules on the GERD filling provide no volumetric allocation of water of the Blue Nile among the three riparians. Nevertheless, the first stage filling retained 18.4 BCM of water of the Blue Nile in two years/phases.

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[218] DoP, *supra* note 75, Article IV.

[219] The Blue Nile in Ethiopia constitutes over 43% of the country's annual surface water in the basin coverage of about 200,000 km^3 where over 25% of its population settled. *See* the discussion in Section 1.3 of this article. *See also* MoWE 2001, *supra* note 51, at 36; MoWR 2002: 2, supra note 50, at 12; Awulachew, S. B *et al.* Water Resources and Irrigation Development in Ethiopia, *Colombo, Sri Lanka: International Water Management Institute. 78p.* (working paper 123), p. 10 (2007).; *See also* Kendie, *supra* note 2, at 143.

[220] Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 11. *Cf.* MoWIE 2017, *supra* note 52.

[221] IPoE, *supra* note 61, at 9 & 42; *see also* MoWIE 2017, *supra* note 52.

[222] The GERD is vital for "Ethiopia's economic potential on which the survival of its people hinges may only be unlocked through the supply of sufficient energy to improve agriculture and realize structural economic transformation through industrialization." Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, at 11.

[223] *See* MoWE 2001, *supra* note 51, at 36; MoWIE 2017, *supra* note 52. *See also* Nikos Tsafos & Lachlan Carey, *Energy Transition Strategies: Ethiopia's Low-Carbon Development Pathway",* Center for Strategic and International Studies *(CSIS)*, p. 11. (2020). Available at: https://www.jstor.org/stable/resrep27034.6 (Accessed on 14 May 2021). (Noting, the GERD generates a zero carbon emitting energy that will decrease Green House Gas (GHG). 90% of energy consumption in rural areas is based on GHG emission.)

[224] *See* MoWIE 2017, *supra* note 52.

[225] IPoE, *supra* note 61, at 38.

[226] DoP, *supra* note 75, Art. IV; UNWCC, *supra* note 105, Art. 6. The GERD also offers benefits to riparians of the Nile in trading cheap electricity. Thus, as the filling progressed it has positive effect on other riparians. *See also generally* Agathe Maupin, Energy Dialogues in Africa: is the Grand Ethiopian Renaissance Dam Transforming Ethiopia's Regional Role? SAIIA OCCASIONAL PAPER (228) 11-12 (2016). Available at: https://www.jstor.org/stable/resrep28379 (Accessed on 14 May 2021).

At this juncture, despite absence of determined water sharing rule among the riparians, as discussed in earlier sections, there exist volumetric figures concerning: the mean annual flow of the Nile (84 BCM); the mean annual flow the Blue Nile (49 BCM);[227] the water share Egypt and Sudan claims to have (55.5 BCM and 18.5 BCM, respectively);[228] and Ethiopia's first filling plan[229] (18.5 BCM in the first stage and 10 BCM in each of the second, third and fourth filling stages). As opposed to the total appropriation of the Nile waters by Egypt and Sudan with negative contribution to the flow; for Ethiopia, who feeds 59% of the Nile from the Blue Nile that counts 43% its surface water, retaining 18.4 BCM of water in the GERD first stage filling in two hydrological years may be taken as utterly equitable.[230] One may argue otherwise, as Egypt does, that the filling may not be equitable stressing its potential impacts on downstream 'existing uses.'[231] However, the filling does not actually caused significant harm.[232]

Even when the GERD filling causes significant harm, its equitability may not be discarded taking only a strand factor of significant impact on 'existing use.' The legality of the filling, as international experiences and case laws show, may not be determined by the interest of Egypt. In the shared water resource, there is no international experience justifying such prioritization of uses in subjecting a potential use to the needs and requirements of existing uses.[233] Both the DoP and the UNWCC considers existing and potential uses jointly,[234] which reaffirms the factors as holistic and to be considered equally and prioritize neither of them.[235]

What bind Ethiopia in relation to the two downstream states with respect to the GERD filling and operation rather is the DoP as well as the fundamental principles of International Water Law – equitable and reasonable use and no significant harm. The DoP's rule on equitable utilization basically "lies outside the bounds of the 1959 agreement."[236] Both Egypt and Sudan, devoid of the 1929 and 1959 Agreements, have nothing but the right to equitable and reasonable use as Ethiopia has. Therefore, the 18.5 BCM of water retained in the first stage filling may be regarded to be illegal or inequitable, only if Egypt's and Sudan's self-granted 'acquired right' to entire flow of the Nile is taken as legal or equitable. This further reinforces equitability of the GERD first stage filling for Ethiopia who has too little existing use of its chief river. This also holds valid for upcoming stage based fillings too.

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[227] *Stebek, supra note 3, at 34. Cf.* ARSANO, *supra* note 1, at 82.
[228] *See* the 1959 Agreement, *supra* note 24, Article 2(4).
[229] *See* Ethiopia's Draft Guidelines for the GERD First Filling, *supra* note 7, Annex I.
[230] *See* Media stakeout of Seleshi Bekele, *supra* note 13.
[231] Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2; Sudan's Letter to UNSC (2 June 2020), *supra* note 74, *enclosure,* at 8.
[232] In this regard, as it can be recalled from Section 4.2. of this article, the first stage filling does not cause significant harm to downstream riparians especially on Egypt's hydrology as well as existing uses.
[233] *Lake Lanoux Case*, *supra* note 201, at 33. In *Lake Lanoux*, the Tribunal held that Spain (the downstream country) may not demand France (an upstream) to undertake its water works in the interests of Spain. "On her side, Spain cannot invoke a right to insist on a development of Lake Lanoux based on the needs of Spanish agriculture." In this regard, the UNWCC, *supra* note 105, also maintains the same under Article 10(1).
[234] DoP, *supra* note 75, Art. IV(e); UNWCC, *supra* note 105, Art. 6(1)(e).
[235] UNWCC, *supra* note 105, Article 10(1). The Convention also maintains that "[i]n the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses."
[236] Ana Elisa Cascão & Alan Nicol, *GERD: new norms of cooperation in the Nile Basin?*, 41:4 WATER INTERNATIONAL, 550, 567 (2016).

However, such downstream 'existing uses' would have serious impact on equitable use right of Ethiopia in the GERD filling and operation as well as its future water developments. This concern is addressed in the following section.

6. EGYPT'S PAST AND CURRENT ACTIONS: SIGNIFICANT HARM ON ETHIOPIA'S EQUITABLE WATER SHARE IN THE GERD AND BEYOND?

Downstream 'existing uses' especially Egypt's continuous unilateral water developments went too far to such extent it forecloses all waters of the Nile to the detriment of other riparians particularly Ethiopia's equitable share.[237] Such Egyptian past unilateral water works left no drop of water to existing and future reasonable uses of Ethiopia in the Nile particularly the GERD. Besides, as discussed in previous sections, Egypt resolute to protect such unilaterally developed existing uses standing antagonistic to the GERD filling and operation by Ethiopia.[238]

As one of the factors to determine equitable and reasonable use,[239] existing uses have direct impact on Ethiopia's water share from the Nile. As illustrated by McCaffrey, since equitable use does not imply equal use, "where there is significant downstream development, consideration of all relevant factors is likely to lead to constraints on the upstream state's freedom to use and develop the watercourse, in order to achieve an equitable balance between the uses in the respective countries."[240] In other words, Ethiopia's share will seriously be dwindled than it would have gotten had Egypt's existing uses were developed equitably. Hence, the capacity and operation of projects by Ethiopia and its due share of the Blue Nile will always be haunted by downstream developments.[241] In developing such unilateral water works, Egypt failed to observe its obligation to equitably and reasonably utilize the Nile.[242] Consequently, such Egyptian existing uses foreclose the entire flow of the Nile depriving Ethiopia of its rightful equitable share from the Nile violating proportionality and good neighborliness – this constitutes significant harm on the legal right of Ethiopia to equitable use.[243]

Particularly, in the GERD filling, Egypt's existing uses sway the GERD fillings to adhere to the storage and operation capacity of downstream projects.[244] Even worse, basing on such existing

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[237] *See* discussion in Section 1.1 of this article. Egypt unilaterally developed the AHD (in 1970) as well as land reclamation projects (since 1990s) which demand more than 75.5 BCM of the Nile waters beyond its mean annual flow (74 BCM) leaving the 18.5 BCM that Sudan 'acquired right' and the 10 BCM losses through seepage and evaporation.

[238] *Recall* discussions in Section 3 and Section 4 of this article to uncover how Egypt has been determined to curtail Ethiopia's use of its chief water resource. *See also* Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2-3, para. 2.

[239] DoP, *supra* note 75, Art. III; UNWCC, *supra* note 105, Art. 6.

[240] MCCAFFREY, *supra* note 110, at 412.

[241] Mekonnen, *Declaration of Principle, supra* note 46, at 262.

[242] *See* DoP, *supra* note 75, Art. III. In this regard the UNWCC, *supra* note 105, Article 5 obliges all riparians to equitably use internationally shared waters. *See also* ILC Commentary, *supra* note 113, at 101.

[243] *See* ICJ, *GabCikovo-Nagymaros Case*, *supra* note 109, at 56 para 85; *Cf.* MCCAFFREY, *supra* note 110, at 411-12; (Analyzing the Swiss Supreme Court decision on *Zwilikon Dam Case*, notes that rights of the downstream and downstream is equal. Hence by foreclosing entire flow it is legally invalid for downstream states to demand continued flow of the river from upstream states undiminished.) *See also* Meshel, *supra* note 106, 166-7; *Stebek, supra* note 3, at 52.

[244] *See GabCikovo-Nagymaros Case*, *supra* note 109, at 56 para 85. (Stating "...by unilaterally assuming control of a shared resource, and thereby depriving [another riparian] of its right to an equitable and reasonable share of the

uses, Egypt demanded a normative compliance producing mechanism of treaties to institutionalize the *status quo* it has full control of the Nile waters in Washington Deal.[245] When it failed, Egypt used obstructionist and stalling tactics, and securitized the GERD first stage filling, to *de-jure* or legal harm to Ethiopia's "basic right" to equitable and reasonable utilization.[246]

CONCLUDING REMARKS

The main objective of this article was to assess the legality and equitability of the GERD first filling and operation, and reveal Egypt's allegations and the ramifications on Ethiopia's interest from international law perspectives. It explored the storyline how downstream hegemonic control of the Nile endured through GERD launch and its filling and operation stage unfolded in the first stage filling Ethiopia conducted amidst intense securitization and internationalization by Egypt having Sudan on its side. The article revealed Egypt's accusations against GERD filling and operation revolve all over again to secure its existing uses at the bedrock of which lays 'historic and natural right' from vicious interpretations of the DoP and the two principles of international water law.

This article also asserted that principles, instruments and case laws of the international water law regime as well as the rules of the DoP clearly reinforced the legality of the GERD filling as conducted by Ethiopia with due regard to procedural steps in realizing its "basic right" to equitably use the Blue Nile. This also holds true for the refilling and annual operation of GERD. However, it is worth noting that Ethiopia's right in the subsequent filling and operation of the GERD as well as future/potential uses in the Blue Nile basin are significantly threatened by Egypt's unilaterally developed existing uses and its current hegemonic steps against the GERD first stage filling to maintain the *status quo* of its full control of the Nile. This puts Ethiopia in threat of significant harm to be deprived of its equitable share in the Nile Basin due to Egypt's existing uses which the latter swore to secure in its current hegemonic tactics.

The stage of negotiations that followed the first stage filling is under the African Union auspice as instructed by the UNSC. However, the trilateral negotiations on the GERD are still adamant to resolve the issue due to unprecedented and unjustified demands of the two downstream states who continue stalling the negotiation process.[247] However, the trilateral negotiation on the GERD filling and annual operation would continue till it is resolved on an agreement. This possible scenario of signing of a binding agreement on the GERD filling and annual operation

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natural resource of the [shared watercourse] with the continuing effect of the diversion of these waters on the ecology of the riparian area ... failed to respect the proportionality which is required by international law." (Emphasis added)

[245] *See* Tekuya, *Sink or Swim, supra* note 60, at 71. This was actually tried in the 'Washington Deal' or 'Washington Agreement' that completely ignored the interest of Ethiopia in the GERD filling that demanding Ethiopia to release water from the reservoir during the drought periods for the ultimate security of Lake Nasser storage. The 'Agreement' tried to turn the GERD reservoir to be Egypt's water store up hills in Ethiopian territory.

[246] *See generally* Mekonnen, *From Tenuous Legal Argument, supra* note 21, at 234-6. Noting, hegemonic tactics of sabotaging rights of other riparians that includes stalling tactics whereby the hegemon painstakingly induce its unwarranted interests to be respected by other riprians against their right to equitable use.

[247] *See* Ethiopia's Letter to the UNSC (16 April 2021), *supra* note 188, at. 7, 11-12 (Noting: the disruption of the AU-led negotiation process by the two downstream states).

could have negative ramification on Ethiopia's equitable right to utilize the Nile. In such scenario, though it would be a daunting task to secure Ethiopia's interests on the Nile basin as well as the Blue Nile in the filling and operation of GERD, in the way forward, the author suggests three concerns to be taken cautiously during negotiations that could result to signing of a binding agreement.

Firstly, entering into an agreement on the GERD filling and operation would be expensive for Ethiopia as the two downstream states never showed softening of their 'historic right' claim which could compromise the sustainable filling and operation of the GERD to its installed capacity. This could be more expensive for Ethiopia than the power trade the country may lose from the Sudan or Egypt with lower generating capacity of the dam. It could also put a potential agreement on the GERD filling susceptible to another mile of securitization and misinterpretations as it suffered in the first stage filling. Instead, because the GERD filling and operation involves technical issue, negotiations in this regard should follow the DoP's pattern, though not in the way it is misinterpreted by Egypt and Sudan. Ethiopia should stick with a framework agreement like DoP's Article V that provides general guidelines and rules on technical aspects based on studies and recommendations of independent experts. In doing so, based on such studies and recommendations, Ethiopia could have a better deal to conduct fillings even in unforeseeable hydrologic periods like drought where there exists lower flow but the GERD can be maintained operational based on equitability and reasonability principles.

Secondly, though the question in dialogue seems to be GERD fillings and operation, downstream hydro-hegemony lingers behind it with a grand aim of maintaining control of the Basin by pressuring Ethiopia to enter into compliance producing legal instruments. Therefore, negotiations on the filling and operation of GERD should be ensured that they do not relate to water apportionment issues. In this regard, the author believes that Ethiopia's approach to negotiate on an agreement concerning "filling only rule"[248] is on the right track. However, during such negotiations technical water sharing could arise when the GERD's fillings is correlated to storages capacity of downstream dams particularly the AHD and Merowe Dam, which virtually represent 'acquired rights' of Egypt and Sudan respectively. Indulging into such correlations would create unnecessary legal complication and trap of institutionalizing 'acquired rights' of Egypt and Sudan. Consequently, signing a binding agreement on such issues would be setting a ticking time bomb to quash Ethiopia's future water developments in the Blue Nile and beyond.

Therefore, as a third concern, should such water sharing issues arise in the GERD filling and annual operation; the negotiations must base the international regime governing shared watercourses. The regime recognizes rights of all the three riparians to equitably utilize the Nile and provides mitigating mechanisms to minimize causing of significant harm on their legal rights. This suggests that Ethiopia's leverage, in this regard, is to demand rejoining of the two downstream states to the basin wide multilateral cooperative framework, i.e the CFA, guided by the equitable water sharing principle within international shared watercourse regime.

[248] *Id*., at 7, para. 8.

DRIVERS FOR SECURITIZATION AND DE-SECURITIZATION OVER THE NEGOTIATION OF THE GRAND ETHIOPIAN RENAISSANCE DAM

Gashaw Ayferam Endaylalu*

Abstract

This study examined the drivers of securitization and de-securitization discourse over the negotiation of the Grand Ethiopian Renaissance Dam Project (GERD). The study employed a qualitative research approach in which data are gathered mainly from secondary sources such as journal articles, conference papers, books, riparian countries water policy, report of International Panel of Expert (IPoE) on GERD, governmental and intergovernmental organizations briefings and statement. The central argument is that Egypt's securitization of GERD as an existential water security threat is neither an actual nor perceived threat. Current water scarcity in Egypt is not due to the hydropower projects of Ethiopia like Tana Beles and Tekezze hydroelectric power projects. Rather water scarcity is largely attributed to Egypt's poor water management, high evaporation at High Aswan Dam, and primitive irrigation system and water-intensive agriculture. The study also identified that the discourse of absolute Nile water dependency and Egypt's notion of 'water security' are the major drivers of Egypt's securitization approach on GERD. However, the study shows that Egypt's absolute Nile water dependency discourses is a myth. Rather Egypt is a groundwater endowed country with infinite access to sea water so that its historicism of the Nile as matter of life and death is a fabricated myth. Based on this, the author argues that GERD is an invented fictitious threat neither has a legal ground nor supported by scientific research. On the other hand, Ethiopia uses tactical securitization-cum-desecuritization approach over the GERD issue using principles of international water law such as equitable and reasonable utilization, discourses of the right to development, and poverty reduction. Thus, two kinds of transformation are needed. On the part of Egypt, the securitizing actors should bring the securitized GERD into the realm of normal politics. On the part of Ethiopia, it should deconstruct the unwarranted myth of Egypt on GERD in particular and Nile in general through proactive discourse targeting international community, regional organizations, Nile River Basin countries, media, and the wider Egyptian public.

Keywords: Securitization, De-securitization, GERD, Nile, Ethiopia, Egypt

INTRODUCTION

Since the second half of the 20th century, Ethiopia has been engaged in building small hydroelectric power development. With the coming to power of Ethiopian People's Revolutionary Democratic Front (EPRDF), however, there are large-scale water resources development projects. The GERD project, which is under construction on the Abbay River, is one of the mega hydroelectric power project. The project has been viewed in the existing

literature as game changer,[1] new legal order[2] and fair system.[3] Despite scientifically verified broader positive regional implication of GERD, Egypt regards GERD as an existential security threat.[4] Egypt securitization approach over GERD is not based on recognition of Nile as a single hydrological unity and shared resource but as a national security and geopolitical issue,[5] deep sense of entitlement and monopolism, doctrine of prior use, discourse of absolute water dependency,[6] absence of alternative water resources other than Nile River in Egypt, and overriding importance to the principle of not to cause significant harm.

In its face value, the major controversies raised by Egypt were the potential downstream consequence of GERD, reservoir filling strategy and time, and overall technical aspects of dam design, and its impact on Egypt's water security.[7] However, in practice what Egypt insist is not the above-mentioned issues but securitization of GERD as a threat of Egypt's notion of water security[8] which is grounded on the logic of not to give a drop of water for Ethiopia whose water is feeding Egypt.

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[1] Rawia Tewfik, *The Grand Ethiopian Renaissance Dam: Benefit-sharing Project in the Eastern Nile?* 41 Water International, 1, 4 (2016). S*ee* also Ana Elisa Cascão and Alan Nicol, *GERD: New Norms of Cooperation in The Nile Basin?*, 41 Water International*,* 550, 565-569 (2016).

[2] Salman M. A. Salman, *The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document,* Water International, 1, 1 (2016)

[3] Zeray Yihdego & Alistair Rieu-Clarke, *An exploration of fairness in international law through the Blue Nile and GERD*, 41Water International*,* 528,544-545 (2016).

[4] Letter From Sameh Shoukry, Minister of Foreign Affairs of the Arab Republic of Egypt, to the United Nations Security Council (June 11, 2021), Security Council Report (19 Jun 2020). Available at: https://digitallibrary.un.org/record/3893948/files/S_2020_566-EN.pdf (Accessed on 12 March 2021) ; Hamdy A. Hassan, *Contending hegemony and the new security systems in Africa,* 9 Afr. J. Pol. Sci., 159, 164(2015); Omar Nasef, *National Security as Told by the Nile*, Century International (Aug. 4, 2016). Available at: https://tcf.org/content/report/egyptian-national-security-told-nile/?session=1 (Accessed on 20 March 2021).

[5] Stefan Deconinck, *Security as a threat to development: the geopolitics of water scarcity in the Nile River basin*, Royal High Institute for Defence Focus Paper (10, 2017), https://www.waternet.be/documents/Security_as_a_threat_to_development_Deconinck.pdf

[6] Letter of the Ministry of Foreign Affairs of The Arab Republic of Egypt to UNSC, *Annex-1, The Grad Ethiopia Renaissance Dam, Setting the Record Straight*, Security Council Report (19 Jun 2020). Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3 CF6E4FF96FF9%7D/S_2020_566%20Egypt%20letter%20of%2019%20June.pdf (Accessed on 12 March 2021).

[7] Ahmed H. Elyamany and Walaa Y. El-Nashar, *Managing risks of the Grand Ethiopian Renaissance Dam on Egypt*, 9 Ain Shams Engineering Journal, 2383, 2383–2388(2018)

[8] Letter From Sameh Shoukry, Minister of Foreign Affairs of the Arab Republic of Egypt, to the United Nations Security Council (June 11, 2021); Samuel Berhanu and Yohannes Eneyew, *Betwixt Development and Securitisation of the Nile: Competing Narratives*, Australian Outlook (Aug. 27, 2020). Available at: https://www.internationalaffairs.org.au/australianoutlook/betwixt-development-securitisation-of-nile-competing-narratives/ (Accessed on 25 Feburary2021); Antoaneta Roussi, *Row Over Giant Nile Dam Could Escalate, Experts Warn*, 583, Nature, 501(2020); Egypt Today, *We want to help Ethiopians in their development, but Egypt's water share is a 'red line': Sisi*, Egypt Today (Jul. 15, 2021). Available at: https://www.egypttoday.com/Article/1/106101/We-want-to-help-Ethiopians-in-their-development-but-Egypt (Accessed on 10 September 2021).

In contrast to the zero-sum game politics of Egypt securitization, Ethiopia has used tactical securitization-cum-desecuritization approach.[9] In Ethiopia, the GERD project has been viewed as an existential issue which can be considered as tactical securitization. However, Ethiopia's approach is largely desecuritization. Because, tactical securitization is emanated from the development narrative as GERD is regarded as a development project than an issue of security. Accordingly, GERD is presented by Ethiopia as a benefit sharing project having not only national but also wider regional and global significance. In this regard, the bedrock of Ethiopia desecuritization approach rests upon the recognition of Nile as a transboundary resource and its utilization based on principle of equitable and reasonable use, hydro cooperation and solidarity, and the right to development.

Against this backdrop, GERD is framed and marketed by Egypt as a threat not only to its water share (55.5 billion cubic meters of water) as per the 1959 bilateral agreement but also to the fabricated identity of inseparability between Nile and Egypt. The very intention of this study is, therefore, to examine the drivers of securitization and de-securitization discourse over GERD. Accordingly, the writer of this paper argues that Egyptian view of GERD as a water security threat of Egypt is a hyperbolically constructed myth that is neither actual nor perceived threat. The rationale behind Egypt securitization of GERD as an existential threat is to counter the broader geopolitical implication of the construction of GERD for Ethiopia and the region at large. Because, the GERD project has a potential in increasing Ethiopia's hard and soft power.

In doing so, the study employed a qualitative research approach due to the need to address who securitizes (securitizing actor) what (issues considered as threat), how (tools employed), why and with what intended goals. Moreover, qualitative research method is found viable approach for water securitization studies because securitization study requires a deep looking at and analyzing how the securitizing actor uses metaphors, policies, analogies, emotions, propaganda and fabricated knowledge in establishing rhetoric of existential threat.

Accordingly, the study principally employed secondary sources of data (documentary analysis and literature reviews) such as journal articles, conference papers, books, riparian countries reports, report of International Panel of Expert (IPoE) on GERD, government official speeches, and governmental and intergovernmental organization briefings and statements. Finally, the data is analyzed using critical discourse which is important in understanding how discourse of national security is constructed and maintained.

To address the foregoing issues, the paper is organized into four sections. The first section justifies the appropriateness of the theoretical framework the study had adopted: theory of securitization which is a constructivist approach. The second section provides a conceptualization of securitization and desecuritization theory in the context of transboundary river basins. The third section examined the drivers of Egypt's securitization discourse. It also questioned the securitization discourse of Egypt whether they are real or myth based on reliable data. This helps the reader to understand the drivers of Egypt's securitization policy. The final section provides a discussion on the tactical securitization-cum-desecuritization approach of Ethiopia. The paper has also concluding remarks.

[9] Eloise von Gienant, *"#Itsmydam": An analysis of Ethiopian and Egyptian discourses surrounding the Grand Ethiopian Renaissance Dam*, Ch 6 (Master Thesis, University of Amsterdam, 2020)

1. THEORETICAL FOUNDATION

The study of hydropolitics is largely dominated by the realism and liberalism school of thought. Founding on the assumption of realism and power analysis, the water war analysis of transboundary water resources contends that water scarcity will led to violent conflict.[10] This is the hydro-pessimist approach to hydropolitics. Their manifesto is that "the war of tomorrow is over water".[11] Nile mainly the Eastern Nile sub-system is most cited example of war-waiting scenario. Nevertheless, the hydro-pessimist approach lacks empirical evidence as there is no recorded overt conflict over water resources. Empirical study shows that internationally cooperation over transboundary water resources is more dominant than conflict.[12] From 805 AD to 1984 more than 3600 water agreements had been signed over transboundary water resources.[13] Moreover, since 1948 more than 295 water treaties have been signed whereas approximately 37 conflicts have been recorded.[14]

In contrast to the hydro pessimism, the neoliberalism variant of water-cooperation scenario portrays transboundary Rivers as an arena of cooperation. Proponents of this perspective characterize the water war thesis as hyperbolic. Despite their optimism, there is no genuine cooperation so far albeit the signing of several agreements and establishment of river basin organizations. Rather there exists pseudo cooperation. For instance, the Nile Basin Initiative (NBI) has not yet transformed into a permanent Nile River Basin Commission due to the delayed ratification of the Nile Basin Cooperative Framework Agreement (CFA). The pre-NBI Egypt engineered cooperative frameworks such as Hydromet, Undugu and TECCONILE (Technical Cooperation Committee for Promotion of the Development and Environment Protection of the Nile Basin) were also an example of pseudo cooperation.[15] Because, they were not inclusive in terms of both membership and focus area. The main focus of these initiatives was technical cooperation that neglect most controversial and important Nile issues such as legal and institutional framework.

As stated above, both the water war and water peace perspectives assumes that Transboundary Rivers may induce water war and cooperation respectively. Nevertheless, in reality at least in overt form, neither principled cooperation nor overt conflict is happening. Moreover, these two theoretical approaches cannot explain why, how and for what riparian countries tend to construct water securitization. Therefore, adopting a securitization theory which is a constructivist approach seems a right theoretical approach to study issues of water securitization like the

[10] Thomas F Homer-Dixon, *Environment, Scarcity, and Violence*, 5(Princeton University Press, New Jersey, 1999)

[11] Brahma Chellaney, *Water, Peace and War: Confronting the Global Water Crisis,* 1(Rowman & Littlefield Publishers, Maryland, 2013).

[12] Lucia De Stefano, Paris Edwards, Lynette de Silva and Aaron T. Wolf, *Tracking cooperation and conflict in international basins: historic and recent trends*, 12 Water Policy, 871, 876-881(2010)

[13] Aaron T. Wolf ,*The Transboundary Freshwater Dispute Database Project*, 24 Water International,160 (1999)

[14] Atlas of International Freshwater Agreements, https://na.unep.net/siouxfalls/publications/treaties/2_WorldsAgreements_atlas.pdf

[15] Zerihun Abebe Yigzaw, *The Nile: Why multilateralism and no room for divide and rule?*, Zerihun Abebe Yigzaw's Views on Transboundary Watercourses and Related Issues Blog. Available at: https://zenileabbay.wordpress.com/2013/05/18/the-nile-why-multilateralism-and-no-room-for-divide-and-rule/ (Accessed on 10 March 2021).

GERD issue and the Nile water. In order to fill the existing gap, therefore, this study has used the securitization and desecuritization theory. The former is used in analyzing why Egypt securitizes GERD, for what and its implication; while the latter is employed to examine Ethiopia's attempt in bringing the securitized water back to mainstream politics and negotiation based on win-win scenario with due consideration of principle of international water law such as equitable and reasonable use.

2. CONCEPTUALIZING SECURITIZATION AND DESECURITIZATION IN TRANSBOUNDARY WATER RESOURCES

Unlike traditional security conception that emphasizes the material aspect of the threat, securitization is a process focused notion of security in which a securitizing actor frame and suddenly transform a normal or neutral issues into a security issue.[16] As a theory, securitization focus on how "a securitization actor refers to an issue as an existential threat, and tries to convince an audience that extraordinary measures must be taken in order to contain the problem".[17] It helps us to look at who securitizes (securitizing actor) what issues perceived as threats for whom (referent object).

In this regard, securitization theory has three steps and five components. In terms of steps, identification of an existential threat comes first. An existential threat is considered as superior of all issues. If it is not addressed it will endanger the very survival of the referent object. The next step is the "declaration of an emergency situation".[18] This will be followed by undertaking an extraordinary measure to stop the threating issue. In this process security, securitizing actor, existential threat, referent object and audience are key components of securitization.[19]

First, security in this sense is the social construction of a security problem through a securitized speech.[20] The securitizing actor frames an issue as a security problem endangering the survival of a particular object.[21] Through this, a securitizing actor legitimizes the importance of taking an extraordinary measure against the socially constructed threat. Second, a securitizing actor is an actor that moves an issue from mainstream politics to high political issue of survival through a securitized speech.[22] Mostly they are key officials and institutions in charge of making decision on extraordinary measure. Kasim, for instance, categorized securitizing actors in to three namely

[16] Stefan Deconinck, *supra note* 5, at 2 ; See also Nassef M. Adiong, *The U.S.' and Israel's Securitization of Iran's Nuclear Energy*, 1, The Quarterly Journal of Political Studies of Islamic World, 95, 105-106 (2012).

[17] Stefan Deconinck, *supra note* 5, at 2

[18] Yandry K. Kasim, *Securitization and Desecuritization in Indonesia's Democratic Transition: A Case Study of Aceh Separatist Movement*, 2-4, A Paper presented at the 8th Pan – European Conference on International Relations, (Warsaw, 18-21 September 2013)

[19] See Melissa G. Curley and Wong Siu-lun, *Introduction and Conceptual Perspectives*, *In* Security and Migration in Asia: The dynamics of securitization 4-7 (Routledge, London, 2008)

[20] *Id*., at 4

[21] Nassef M. Adiong, *The U.S.' and Israel's Securitization of Iran's Nuclear Energy*, 1, The Quarterly Journal of Political Studies of Islamic World, 95, 106 (2012).

[22] Jack Woodrow Stuart, *Securitization in Africa's River Basin Organizations: Implications for Transboundary Water Governance*, Ch 2, 20-22 (Master Thesis, The Elliott School of International Affairs, George Washington University, 2019).

"political leaders, bureaucracies, and governing bodies".[23] They have a role of labeling, framing and marketing a problem as an existential threat to a referent object; and convince the audience about the necessity to employ an extraordinary measure.
The success of the securitizing actor, however, depends on gaining of two kinds of support: moral and formal.[24] Moral support of the public about the measure to be taken is necessary but not sufficient. While formal support in the form of decision by institutions mandated to vote such as parliament are both necessary and sufficient to take the extraordinary measure against the threat.[25] In the case of international issues like transboundary water resources, getting the support of regional and international governmental and non-governmental organization is important at least to make the claim legitimate. For instance, Egypt has been using the Arab League in attempt to frame the GERD as a regional security issue. It has also referred the case to the UNSC.

Existential threat is the third element of securitization theory. Existential threats are threats to the very wellbeing and existence of a particular object. However, the polemical issue is that under what circumstances are problems or issues considered as an existential threat? Are they a socially constructed or real threat? In this regard, scholars have identified three types of threats: actual, perceived and fictitious.[26] Actual threat is current existing threat or to use the word of Abdulrahman 'security in practice'; security that taking place in reality.[27] For instance, any actual decrease of the Nile waters can be considered as an actual threat for the watercourse States. However, to the best of my knowledge, there are no reports on the decrease of the Nile water due to the operational hydroelectric power plants on the Abbay and Tekezze River basins such as Tana Beles and Tekezze. Unlike water-consumptive projects like irrigation, GERD is a single purpose hydroelectric power project which is a non–consumptive water use. So that there is no reason to assume that GERD could be an actual threat to downstream countries. This can be evidenced from the first filling and operation of GERD that was completed as per the plan of Ethiopia. The first filling and operation of GERD has not resulted any decrease of the Nile water reaching Egypt. Perceived threat is securitization by perception. It is neither happening at present nor transformed into actual threat but it is assumed that it will happen in the near future.[28] Fictitious threat is securitization by imagination. It has no likelihood of occurrence and never exists in a real sense.[29] But, the securitizing actor invoked it in order to achieve its intended goals.

Fourth, the referent object of securitization can be things regarded as existentially threatened by the security issues that have a legitimate claim to survive.[30] The referent object(s) can be State security particularly military security, political security such as sovereignty or ideology, economic security, social security in terms of collective identities, environmental security such

[23] Yandry K. Kasim*, Supra Note 18*, at 3
[24] Thierry Balzacq, *A theory of securitization: Origins, Core Assumptions, and Variants*, In Securitization Theory: How Security Problems Emerge and Dissolve 9 (Routledge, New York, 2011
[25]*Id*., *at* 9
[26] Nassef M. Adiong, *Supra Note* 21, at 106
[27] Salam A. Abdulrahman, The *River Nile and Ethiopia's Grand Renaissance Dam: challenges to Egypt's security approach*, International Journal of Environmental Studies*, 3 (2018)*
[28] *Id*., at 3
[29] Nassef M. Adiong*, Supra Note 21*, at 106.
[30] See Buzan, *et.al*. (1998) cited in Yandry K. Kasim, *Supra Note* 18, at 2

as species and their habitats.[31] Finally, audience is another key component of securitization theory. The success of securitization is largely determined by the acceptance of the audience such as the wider public, political elites, military and others that a referent object is actually or perceivably threatened.[32] For this, the securitizing actor uses language of securitization, *the speech act*, to convince the audience. It is via speech act that a securitizing actor convinces its audience about the existence of existential threat and thereby the necessity of an exceptional measure.

To sum-up, securitization theory is about security transformability. Securitizing actor transmute an issue or a problem into a security issue otherwise in its very nature the issue is part of the normal politics. Security transformability has twin implication: transformed security problems are "turned in to existential threats that require exceptional, emergency measure" and the way of dealing the security problem may also become a metaphoric war.[33] In the Nile river basin, for instance, various leaders of modern Egypt calls for exceptional measures against Ethiopia. Because, they constructed a knowledge system that consider the Nile water as matter of national security issues.

In contrast, de-securitization is a reverse to securitization. It is the process of bringing a securitized problem by securitizing actor back to normal politics. Some author portrayed desecuritization as "back to normality", the unmaking of an existential threat.[34] For others, it is a process of "transforming an issue that had previously been considered a threat to national security into a matter of routine politics".[35] It is the transformation of superficially framed security danger from high politics and exceptional extraordinary measure into a mainstream politics where agreements, position shifting, compromise and win-win outcomes can be gained via principled negotiations.

On the other hand, desecuritization is considered as a counter strategy whereby a desecuritizing actor deconstructs an issue being securitized so far.[36] It is the process of bringing out a securitized issue out of a national security domain into normal or mainstream politics.[37] In a simple term, the actor no longer accepts the idea that 'X is an existential threat to Y'.[38] For instance, when Egypt referred the GERD issue to the attention of the UNSC as matter of regional

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[31] See Yandry K. Kasim, *Supra Note* 18, at 2; Nassef M. Adiong, *Supra Note* 21, at 106

[32] Christian Kaunert and Sarah Leonard, *Reconceptualizing the audience in securitization theory*, In Securitization Theory: How Security Problems Emerge and Dissolve 59-63 (Routledge, New York, 2011.

[33] Maria Julia Trombetta, *The Securitization of the Environment and the Transformation of Security*, Draft Paper (Jan. 1, 2006, Standing Group on International Relations Conference). Available at: https://www.academia.edu/868265/The_securitization_of_the_environment_and_the_transformation_of_security (Accessed on 10 February 2021).

[34] Yandry K. Kasim*, Supra Note 18*, at 4

[35]Fred H. Lawson, *Desecuritization, Domestic Struggles, and Egypt's Conflict with Ethiopia over the Nile River,* 12 Democracy and Security,1, 9 (2016).

[36] Juha A. Vuori, *Religion Bites: Falungong, securitization/desecuritization in the People's Republic of China*, In Securitization Theory: How Security Problems Emerge and Dissolve 191 (Routledge, New York, 2011).

[37] Fred H. Lawson*, Supra Note 35*, at 9

[38] Juha A. Vuori*, Supra Note 36*, at 191

security,[39] Ethiopia has desecuritized it by asserting that GERD is not a political or security issue so that an agreement is within reach if there is both a political will and commitment to negotiate the GERD issue in a good faith.[40] Moreover, instead of securitizing the Nile water, the former minister of Water, Energy and Irrigation raised a question of justice before the UNSC: "Do Ethiopians have the right to drink from the Nile".[41] Nevertheless, desecuritization through speech act alone does not signify a real security transformation from exceptional politics to normal political realm. Scholars like Behnke, for instance, regarded desecuritization as 'withering away' and termination of the institutional fact of a securitized issue in which the issue is no longer a threat.[42] On the other hand, Hansen also noted that "one cannot desecuritise through speech acts such as, I hereby declare this issue to no longer be a threat".[43] From this, it can be argued that both speech act and lack of speech can be instrument of desecuritization. But a game changer in desecuritization discourse is if the actor successfully moves the securitized issue from the securitized realm into the public sphere with a focus on win-win.

At this juncture, Lane Hansen identified four analytical frameworks considered as outcomes of desecuritization when formerly securitized issues transformed into mainstream politics: stabilization, replacement, rearticulation and silencing.[44] Desecuritization through stabilization is a state of affairs characterized by a gradual explicit change in the security discourse.[45] Less militaristic and violent approaches in apparent form are manifestation of desecuritization via stabilization.[46] Replacement is the process of excluding previously securitized issue from security sphere but a new securitized issue will replace it. In the security discourse, there is no change both in theory and practice. The change is just a shift from one securitized issue to other kind of security threatened by another.[47]

Desecuritization through rearticulation is an ideal form of desecuritization. Lawson asserted that rearticulation is a situation where the actors successfully move the problem or issue being securitized out of the security box through political solution.[48] In rearticulation, competing actors come to realize that their interest and survival is better served not by mutual antagonism and securitization but only through the trinity of win-win approach: collaboration, accommodation

[39] See Letter From Sameh Shoukry, Minister of Foreign Affairs of the Arab Republic of Egypt, to the United Nations Security Council (June 11, 2021), Security Council Report (19 Jun 2020) Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/S_2020_566%20Egypt%20letter%20of%2019%20June.pdf (Accessed on 12 March 2021).

[40] UNSC, *Grand Ethiopian Renaissance Dam Agreement within Reach, Under-Secretary-General Tells Security Council*, *as TrilateralTalks Proceed to Settle Remaining Differences*, Press Release, SC/14232 (29 June, 2020), https://www.un.org/press/en/2020/sc14232.doc.htm

[41] Remarks by H.E Dr (Eng) Sileshi, Ethiopia's Minister of Water, Irrigation and Energy before UNSC on GERD. Available at: https://www.ethioembassy.org.uk/the-brief-09-07-21-insights-on-ethiopian-current-affairs/ (Accessed on 10 July. 2021).

[42] Behnke (2006) cited in Juha A. Vuori *Supra Note 36*, at 191

[43] Hansen cited in Fred H. Lawson, *Supra Note 35*, at 9

[44] Lane Hansen cited in Fred H. Lawson, *Supra Note 35*, at 9; Yandry K. Kasim, *Supra Note* 18, at 5

[45] Yandry K. Kasim, *Supra Note* 18, at 5

[46] *Id*., at 5

[47] *Id*., at 5

[48] Fred H. Lawson, *Supra Note 35*, at 9

and negotiation.[49] Unlike stabilization and replacement which faces problem of conservatism and new securitized problem respectively, rearticulation claims a desirable final solution for all conflicting parties. Nevertheless, the stability and durability of the solution on normative and political level, the impossibility of a complete final solution, and the bitter bargaining process in the context of power dynamics are seen as challenges of rearticulation approach. Desecuritization through silencing is a situation "in which an existing threat ends up being quashed"[50]and disappears in a security discourse.[51]

In the water sector, desecuritization is calling for water negotiation not in a high political setting but in the context of normal politics where all major actors become major player in the resolution of the problem. In desecuritization, "a political community downgrades or ceases to treat something as an existential threat to a valued referent object, and reduces or stops its calls for exceptional measures to deal with the threat''.[52] In this process, there is a steadily removal of previously legitimized use of extraordinary measure and thereby use of force is not a legitimate option. According to some writers, the verified assumption of desecuritization in the water sector is that it contributes for institutional development, bring a shift from zero-sum-game politics to win-win and benefit sharing regime, and bring economic growth and positive peace.[53] It is argued that desecuritization will bring a desecuritize decision-making process, data sharing, establishment of river basin organization, and virtual water trade.[54]

In desecurtization process, actors may include governments, political elites, civil society, individuals and a more emphasis is given to negotiation, interdependence and cooperation. With respect of GERD, Ethiopia is a desecuritizing actor while Egypt is a securitizing actor. The position of Sudan is gradually shifted from a securitizing actor to middle ground and desecuritizing actor sometimes in between the two. For instance, at a time when the government of Ethiopia announced the construction of GERD in April 2011, Sudan opposed the project claiming that the dam will have a devastating impact as a result of dam collapse and reduction of the amount of water reaching Sudan.[55] However, Sudan gradually shifted its position towards supporting the construction of the project. It has also declined from signing the Arab League March 2020 resolution on GERD on the ground that the involvement of Arab League could escalate the issue.[56] But, later on the same country has declared the already recognized beneficiary project as a regional and international security threat.[57] This implies that Sudan is

[49]Fred H. Lawson*, Supra Note 35*, at 9; Yandry K. Kasim, *Supra Note* 18, at 5

[50] Fred H. Lawson*, Supra Note 35*, at 9

[51] Yandry K. Kasim, *Supra Note* 18, at 5

[52] Buzan and Wæver cited in Itay Fischhendler, *The securitization of water discourse: theoretical foundations, research gaps and objectives of the special issue*, 15 *International Environmental Agreements, 8 (2015).*

[53] *Id.,* at 8-9

[54] *Id*., at 8

[55] Salman M. A. Salman, *The Grand Ethiopian Renaissance Dam: the road to the declaration of principles and the Khartoum document*, Water International, 5(2016)

[56] Addis standard, *News: Ethiopia Condemns Arab League's "Blind Support" To Egypt*, Commends Sudan's "Principled Position", March 2020. Available at: https://addisstandard.com/news-ethiopia-condemns-arab-leagues-blind-support-to-egypt-commends-sudans-principled-position/ (Accessed on 10 March 2021).

[57] Egypt Today, Sudan's *irrigation minister: GERD issue became threat to regional security, peace,* Egypt Today (01 Jul 2021). Available at: https://www.egypttoday.com/Article/1/105716/Sudan%E2%80%99s-irrigation-minister-GERD-issue-became-threat-to-regional-security (Accessed on 10 July2021).

still in a hydro-political dilemma due to political instability and third party intervention in Sudanese internal politics.

3. EGYPT SECURITIZATION APPROACH OVER GERD

Egypt's Nile policy is solely guided by securitization of Nile water. From Gamal Abdel Nasser to the incumbent president Abdel Fattah el-Sisi, all regimes in Cairo have used water war rhetoric as an instrument of securitization to maintain the inequitable status quo established by the 1929 and 1959 bilateral agreements. Water security for Egypt is non-alteration of its current use and claimed historic rights.[58] Thus, the consideration of GERD as a national security threat to Egypt is not a new policy approach. It is part of Egypt's Nile securitization policy.

However, there was a desecuritization move during the transition period headed by Prime Minister Issam Sharaf from March to December 2012.[59] Instead of making a securitized speech, the transitional government sent a public diplomacy delegates to Ethiopia which was followed by Sharaf official visit.[60] This shows the temporary shift of Egypt's policy towards Ethiopia. Nonetheless, the absence of a securitized speech during the transitional government does not signify the abandonment of Egypt's securitization policy. Rather Egypt notion of water security remains unchanged.

With the coming to power of President Morsi (June 2012–July 2013), GERD was framed as an existential threat of national security, sovereignty, and economic security (the referent objects). From this period onwards, the major securitizing actors are presidents of the Arab republic of Egypt, military leaders, radical Islamist party, and parliament members. These actors asserted that any actual or perceived threat to the existing water use of Egypt constitutes a red line for legitimate use of force. The first securitizing actor was President Muhammad Mursi who marketed his policy of a drop of Nile water with our blood.[61] The securitization of GERD as an existential threat had reached its climax level when the government of Ethiopia announced to divert Abbay River. While the spokesperson of the president and Egypt Ambassador to Addis Ababa regarded the diversion as a realm of normal politics, opposition political parties particularly the radical Islamist Party of Light, radical Islamist Party of Construction and Development, and Parliamentary representatives moved GERD from mainstream politics to exceptional high politics calling an emergency situation and extraordinary measure.[62] Leaders of

[58] Zerihun Abebe Yigzaw, *Open Letter to Egypt: A Response to The Spokesman of Egypt`s Ministry of Foreign Affairs Regarding GERDP from An Ethiopian Perspective*, Zerihun Abebe Yigzaw's Views on Transboundary Watercourses and Related Issues Blog. Available at: https://zenileabbay.wordpress.com/2014/03/28/open-letter-to-egypt-a-response-to-the-spokes-man-of-egypts-ministry-of-foreign-affairs-regarding-gerdp-from-an-ethiopian-perspective/ (Accessed on 10 March2021).

[59] Fred H. Lawson, *Supra Note 35*, at 3-6 and 17

[60] *Id*., at 2; See also Shaul Shay, *The "Renaissance Dam" crisis*, Herzliya Conference Papers (April 2018, at 3). Available at: https://www.runi.ac.il/en/research/ips/2018/documents/shaulshayrenaissance%20damen22.4.2018a.pdf (Accessed on 10 February 2021).

[61] BBC, *Egyptian warning over Ethiopia Nile dam*, BBC News (10 June 2013), https://www.bbc.com/news/world-africa-22850124

[62] Fred H. Lawson, *Supra Note 35*, at 4-5

opposition political parties make the issue an absolutely urgent by declaring that president Mursi would be responsible for any shortage of water Egypt might face as a result of GERD.

Apart from his political rivals, President Morsi had also made a securitized speech act to legitimize extraordinary measures to be used against GERD including proxy war. Morsi and his foreign minister proclaimed that Egypt will not give a single drop of water; water security would be ensured by any means including use of force.[63] In his June 2013 televised speech, President Morsi had not only reaffirmed the identity of inseparability between Egypt and the Nile saying that "If Egypt is the Nile's gift, then the Nile is a gift to Egypt"[64] but also made a securitized speech:

> The lives of the Egyptians are connected around it [Nile]... Egypt's water security cannot be violated at all… As president of the state, I confirm to you that all options are open…If it diminishes by one drop then our blood is the alternative.

The regime also invoked indefensible claimed historic right, associate water with bread rights, identity, national security and geopolitical issue.[65]According to Nasr and Andreas, "the securitisation of water poverty was again asserted through a narrative constructing Ethiopia as having 'evil' motives to endanger and destabilise Egypt, emphasizing particularly the relationship between Ethiopia and Israel".[66] This implies that Nile water is treated in terms of national security, identity and geopolitical consideration.

However, the tone of speech act, if not the securitization of GERD, was changed with the coming to power of Abdel Fatah al Sisi (from 2014 onwards). The inauguration of Abdel Fatah al Sisi as the president of the Arab Republic of Egypt was seen by many as a shift of Egypt policy over GERD: a shift from possible use of force to peaceful resolution of the dispute over GERD.[67] Despite his initially desecuritization move, Egypt official policy of securitization over GERD remains unchanged. What changed was the rhetoric he made about the importance of solving the GERD dispute through negotiation and cooperation than use of force.[68] The reason for his deviation from the historic trend and position of his predecessors of modern Egypt is to buy a time. Because since the very day of his election campaign to the recent GERD stalemate, he has made several speech act stressing Nile water as a matter of life and death.[69] For instance, in the 2021 news conference in Ismailia, Abdel Fatah al Sisi had made a securitized speech

[63] BBC, *Egyptian warning over Ethiopia Nile dam*, BBC News (10 June 2013), https://www.bbc.com/news/world-africa-22850124
[64] *Id.*
[65] Andreas Neef and Hala Nasr, *Ethiopia's Challenge to Egyptian Hegemony in the Nile River Basin: The Case of the Grand Ethiopian Renaissance Dam,* 21Geopolitics, 1, 8(2016)
[66] *Id.*, at 9
[67] Endalcachew Bayeh, *New Development in the Ethio-Egypt Relations over the Hydro-Politics of Nile: Questioning its True Prospects*, *3International Journal of Political Science development,*159, 161(2015)
[68] *Id.,at* 161
[69] Zerihun Abebe Yigzaw, *Al-Sisi`s Nile Policy: What is New and What is Not?,* Zerihun Abebe Yigzaw's Views on Transboundary Watercourses and Related Issues Blog, https://zenileabbay.wordpress.com/category/dams/

saying that "…no one can take a drop from Egypt's water, and if it happens there will be inconceivable instability in the region".[70]

In sum, the government of Mursi and al Sisi has used securitization as an instrument of maintaining the inequitable status quo. Conservative religious leaders have also attempted to give a moral legitimacy for any action to be undertaken by the regimes in Cairo in defending the claimed Islamic principle of no harm through water/green jihad.[71] From this it can be argued that, the securitizing actors not only securitized the water of Nile through their speech act but also attempted to change the Nile identity. By invoking history of prior use, they also denied the transboundary nature of Nile River. In the eye of the country's politician and statesmen, GERD is a threat not only to their self-claimed 55.5 billion cubic meters of water as per the unbinding 1959 bilateral agreement but also to their identity of inseparability between Nile and Egypt. This is the author's point of departure arguing that Egyptian view of GERD as a water security threat of Egypt is a hyperbolically constructed myth that is neither actual nor perceived threat. Rather the securitization of GERD by Egypt is an invented fictions threat. The following sub-sections provide further discussions on the myth and reality of each of the securitization mechanisms used by Egypt.

3.1. Absolute Water Dependency

One of the securitization mechanisms of Egypt against GERD is based on an invented discourse of absolute water dependency. Egypt viewed itself as a country whose life is absolutely dependent on the Nile waters and thus water is taken as a national security issue.[72] Al Rasheedy and Hamdy described the dependency discourse as follows:

> "as compared to the other riparian states, Egypt is the only country that is heavily dependent on the Nile River waters, making Cairo vulnerable to any actions that would jeopardize the flow of the Nile. The Nile River will always be the parameter that influences Egyptian foreign policy vis-à-vis the states in the basin region."[73]

While maintaining absolute dependency discourse and any decrease of Nile water as an existential threat, Egypt maintain that Ethiopia has alternative sources other than the main Nile

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[70] Aljazeera, *Egypt's Sisi warns Ethiopia dam risks 'unimaginable instability'*, Aljazeera News (30 March 2021). Available at: https://www.aljazeera.com/news/2021/3/30/egypts-sisi-warns-ethiopia-dam-risks-unimaginable-instability (Accessed on 10 April 2021).

[71] Green Jihad is an emerging concept denoting the duty to comply with Islamic principles by fighting climate change, environmental degradation and pollution. It comes from the calls of Muslim leaders for 'Green Jihad' to save our plant at different global climate change movement and conferences. On the one hand, Green Jihad is the duty of doing the right thing which includes protection of the physical environment and water bodies. On the other hand, it denotes the duty of not doing harm to nature as well as the duty to fight any threats to the nature. However, the Egyptians notion of Green Jihad specifically water Jihad mainly focus on the 'do no harm' Islamic principle. Andreas Neef and Hala Nasr, *Supra Note 65*, at 9; See also Janot Mendler de Suarez, *Achieving equitable water use in the Nile Basin: time to refocus the discourse on collective human security*?, 38 Review of African Political Economy,455, 462-464 (2011).

[72] Arab Republic of Egypt, Ministry of Water Resources and Irrigation Planning Sector, *National Water Resources Plan for Egypt-2017*, 1 (2015)

[73] Ahmad Al Rasheedy and Hamdy A. Hassan, *The Nile River and Egyptian Foreign Policy Interests*, 11African Sociological Review, 25, 36(2007)

for whom water is not an existential threat. In this discourse, taking a drop of water from the Nile is taken as a red-line for calling extraordinary measure against the threat. GERD is thus securitized by Egypt based on absolute water dependency discourse. This securitization narrative of Egypt is, however, an artificially manufactured myth on the following grounds.

First, Egypt is a country endowed with groundwater source[74] and infinite sea water while Ethiopia depends on surface water. Any decrease of annual rainfall is a national security threat to Ethiopia. Factors such as climate change and El Nino has been exposing the country for drought. From this it can be understood that, if rainfall stops reaching Ethiopia due to natural reason it would mean that there will be no water, no food and ultimately no life. However, any absence of rainfall in upstream Nile could not jeopardize lives in Egypt like that of Ethiopia. Because, they have alternative water such as sea and ground water. This is the reality denied by Egyptians for millennia.

If one looks at the hydrologic water budget of the Nile riparian countries, then it will be clear to know more water stressed country. With the exception of Sudan and Egypt, the rest of Nile riparian countries have insignificant groundwater reserves. According to the British Geological Survey, in Africa the largest groundwater reserve is found in five countries of North Africa: Libya, Algeria, Sudan, Egypt and Chad.[75] Of these countries, Egypt is ranked the 4th huge groundwater reserve country in Africa.[76] It has eight hydrological units for storing groundwater namely the Nile Valley and Delta aquifers, Coastal aquifers, Nubian Sandstone aquifer, Moghra aquifer, Tertiary aquifer, Carbonate rocks complex aquifers, Fissured basement complex aquifers and Aquiclude rocks.[77] The Nubian Sandstone and Nile aquifer are the two significantly important groundwater aquifers. Some of these systems, for instance, the Nile Valley and Delta, are renewable water resources both extractable and fresh with low pumping cost. Egypt has an estimated total groundwater storage of 55, 200-63,200 BCM.[78]

Table-1: Estimated Groundwater resources of Sudan, Egypt and Ethiopia in Decreasing Order

Country	**Groundwater storage (km^3)**	
	Rang	Best estimate
Sudan*	37,100–151,000	63,200
Egypt	36,000–130,000	55, 200
Ethiopia	4,340–39,300	12,700

Source: Extracted from Bonsor *et al.*[79]

* The estimation includes the share of South Sudan

[74] Tekleab Shibru, *Debunking Ethiopia's Plentiful Water Resources vis-à-vis Egypt: A Closer Look at Basins' Water Budget*, 4. Available at: https://eastafricanistcom.files.wordpress.com/2020/06/egypt-has-more-water-resources-than-ethiopia-a-closer-look-by-dr.-tekleab-shibiru-gala.pdf (Accessed on 10 March 2021).

[75] H. C. Bonsor, A.M. MacDonald, B´E´O. Dochartaigh and R G Taylor, *Quantitative maps of groundwater resources in Africa*, 7Environmental Research Letters, 1, 5 (2012).

[76] Tekleab Shibru, *Supra Note 74*, at 7

[77] S.S. Ahmed, M. R. El Tahlawi, and A. A. Farrag, *Groundwater of Egypt: an environmental overview*, *Environ Geology*, 1, 3, (2007).

[78] See. H.C. Bonsor, A.M. MacDonald, B´E´O. Dochartaigh and R G Taylor, *Supra note* 75, at 5; Tekleab Shibru, *Supra Note* 74, at 7-8

[79] See H.C. Bonsor, A.M. MacDonald, B´E´O. Dochartaigh and R G Taylor, *Supra note* 75, at 5;

As indicated in the above table, Sudan has high groundwater reserves followed by Egypt while the groundwater reserve of Ethiopia is insignificant as compared with the two downstream countries. When we make a comparison there is a big difference. Ethiopia has approximately 12,700 BCM groundwater storage. Whereas Egypt has close to 55, 200. Other studies, however, estimated Egypt's groundwater reserve as 63,200 BCM.[80] If we take, for instance, the estimation by Tekleab, Egypt's groundwater reserve is "50,500 BCM more and 400% higher than the groundwater reserve of Ethiopia".[81] By comparing available groundwater resources with that of the annual flows of Nile, Habtamu noted that "if one compares it with the 1959 bilateral Nile water quota of Egypt and Sudan, i.e., 55 and 18.5bm^3 per annum respectively, their groundwater potentials correspondingly equate to the sum of flow of Nile water share of 1,000 and 3,400 years".[82]

Moreover, Egypt has more surface water reserve than Ethiopia. The study of Tekleab reveals that Ethiopia and Egypt have 30 and 108 BCM surface water reserve in the Nile Basin, respectively.[83] Egypt has also unlimited access to sea water whereas Ethiopia has no access to sea water due to its landlocked status. From this one can concluded that Egypt will not be threated due to the water resources development of Ethiopia like GERD. Thus, Egypt discourse of absolute dependency on the Nile water is a socially constructed myth used as an instrument of denying the right of Ethiopia. Its claim of GERD as a threat to its water security based on the notion of absolute dependency is a myth and 'misplaced opposition'.[84] In reality, for instance if one take criteria's like per capital water availability and storage capacity, and spatial variability, it come to clear that Ethiopia is more water stressed than Egypt. Habtamu noted that "…if Nile water flow dries up by some inexplicable natural and/or manmade factors, the two nations [Egypt and Sudan] can lead life for millennia without change to present water usage".[85] No rain in upstream Ethiopia literally means no life. But Egypt can sustain life without Nile with its groundwater resources and infinite sea water. Thus, age-old Egypt Nile policy of 'there is no Egypt without Nile' as well as interpretation of Egypt civilization as the result of "fortune geographical marriage between Egypt and Nile"[86] is also a fabricated myth.

3.2. Nationalization and Politicization of the Nile Water

The securitization of GERD emanates out of Egypt politicization/nationalization of Nile water that has legal, institutional and mythological grounds. Legally, the 2014 constitution of the Arab

[80] Tekleab Shibru, *Supra Note 74*, at 8
[81] *Id.*, at 8
[82] Habtamu Abay, *Egypt's Groundwater Resources*, Aiga Forum (April 10, 2014). Available at: http://www.aigaforum.com/articles/Egypt-groundwater.pdf (Accessed on 20 February 2021).
[83] Tekleab Shibru, Exposing an Infinite Water Resources Advantage of Egypt over Ethiopia, 1 (2020). Available at: https://www.researchgate.net/publication/342354234_Exposing_an_Infinite_Water_Resource_Advantage_of_Egypt_over_Ethiopia (Accessed on 1 April 2021).
[84] Mammo Muchie, Minga Negash and Seid Hassan, *Misplaced Opposition to the Grand Ethiopian Renaissance Dam*, Aiga Forum (April 30, 2014). Available at: http://www.aigaforum.com/articles/Misplaced-opposition-to-the-Grand-Ethiopian-Renaissance-Dam.pdf (Accessed on 20 February 2021).
[85] Habtamu Abay, *Supra Note 82*, at 3
[86] Himdan (1987: 782) cited in Ahmad Al Rasheedy and Hamdy, *Supra Note 73*, at 25

Republic of Egypt fallaciously legalized Egypt's monopolistic ownership of the Nile water. The preamble of the constitution denied the transboundary nature of the river as it recognized an identity of inseparableness between Nile and Egypt: "Egypt is the gift of the Nile for Egyptians and the gift of Egyptians to humanity".[87] The constitution also obliged the government to "…protect the River Nile and preserve Egypt's historical rights".[88] This kind of constitutional securitization as well as legalization of the monopolization claim of Egypt is a major hurdle in the decade of CFA and also the ongoing GERD negotiation. Because, the government in Cairo has been negotiating the Nile water with co-riparian to safeguard not only Egypt's historical right but also to preserve the constitution. It is obvious that negotiations with an external party always require a simultaneous negotiation with domestic groups such as citizens, parliament, political parties and pressure groups. For instance, Robert Putnam argued that "at the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments".[89] From this perspective, it can be argued that if Al Sisi fails to preserve constitutionally enshrined rights of Egypt over the Nile water, the regime may face a legitimacy crisis. Thus, GERD is a threat to the regime in power, being a driving factor forcing the regimes in Cairo to tend to securitize the Nile water.

In this regard, for the regime in Cairo, the regionalization and internationalization of the GERD as a security issue by Egyptian statesmen might be considered as a success. Saving the regime in Cairo is also a driving force behind the blind US support of Egypt's position on GERD to the extent of forcing Ethiopia to sign US drafted deal under the Trump administration. For US, letting the Al Sisi regime to lose power would mean selling Egypt for the Muslim brotherhood or any anti-American forces. This is the strategic calculation of U.S. policy towards the Middle East, because, the Egypt-Saudi Arabia-United Arab Emirates axis power is considered as a key for US interest in the Red Sea. This axis power counters the Turkey-Qatar axis. Thus, one of the reason for US in supporting Egypt over GERD is because of the geopolitical leverage Egypt have for the purpose of western countries.

The politicization and securitization of Nile is also institutional. For Egypt, the Nile is a security and political issue. Because of this, issues related with Nile are dealt by the Supreme Committee for the Nile Water (SCNW) consisting of Ministry of Foreign Affairs, The Minister of Water Resources and Irrigation, the Ministry of Defense, General Intelligence Service, and the Prime Minister and President.[90] Zerihun noted that in all riparian except Egypt, the Ministry of Water Resources Affairs has a mandate to deal issues related with Nile while Ministry of foreign affairs have a supportive role. Whereas in Egypt, the Ministry of Water and Irrigation has nominal power especially when it comes to issues of negotiation.[91]

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[87] Preamble of The Constitution of the Arab Republic of Egypt (2014)

[88] *Id.,* article 44

[89] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 45International Organization, 427, 434(1988)

[90] Zerihun Abebe, *Blue Nile/Abbay and Grand Ethiopian Renaissance Dam*, Power Point Presentation Given at 2020 International Conference on the Nile and GERD. Available at: https://environment.fiu.edu/events/all/2020-international-conference-on-the-nile-and-grand-ethiopian-renaissance-dam/_assets/zerihun-abebe---zerihun-abebe-21-august-2020-fiu-1.pptx (Accessed on 5 February 2021).

[91] Zerihun Abebe Yigzaw, *Supra Note 69*

3.3. Water Security

Water security is another Egypt securitization mechanism over the GERD in canonizing the iniquitous status quo established by the 1929 and 1959 bilateral agreements. However, Egypt's notion of water security is different from the concept of water security as defined by literature and legal instruments. As noted by a diplomat in the Ministry of Foreign Affairs of Ethiopia, water security for Egypt denotes its current use and historic rights as per the 1959 bilateral agreement.[92] Taking a drop of water from the 55.5 BCM allocated by the 1959 agreement is considered a security threat. This implies that Egypt notion of water security has taken the three element as inseparable: national security, the Nile water, and 1959 agreement. It is rested upon the assumption that the water security of Egypt will be ensured if and only if Egypt sustain its monopolization of the Nile water as per the 1959 agreement. According to Yacob, safeguarding ones water security at the expense of other co-riparian is a dangerous misconception that should be challenged.[93] Thus, Egypt notion of water security is non-accommodative. It has been used as a cover to shield the status quo.

Moreover, Egypt notion of water security is beyond the scientific domain of water security. In literature, water security is about the nexus between water availability, accessibility and use.[94] It is defined as both the availability and accessibility of water in sufficient manner qualitatively and quantitatively for people.[95] Egypt notion of water security has also contradiction with legal instruments. Under CFA water security is defined as "…the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment".[96] Under this article, it has made clear that the water security of all riparian countries can be ensured when there is equal access to and equitable use of the Nile water. As opposed to the Egypt notion of water security which is a win-lose, CFA enshrined a win-win conception of water security. Because, Egypt insisted that its water security will be ensured if and only if it safeguarded the allocated water (55.5 BCM) as per the 1959 agreement. This is, however, at the expense of other riparian.

This shows that Egypt notion of water security is neither supported by CFA nor by scientific evidence. Rather water is mistakenly entangled with national security and treated as high political issue. Calow and Nathaniel noted that "…the word 'security' will always carry militaristic overtones, or will imply that solutions to water problems will be achieved by force, rather than negotiation and cooperation".[97] It is this kind of water security conception that

[92] Zerihun Abebe Yigzaw, *Supra Note* 58

[93] Yacob Arsano, *Negotiations for a Nile-Cooperative Framework Agreement*, 222 ISS Paper, 1, 2 ((2011)

[94] Valerie Ndaruzaniye, *Water Security in Ethiopia: Risks and Vulnerabilities' Assessment*, Global Water Institute for Africa Climate change, environment, Security, 1, 2 (20110

[95] *Id*., at 2; See also Christina Leb and Patricia Wouters, *The Water Security Paradox and International Law: Securitisation as an Obstacle to Achieving Water Security and the Role of Law in Desecuritising the World's Most Precious Resource*, *In* Water Security: Principles, Perspectives, and Practices, 28 (Routledge, London, 2013)

[96]Agreement on The Nile River Basin Cooperative Framework, article 2(f)

[97] Nathaniel Mason and Roger Calow, Water *security: from abstract concept to meaningful metrics: An initial overview of options*, Working Paper 357, 2 (2012).

hindered the ongoing GERD negotiation. Because, from the very beginning Egypt has decided that it will not give any drop of water from its share as per the 1959 agreement. Egypt has not dropped its notion of special entitlements to the Nile water when it comes to the GERD negotiation.

3.4.Egypt as Extravagant and Abusive User of Nile Water and GERD

Despite Egypt's alleged fear of water scarcity as a result of GERD, it is an extravagant and most abusive user of Nile water. Current water scarcity in Egypt is neither due to shortage of physical water nor upstream dam projects but because of poor water management of Egypt. A scholar argued that "…Egypt not only refuses to share benefits but also utilizes the Nile abusively".[98]

First, an extensively high amount of water loses due to evaporation at the Aswan High Dam have been inducing water scarcity and more water demand in Egypt. Studies show that seepage and evaporation at the Aswan High Dam has been increased tremendously.[99] The evaporation rate has been increased tremendously (18 BCM per year)[100] due to climate change and sediment deposition; nearly 6.6 BCM sediments are deposited in the High Aswan Dam reservoir since its operation.[101]Another study also revealed that due to evaporation and artificial fertilizer[102], Nile River loses 25% of its water in Lake Nasser.[103] While water loss due to evaporation has induced more water demand on the part of various water users and sectors, artificial fertilizers have also been cited as a source of water pollution and affects water quality.[104]

Second, Egypt poor water management is a primary cause of water scarcity. Egypt is responsible for wasting high amount of water due to its poor water management. For instance, agriculture is totally dependent on irrigation[105] and consumes more than 86% of the total water use.[106]

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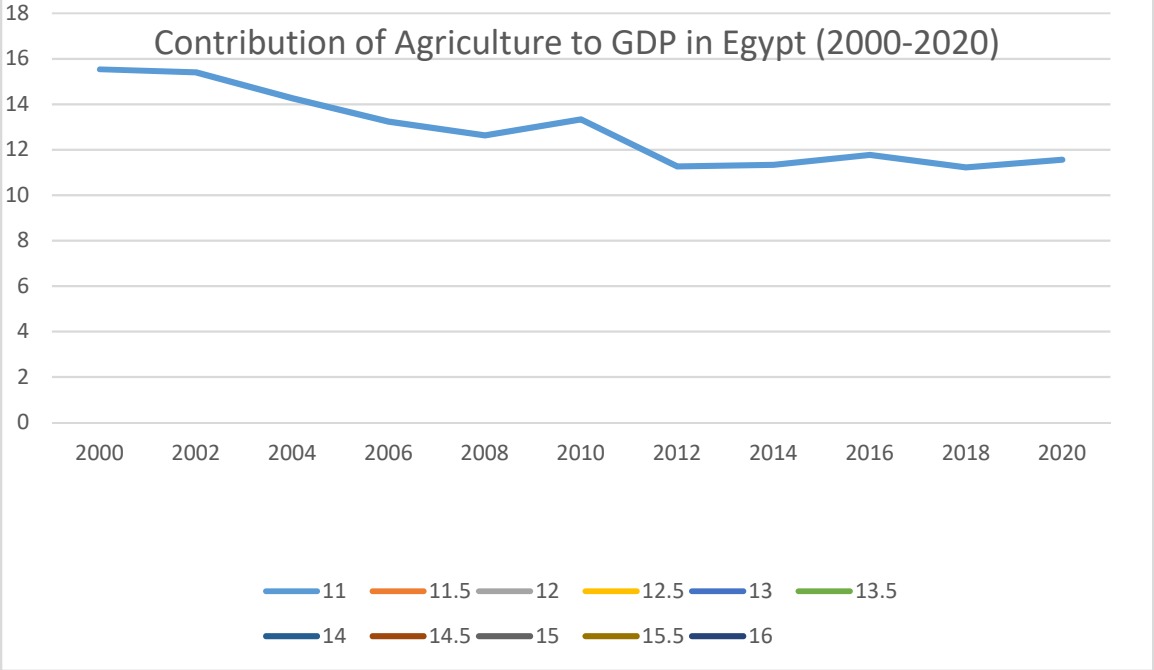
[98] Jack Kalpakian, *Ethiopia and the Blue Nile Development Plans and Their Implications Downstream*, ASPJAfrica & Francophone- 2nd Quarter, 40, 49 (2015).
[99] *Id.,* at 49
[100] Emad Elba, Dalia Farghaly, Brigitte Urban, *Modeling High Aswan Dam Reservoir Morphology Using Remote Sensing to Reduce Evaporation*, 5 International Journal of Geosciences, 157, 156-169 (2014)
[101] Emad Elba1, Brigitte Urban, Bernd Ettmer, Dalia Farghaly, *Mitigating the Impact of Climate Change by Reducing Evaporation Losses: Sediment Removal from the High Aswan Dam Reservoir*, 6 American Journal of Climate Change, 230, 230-246 (2017).
[102] The construction of the High Aswan Dam has increased the demand for artificial fertilizer. Before the construction of the dam, the agriculture sector in Egypt was largely depends on the annual flooding of the Nile River that brings Egypt both the water and nutrient rich sediments. However, the sediments has been reduced with the construction of the dam. This has increased the demand for artificial fertilizers. The growing use of artificial fertilizer, however, affected the water quality of both the Nile River and Egypt groundwater resources such as the Nile water aquifer. It has also increased salinity. This may further exacerbate the water security problem. Moreover, it may also increase the demand of different water users for clean water. *For more see* Mohamed Shamrukh, M. Yavuz Corapcioglu and Fayek A.A. Hassona, *Modeling the effect of chemical fertilizers on ground water quality in the Nile Valley Aquifer, Egypt*, 39 Groundwater, 59-67 (2001).
[103] Stefan Deconinck, *Supra note* 5, at 7
[104] El-Sayed Ewis Omran and Abdelazim Negm, *Environmental Impacts of AHD on Egypt Between the Last and the Following 50 Years*, *in* GRAND ETHIOPIAN RENAISSANCE DAM VERSUS ASWAN HIGH DAM A VIEW FROM EGYPT, 22, 40, (Abdelazim M. Negm and Sommer Abdel-Fattah, eds., 2019)
[105] Arab Republic of Egypt, Ministry of Water Resources and Irrigation Planning Sector, *Supra Note 72*, at 29
[106] Stefan Deconinck, *Supra note* 5, at 6

However, the agriculture sector has minimal contribution to the GDP of the country which is decreased from 15.5 percent in 2000 to 11.5 in 2020.[107] From the economic point of view, it will be to the advantage of Egypt to focus on the industry sector that uses 6 % of water.[108] Because, Egypt has a comparative advantage in industry than agriculture sector. Likewise, Sudan and Ethiopia have a comparative advantage in agricultural production and hydroelectric power production respectively.



Sources: Based on World Bank Online Database[109]

Moreover, the production of water intensive crops such as rice, wheat, cotton and sugarcane on fragmented farmland has also contributed for water scarcity. In the 2017 National Water Resources Plan of Egypt, rice is regarded as the most water consuming crop.[110] The irrigation water needed per *feddan* is 75 and 126 % higher than that of cotton and maize respectively.[111] On this ground, one may question that why the Egyptians official discourse is dominated by water scarcity and thereof probability of water war given the fact that Egypt is wasting the precious Nile water in the desert because of its poor water management.

Third, primitive irrigation system of Egypt and its intensive agriculture are wasting more water causing water scarcity and more water demand on the part of Egypt. In this regard, Abdrabbo noted that;

[107] *Id*., at 6
[108] *Id*., at 6
[109] https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?end=2020&locations=EG&start=2000&view=chart (Accessed on 5 May 2021).
[110] Arab Republic of Egypt, Ministry of Water Resources and Irrigation Planning Sector, *Supra Note* 72, at 34
[111] *Id*., at 34

> "about 2.52, ha (6 million feddans) are old lands irrigated by surface irrigation methods with low on-farm water application efficiency (40–60%). Waterlogging, salinization, and low application efficiency are the main problems inherent with surface irrigation. Replacing the surface irrigation method with precise irrigation systems became the main interest of the decision makers and policy planners in Egypt".[112]

Instead of changing its traditional water extravagant irrigation system by an efficient water saving methods of irrigation, Egypt regards GERD as potential causes of water scarcity. In reality, however, GERD has positive implication for downstream countries in terms of sediment reduction and regulation of water flow.

In general, more water is wasted at High Aswan dam and Egyptian irrigation system. The cumulative wasted water is about 20 to 50 % of the water that flowed into Egyptian irrigation system.[113] Sadly, Egypt is not yet changed its water consumption habit which is both extravagant and abusive. Instead, it is following a policy of no dam in upstream Ethiopia due to Egypt's alleged fear that the construction of dams in Ethiopia may cause water scarcity in downstream Egypt. However, the existing water resources development in Ethiopia is largely hydropower which is non-water consumptive. Moreover, as showed above the current water scarcity in Egypt is not due to Ethiopia's water resources development. But, because of Egypt's poor water management.

3.5. GERD as an Invented Existential Threat and Foreshadower of Egypt's *Ethiophobia*

As reiterated above, Egypt's securitization of GERD as a threat of water security is a false allegation neither supported by scientific evidence nor moral grounds. The concern of Egypt, to use Mahmoud Salem's word, is *hysteria*.[114] Zerihun also used the term *Ethiophobia*[115] to explain Egypt opposition of GERD. The reason behind the Egypt securitization of GERD is also polemical. Because, GERD is not a multi-purpose and water consuming project. It is a hydroelectric project. More importantly, the advantage of storing water in upstream Ethiopia as well as the several benefits of GERD to downstream countries has been also verified by the international experts.[116] Because of this reason, Mahmoud Salem questioned the real motive of

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[112] Abdrabbo Abou Kheira cited in Jack Kalpakian, *Supra Note* 98, at 49

[113] Jack Kalpakian, *Supra Note* 98, at 49

[114] Jack Kalpakian, *Supra Note* 98, at 50

[115] Ethiopian Press Agency, *Egypt is sailing against the wind, squandering its opportunity*, Interview with Diplomat Zerihun Abebe (March 26, 2020). Available at: https://www.press.et/english/?p=20054# (Accessed on 6 April 2021).

[116] The major benefits of GERD to downstream countries as outlined in the final report of IPoE and international researchers includes evaporation reduction, flood control, improved water supply in dry season, sediment reduction and regulation of water flow. See Dale Whittingtona, Marc Jeuland and John Waterbury, *The Grand Renaissance Dam and prospects for cooperation on the Eastern Nile, 16*Water Policy, 595, 600 (2014); Rawia Tawfik, *The Declaration of Principles on Ethiopia's Renaissance Dam: A Breakthrough or another Unfair Deal*?, The Current Column, 26 (2015); International Panel of Experts, *Grand Ethiopian Renaissance Dam Project Final Report*, 31st May 2013

Egypt anxiety that; "believe it or not, storing the water in Ethiopia before it reaches Egypt will actually lead to an increase in our water supply. So why the hysteria?"[117]

Some scholars have been also surprised by Egypt securitization approach. Some argue that Egypt opposed the GERD project based on unconstructed 'exclusionary nationalism than is hydrological matter'.[118] Others also argue that "the expected loss of water due to evaporation for the new project [GERD] is not worse than what Egypt is currently losing from its environmentally unfriendly projects and poor water management".[119] In the same way, Stefan Deconinck also attempted to answer the question that why Egypt overemphasized water scarcity through its discourse of water security while it is wasting high amount of water due to its water mismanagement practice.[120] The author of this article also argues that Egypt contestation of GERD is not due to the negative impact posed by the project but to counter the broader geopolitical implication of GERD for Ethiopia and the region at large. First, the completion of the GERD project will help Ethiopia to meet the growing energy demand at home and its neighboring countries. Even though Ethiopia is providing Sudan and Djibouti hydroelectric power energy at affordable price, the country has not yet provided the two countries energy demand satisfactorily. As a result, Ethiopia has planned to increase the power export to Sudan and Djibouti. In the latter case, the second Ethio-Djibouti power interconnection system has been under construction.[121] There was also a negotiation between Ethiopia and Sudan to construct additional power transmission line to increase the power supply to 100MW from the under construction GERD.[122] There is also energy demand from Kenya and South Sudan. Ethiopia and South Sudan had also signed a Memorandum of Understanding and they agreed that Ethiopia will export 100MW to South Sudan in the first phase and will increase into 400MW in the next phase.[123] Furthermore, the power transmission line from Ethiopia to Kenya was also completed. All these regional demands will not be meted without a huge investment in the hydropower sector. In this case, GERD will increasing the country's power export. Second, power export has multiple benefits. For Ethiopia, power export is an important source of foreign currency. The country has been generating an average of seventy million US dollar per annual from the power sale to Sudan and Djibouti. For the power importers, access to reliable and affordable energy may boost their economy. Furthermore, the power export may contribute to the creation of an interdependent grid community. Thus, for Ethiopia hydroelectric power projects like GERD may boost the countries geopolitical power.

Furthermore, the GERD has also an emancipatory potential. It showed the possibility of building a mega-hydroelectric power project with domestic resource mobilizations. This may emancipate

[117] Jack Kalpakian, *Supra Note* 98, at 50
[118] Jack Kalpakian, *Supra Note* 98, at 67
[119] Mammo Muchie, Minga Negash and Seid Hassan, *Supra Note* 84
[120] Stefan Deconinck, *Supra note* 5, at 2
[121] Africa Development Bank Group, *Multinational - Ethiopia Djibouti Second Power Interconnection Project, Phase II*, June 09 2022, https://projectsportal.afdb.org/dataportal/VProject/show/P-Z1-FA0-180
[122] Fana Broadcasting Corporation, *Ethiopia, Sudan Striving to Increase Current Amount of Power Supply To 1000MW*, 11 March 2022, https://www.fanabc.com/english/ethiopia-sudan-striving-to-increase-current-amount-of-power-supply-to-1000mw/
[123] Fana Broadcasting Corporation, *Ethiopia Plans to Export 100 MW Electric Power to South Sudan in Three Years*, May 6, 2022, https://www.fanabc.com/english/ethiopia-plans-to-export-100-mw-electric-power-to-south-sudan-in-three-years/

other riparian to construct infrastructure to harnesses their untapped hydroelectric and irrigation potential with their own resources. From this, it can be argued that GERD has not only the potential in enhancing the power of Ethiopia but also have an impact on the regional balance of power. Because of this, Egypt has been using securitization to counter the geopolitical implication of GERD. Thus, the concern of Egypt is not the GERD alone but its geopolitical implication.

4. ETHIOPIA'S TACTICAL SECURITIZATION-CUMD ESECURITIZATION APPROACH

While Egypt securitizes the GERD as a security threat, Ethiopia has been desecuritizing the issue. Ethiopia has also used tactical securitization which is manifested in the GERD narrative that consider it an existential project. However, Ethiopia's approach over GERD is largely desecuritization. The bedrock of Ethiopia desecuritization approach rests upon the recognition of Nile as transboundary resource and its utilization based on principle of equitable and reasonable use, and cooperation. Its desecuritization approach over GERD is manifested through its altruistic invitation of downstream countries to establish a tripartite committee to review the design and study documents, establishment of IPoE, accept the recommendation of IPoE, hired consultants to implement the recommendation of IPoE, signing of DoP, establishment of Tripartite National Committee, and establishment National Independent Scientific Research Group. The approach of Ethiopia is an exceptional not only in the history of Nile but also in international transboundary watercourses. In an article published on the official website of Ethiopian Ministry foreign Affairs (MoFA), it is stated that:

> "We don't know of any single country in the Nile basin that has ever previously invited other riparian countries to study the impact of a dam on riparian countries. Definitely this has never been the experience of Egypt, at least in regards to Ethiopia. If Ethiopia had chosen to follow historical precedent and indeed the example set by Egypt, there would never have been any consultations on GERD in the first place."[124]

Egypt has built macro and micro dams on Nile but neither notified nor consulted Ethiopia. Why Ethiopia did this is just for the sake of hydro-cooperation, confidence building and to forge a benefit sharing regime. In view of that, the following are the desecuritization discourses of Ethiopia.

4.1. GERD as a Benefit Sharing Project

[124] Ministry of Foreign Affairs, *Egyptian "Experts": unjustified statement on GERD*. Available at: http://www.mfa.gov.et/web/guest/articles/-/asset_publisher/TiDZpSUe5oS6/content/egyptian-experts-unjustified-statement-ongerd?_101_INSTANCE_TiDZpSUe5oS6_redirect=http%3A%2F%2Fwww.mfa.gov.et%2Fweb%2Fguest%2Farticles%2F-%2Fasset_publisher%2FTiDZpSUe5oS6%2Fcontent%2Fegyptian-experts-unjustified-statement-on-gerd&_101_INSTANCE_TiDZpSUe5oS6_cur=0&_101_INSTANCE_TiDZpSUe5oS6_page=1 (Accessed on 10 April 2021).

In the Nile basin, both water sharing and benefit sharing approaches has been applied at different degree. The 1929 and 1959 bilateral agreement and the CFA can be considered as a water sharing frameworks whereas the NBI is a benefit sharing arrangement.[125] However, upstream and downstream countries have contradictory position on water sharing and benefit sharing. For Egypt and Sudan, water sharing means the 1959 agreement that allocates the Nile water only for themselves. Egypt objection of GERD is based on this inequitable bilateral agreement as it pursued a policy of not to give a drop of water for upstream countries. Against this back drop, however, GERD is presented by Ethiopia as a benefit sharing project.

While the speech of all Egyptian statesmen is securitization of GERD, in their speech act on GERD successive Ethiopian leaders have used a consistent desecuritized, transformative and win-win narratives. For example, during the inauguration of the project the late Prime Minister Meles Zenawi announced that GERD is a benefit sharing project having a role of inducing cooperation among countries that share the Nile River.[126] The desecuritizaition policy of Ethiopia is also manifested in its altruistic invitation of downstream countries to establish tripartite committees.

Moreover, the GERD project has also cross-border benefits. In this regard, Sudan is an immediate beneficiary of the project: increases the hydropower generation capacity of its seasonal storage dams, reduce damages as a result of seasonal flooding, increase potential of irrigated agriculture, reduce the cost used to cope with the destruction and for maintenance due to flooding, saving of more water and reduce evaporation, sediment control, navigation opportunity and power purchasing form the project.[127]

Despite the strong assertion that Egypt will be affected negatively, the benefits accrued form GERD for Egypt includes water saving and enhanced water management, flood control, controlled and uniform flow of water, reduction of evaporation loss to 9.5 BCM/year from 10.8 BCM/year at High Aswan Dam, sediment control and hence GERD will extend High Aswan Dam design life, enhanced navigation as a result of regulated and increased water flows.[128]The report of IPoE similarly confirmed that the benefit of GERD for Egypt includes "…an increase in irrigated area, a decrease in sedimentation in Lake Nasser, and a reduction in flooding".[129] Of these benefits, the major one is drought mitigation. As Egypt faces irrigation failure due to drought and high evaporation, this will be decreased as a result of GERD. According to several studies and the report of IPoE, the negative impact of the project on Egypt is the reduction in power generation at High Aswan Dam which is very minimal and largely determined by the type and duration of reservoir filling strategy of GERD.[130]

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[125] Zerihun Abebe, Eastern Nile Basin: The Nexus Between Water Sharing And Benefit Sharing Arrangements, Chap3 (Master Thesis, Addis Ababa University, Department of Political Science and International relations, 2011)

[126] Meles Zenawi Memorial, *Ethiopian Pm Meles Zenawi Speech on Launching GERD (Text and Videos), April 02, 2011, Guba, Benishangul Gumuz.* Available at: http://www.meleszenawi.com/ethiopian-pm-meles-zenawi-speech-on-launching-gerd-text-and-videos/ (Accessed on 10 April 2021).

[127] Office of National Council for the Coordination of Public Participation on the Construction of the Grand Ethiopian Renaissance Dam, *Grand Renaissance Dam*, 4 Special Magazine Publication, 9 (2017).

[128] *Id., at 9*

[129] International Panel of Experts, *Grand Ethiopian Renaissance Dam Project Final Report*, 31st May 2013, at 41

[130] See Rawia Tawfik, *The Declaration of Principles on Ethiopia's Renaissance Dam: A Breakthrough or another Unfair Deal*?, The Current Column, 26 (2015); Esam Helal and Abdelhaleem Fahmy, *Impacts of Grand Ethiopian*

4.2. Principle of Equitable and Reasonable Utilization

In contrast to the downstream countries claim of acquired and historical rights of the Nile waters, Ethiopia asserts an international water law principle such as equitable and reasonable utilization with a duty of not to cause significant harm. This can be found in the agreements signed by Ethiopia such as CFA[131] and DoP.[132] Both legal instruments codified principles such as equitable and reasonable utilization and not to cause significant harm. These principles have also got wider international acceptance. They have been also codified in the 1977 Convention on the Law of the Non-navigational Uses of International Watercourses.[133] Throughout the GERD negotiation, Ethiopia has adopted and adhered to the principle of equitable and reasonable use as enshrined in regional and international water related legal instruments.

CONCLUDING REMARKS

This study questioned the myth and reality of securitization and desecuritization discourse over the negotiation of GERD. By making the criticism against the realist and liberalist variant of 'water war' and 'water peace' perspectives as point of departure, the study grounded on the constructivist theory of securitization and desecuritization theoretical perspectives. Using securitization theory as an analytical framework, the author argues that Egypt securitization of GERD as an existential water security threat is neither an actual nor perceived threat. Rather Egypt view of GERD as a water security threat is an invented fictitious threat neither scientifically verified nor legally supported. Thus, Egypt securitization of GERD is part of the historicism strategy of Egypt as it considers Nile water matter of life and death, a security and geopolitical issue.

In contrast to Egypt's strategic geopolitical securitization approach, Ethiopia has used a combination of tactical securitization and desecuritization approach. It is tactical because Ethiopia consider the GERD and Nile water as matter of survival and an existential issue. However, for Ethiopia the issue of GERD as well as the Nile water is more of technical than political. Because of this, Ethiopia has been in the process of depoliticizing and de-securitizing the GERD and Nile water issue. Moreover, it has to be understood that even though Ethiopia has used tactical securitization, its overarching approach is largely desecuritization. Its desecuritization approach is grounded upon the recognition of Nile as a transboundary resource and its utilization based on principle of equitable and reasonable use, and hydro cooperation and solidarity.

Renaissance Dam on Different Water Usages in Upper Egypt, 8British Journal of Applied Science & Technology, 461, 462 and (2015); Asegdew G.Mulat and Semu A. Moges, *Assessment of the Impact of the Grand Ethiopian Renaissance Dam on the Performance of the High Aswan Dam*, 6Journal of Water Resource and Protection, 583, 583 (2014).

[131] Agreement on the Nile River Basin Cooperative Framework, Article 4 and 5

[132] Agreement on the Declaration of Principles between the Arab republic of Egypt, The Federal Democratic Republic of Ethiopia, and The Republic of the Sudan on The Grand Ethiopian Renaissance Dam Project, March 23, 2015, Article 3 and 4

[133] Convention on the Law of the Non-navigational Uses of International Watercourses, General Assembly of the United Nations on 21 May 1997; Article 5 and 7

Through this, Ethiopia presented GERD as a benefit sharing project having scientifically verified domestic, regional and international benefits. Against this backdrop, Egypt negotiation approach is based on securitization of GERD under the notion of water security, discourse of absolute dependency and claimed historic rights. They come to negotiation table to pressurize Ethiopia to recognize Egypt's claimed historic right under the cover of ill-defined and amorous concept of water security. Its strategy of negotiation is not based on scientific knowledge, data and principled politics of give and take. Rather it is based on distorted image and securitization of GERD. Egypt approach of negotiation is based on win-lose as the negotiator always comes to negotiation table 'not to give a drop of water based on the notion of water security'.

The study also identified the myths and realities in the securitization discourse of Egypt. The myths of the securitization of GERD by Egypt as a security threat include the following. First, securitizing GERD based on the discourse of Egypt absolute dependency on the Nile water is scientifically unverified invented myth. Contrary to Ethiopia, Egypt is groundwater endowed State. Estimated groundwater resources of Egypt and Ethiopia is 55, 200 km^3 and 12,700km^3 respectively. In Ethiopia, if there is no rain then there will be no agriculture, no food and no life at all. However, life in Egypt can sustain in the absence of Nile waters with groundwater. Second, Egypt securitization of GERD based on its policy of politicization and nationalization of Nile waters is a myth. By politicizing the Nile waters, Egypt brings the political GERD rather than the technical GERD in to the negotiation table. Egypt also securitized GERD based on unscientific syllogism of 'Egypt is a gift of Nile then Nile is a gift of Egypt'. Third, the securitization of GERD based on Egypt notion of water security is unscientific, non-accommodative, and destructive. Why Egypt use ill-defined, amorphous and destructive concept of water security is to stop the construction of GERD and thereby canonizing the inequitable status quo. Fourth, GERD is an invented existential threat and foreshadower of Egypt's hysteria and *Ethiophobia.*

In conclusion, two kind of transformation is needed. On the part of Egypt, it should renounce its unscientifically supported securitization discourses and recognize Nile as a transboundary shared resources. Instead of maintaining indefensible historical rights, Egypt should accept international water law principles such as the principle of equitable and reasonable use, and not to cause significant harm as codified in CFA and DoP. Moreover, Egypt must revisit its notion of water security which is a win-lose. On the part of Ethiopia, it should deconstruct the unwarranted myth of Egypt on GERD in particular and Nile in general.

AN APPRAISAL ON THE LEGAL PROTECTION OF HUMAN RIGHTS DEFENDERS IN ETHIOPIA

Brook Kebede Abebe*

Abstract

Human rights defenders (HRDs) play a role in the solidification of democracy and the realization of fundamental rights and freedoms of individuals, they are crucial for the firming-up of democratic institutions. However, as they challenge the incumbent and the dominant non-state actors, HRDs are frequently victims of state and non-state actors. Subsequently, they need strong protection and attention from the government and the international community. Governments need to provide them with adequate protection and adopting robust means of doing this. Governments need also to recognize the work of HRDs as an opportunity rather than a threat to the incumbent, it is essential to allow them to perform their activities effectively and safely. This paper analyses the pertinent legal frameworks designed for the protection or otherwise of HRDs in Ethiopia. However, it doesn't address their institutional issues and all their rights, rather it concerns freedom of expression, the right to assembly and demonstration, and the right to association. In doing so, the current legislative reform measure and its fruits are investigated instead of the rights of HRDs. Major legal documents including international, regional and domestic legal instruments are critically investigated. The findings reveal the legal protection of HRDs before the reform measure was terrifying and targeted HRDs. Most of the legal documents were draconian and had a chilling effect on the works of HRDS in Ethiopia. After 2018, due to the legal and institutional reforms in the country, the protection of the rights of HRDs seems very promising. However, there are still legal gaps needing critical revision for their better protection in Ethiopia.

Keywords: Human Rights Defenders, Protection, Freedom of Expression, Freedom of Association, Freedom of Assembly and Peaceful Demonstration, Ethiopia

INTRODUCTION

In the Ethiopian context, individuals and groups including journalists, labour unions, Civil Society Organizations (CSOs), lawyers, witnesses, labour unions, whistle-blowers, teachers, and others are engaging as human rights defenders (HRDs). Most of the time, their role in fighting human rights issues makes them vulnerable to human rights violations and abuses from state and non-state actors.[1] Practically, many of them have

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experienced threats, harassment, arbitrary detentions, arrests, violence, death, unfair trials, unlawful surveillance, and repression due to their engagement in human rights activities.[2] In this respect, there is a strong need to protect those individuals, groups, and organs of society that promote and protect universally recognized human rights and fundamental freedoms.[3]

The work of HRDs is highly dependent on the existence of adequate legal recognition and practical protection of their human rights. In this regard, the Federal Democratic Republic of Ethiopian Constitution (the FDRE Constitution), as well as other subordinate legislation, have their own positive and negative implications on the activities of HRDs in Ethiopia. The FDRE Constitution consists of bountiful human rights. It also acknowledges the importance of international human rights treaties in times of interpretation of basic human rights and fundamental freedoms, which are built-in under Chapter Three. It declares the status of the ratified international treaties as part and parcel of the laws of the country.

In mid 2018, the Abiy Ahmed administration introduced and implemented many positive human rights reforms and brought a renewed sense of optimism for the promotion and protection of human rights in Ethiopia. Among the practical measures, thousands of political prisoners including HRDs and journalists were released and those living in exile are allowed to enter the country.[4] The government, *inter alia*, attempted to conduct legal and institutional reforms on the National Election Board, national human rights institutions, and the judiciary branch of the government.

In Ethiopia, legal and institutional reformative measures also came in mid 2018. The government established the Legal and Justice Affairs Advisory Council (the LJAAC or the Council). The Council was established and mandated to reconsider the oppressive legislation and work on law reform by prioritizing those legal documents that affect the fundamental rights and freedoms of individuals and jeopardize the political space in the country. Accordingly, the Council has been undertaking a massive legal reform project. As part of this reform, the Council engaged in the change of that draconian legislation and contributed a lot in the drafting of several legal documents including the CSOs Proclamation Number 1113/2019; the Anti-Terrorism Proclamation Number 1176/2020; the Ethiopian Human Rights Commission Amendment Proclamation, Proclamation Number 1224/2020; Administrative Procedure Proclamation, Proclamation Number 1183/2020; the Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation Number 1162/2019; and the Media Proclamation Number

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would like to thank the anonymous referees (to whom the IJELS had sent this article) and who pointed out some serious flaws and constructive comments in the original manuscript.

[1] The Association for Human Rights in Ethiopia, Ailing Civic Space In An Authoritarian State, The State of Human Rights Defenders and Cost of Dissent in Ethiopia, Rue Ami-Levrier (1201 Geneva | Switzerland, 2018). Available at, https://ahrethio.org/wp-content/uploads/2018/01/AilingCivicSpace_large-1.pdf. (Last Accessed on 19 April 2021).

[2] Ibid

[3] Todd Landman, Holding the Line: Human Rights Defenders in the Age of Terror, The British Journal of Politics and International Relations 2006,2 P: 123-147

[4] However, even after the reform, there are reports that indicate the increasing of arrests of journalists and human rights defenders in Ethiopia. See for instance: Committee to Protect Journalists, Ethiopia uses emergency law to ramp up arrests of journalists, New York, NY 10108 December 15, 2021. Available at, https://cpj.org/2021/12/ethiopia-uses-emergency-law-to-ramp-up-arrests-of-journalists/ (Accessed on 20 December 2021).

1238/2021. However, still HRDs are facing intimidation and harassment by the government and non-state actors. Therefore, in addition to liberalizing the civic space, the government of Ethiopia need to be committed for the enforcement of such laws. Particularly, after 2018, the political situation of the country is not conducive for HRDs.

Regarding HRDs, a significant research gap remains due to scattered nature of laws and lack of comprehensive study on the issue in Ethiopia. In this respect, it is very relevant to explore whether and how such legal frameworks could comprehensively and meaningfully contribute to the protection of HRDs in Ethiopia. Hence, this paper explores the legal framework relevant to the protection of the rights of HRDs in Ethiopia. Besides, it highlights several key international and regional human rights instruments, which enshrine the rights that specifically promote and protect the rights of HRDs. It shows the complementary nature of the legal framework whereby instruments at the international level can be invoked to support domestic legislations for the purpose of protecting HRDs in Ethiopia. Accordingly, the paper outlines some selected legal documents.

As noted above, the paper evaluates the Ethiopian scattered legislations in protecting and facilitating the works of HRDs, particularly, the right to freedom of expression, association, and peaceful demonstration. These rights are enshrined in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration)[5] that facilitate the work of promoting and protecting human rights.[6] Methodologically, it uses a doctrinal legal research method, which assesses the pertinent legal frameworks and reports related to the works of HRDs in Ethiopia. It is limited in scope to the analysis of legislation and the writer does not investigate empirical data on the practicability of rights of HRDs in Ethiopia. However, the writer strongly believes that empirical investigation into the issue is very crucial.

The paper is organized into five parts. The first part outlines the introduction and methodology of the paper. The second part outlines the definition and characteristics of HRDs. In this respect, it critically examines the definition of HRDs based on the Declaration and the Office of the UN High Commissioner for Human Rights (OHCHR) Fact Sheet Number 29. Part three highlights the protection of HRDs under international and African human rights laws. The fourth part discusses domestic legislations, which have impacts on the freedom of expression, association, and peaceful demonstration of HRDs in Ethiopia. Under this part, there is a brief analysis of the Ethiopian policy and legal documents in the light of the country's recent reformative measure, and analyses the protection of HRDs under Ethiopian constitutional and infra-constitutional laws. Some prospects and challenges for the protection of HRDs are identified and discussed by reviewing the existing domestic legislation. Specifically, the major legal documents that

[5] United Nations General Assembly, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," 9 December 1998. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx (Accessed on 2 March 2021).

[6] A. M. Nah,K. Bennett,D. Ingleton,J. Savage A Research Agenda for the Protection of Human Rights Defenders, Journal of Human Rights Practice; 2013,3 P: 401-420

have direct and indirect impacts on the work of HRDs are discussed. The last part presents the conclusion.

1. DEFINING AND CHARACTERIZING HUMAN RIGHTS DEFENDERS (HRDS)

There is no universally agreed definition for a 'HRD'. Hence, the use of this concept is not the same and straightforward[7] since there is no explicit agreement on it.[8] This is because defining HRD is controversial and some states would like to take it as an internal matter and link it with sovereignty while others underscored the relevance of having a universal definition. [9] The Declaration under Article 1 states that 'Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels'.[10] Accordingly, instead of providing a precise definition, the Declaration sets out the rights and protections bestowed to HRDs, the duties of states, and the role and responsibilities of non-state actors.[11] As a result, the entitlement of the term 'HRD' to a specific person is still very controversial. For instance, some people would like to focus on the specific actions of an individual or a group of people needing protection. However, others may consider HRDs as individuals or groups of individuals who are professionally engaged in the promotion and protection of human rights.[12] In this respect, the lack of a precise and comprehensive definition for HRDs creates challenges in deciding whether or not protection mechanisms and resources assigned for HRDs rub on to specific individuals or groups.[13]

Practically speaking, 'HRD' can be understood quite broadly. This is because it has been referred to any individuals or groups who stand for the protection of individuals and groups engaged in human rights work in any part of the globe, regardless of their profession, gender, race, religion, ethnicity, or group association.[14] On the contrary, some argue that certain individuals, organizations, and communities like members of a 'terrorist group', defenders of criminals, or 'the guerrilla' are not to be considered as HRDs. Besides, they are not entitled to legal protection and support on that basis.[15]

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[7] Bertrand Ramcharan, The Advent of Universal Protection of Human Rights: Springer Biographies, 2018.
[8] For better understanding please see the UN Special Rapporteur on the situation of human rights defenders (2011).
[9] Petter Wille, the history of the UN Declaration on Human Rights Defenders: its genesis, drafting and adoption. Available at: https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/. (Accessed on 8 June 2021).
[10] A. M. Nah, K. Bennett,D. Ingleton,J. Savage, A Research Agenda for the Protection of Human Rights Defenders, Journal of Human Rights Practice, 2013,3 P: 401-420
[11] Jones, M. Ending the Two Solitudes: Bringing Human Rights Defenders at Risk into the International Refugee Regime. Paper presented at the Research Workshop on Human Rights Defenders, University of York, 15 17 May 2013.
[12] Michael INEICHEN, Protecting Human Rights Defenders: A Critical Step Towards a More Holistic Implementation of the UNGPs, Business and Human Rights Journal, 2018,1 P: 97-104 see also Nah, AM, Bennett, K, Ingleton, D & Savage, J, 'A Research Agenda for the Protection of Human Rights Defenders', *Journal of Human Rights Practice*, vol. 5, no. 3, pp. 401-420, (2013) (June 24, 2021) https://doi.org/10.1093/jhuman/hut026
[13] Ibid
[14] Who is a defender? Office of the United Nations High Commissioner for Human Rights. Available at: http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx. (Accessed on 12 June 2021).
[15] Ibid

Generally, the lack of agreed and comprehensive definition can be problematic for the realization of the rights of HRDs. However, the UN Declaration on HRDs is not the only international legal document that lacks a definition of the subjects of the instrument.[16] In this respect, the OHCHR has tried to provide clarification on the interpretation and application of the term HRDs.[17] Accordingly, HRD refers to people who, individually or with others, act to promote or protect human rights.[18] In this respect, there is no special qualification attached that is required for an individual to be considered as a HRD. It is because the Fact Sheet principally concerns the responsibilities and rights of the individuals or groups. It also emphasizes the obligation of the HRDs that should accept the universality of human rights as defined in international human rights instruments.[19] The same document stated that 'the actions taken by HRDs must be peaceful to comply with the Declaration'.[20] However, the Fact Sheet has failed to address some practical issues. For instance, it ignores the importance of the 'universality' criterion in the contexts where discrimination against women is deeply entrenched in cultural norms like the Saudi Arabian or the Ethiopian societies. Accordingly, HRDs can be identified by what they do and through a description of their actions. So, for the purpose of this article, anyone who advocates for the promotion and protection of universally recognized human rights can simply be identified as a HRD. However, to the minimum, HRDs shall acknowledge or be in line with the basic principles of human rights including the universality and indivisibility of human rights.[21]

2. THE PROTECTION OF HRDs IN INTERNATIONAL AND AFRICAN HUMAN RIGHTS SYSTEMS

As noted above, there is no comprehensive binding international human rights instrument designed specifically for the protection of HRDs.[22] However, we can mention a non-binding international human rights instrument that specifically addresses the protection of

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[16] Petter Wille, the history of the UN Declaration on Human Rights Defenders: its genesis, drafting and adoption, March 11, 2019. Available at: https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/. (Accessed on 12 June 2021).

[17] Office of the UN High Commissioner for Human Rights (OHCHR), Human Rights Defenders: Protecting the Right to Defend Human Rights. Fact Sheet No. 29. (2004)

[18] Petter Wille, the history of the UN Declaration on Human Rights Defenders: its genesis, drafting and adoption, March 11, 2019 available at: https://www.universal-rights.org/blog/the-un-declaration-on-human-rights-defenders-its-history-and-drafting-process/. (Accessed on 12 June 2021).

[19] To put it differently, a person may not deny some human rights and yet claim to defend other human rights because he or she is an advocate for other human rights. For example, it may not be acceptable to defend the human rights of minorities but to deny that women have equal rights.

[20] Ibid

[21] Who is a defender? Office of the United Nations High Commissioner for Human Rights. Available at: http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx. (Accessed on 11 June 2021).

[22] Even though the Declaration on Human Rights Defenders is not legally binding and does not impose any obligation on states in the strict sense of the word, it is however the result of unanimity of the United Nations General Assembly and requires a robust assurance by states to enforce it. Therefore, this document is politically binding and as such includes a series of principles and rights based on existing human rights standards enshrined in other international instruments which are legally binding. In this regard, Ethiopia adopted almost all major international and African human rights instruments which contain basic rights of HRDs including, UDHR, ICESCR, ICCPR, ICERD, CAT, CRC, CEDAW, and ICRPD. There are also several regional instruments covering human rights issues ratified and signed by Ethiopia.

HRDs. In this respect, the Declaration for HRDs stated that States have a responsibility and duty to protect, promote and implement all human rights and ensure that they are fully enjoyed by all persons under their domestic jurisdiction by taking all necessary legislative, administrative, judicial etc. steps.[23]

The Declaration refers to several rights that are guaranteed by binding international human rights norms. These rights are crucial for HRDs to conduct their activities for the promotion and protection of human rights. Once binding international human rights instruments that protect those rights have been ratified by a State, they should be used to demand that the State protect not only individuals in general but also HRDs in particular. Besides, there are various binding international and regional human rights instruments regarding the protection of HRDs.

To begin with the international human rights instruments, the United Nations has created several binding instruments that are essential for the work of HRDs. Principally, international human rights documents impose an obligation on the state to provide adequate protection for individuals including HRDs. The obligation to provide adequate protection refers to the State's obligation to protect the rights of HRDs. However, these obligations originated from the State's primary responsibility to protect all human rights.[24] Accordingly, the right to be protected entails both negative and positive duties of the state. States must not only refrain from violating human rights but also act with due diligence to prevent violations of the rights of HRDs under their jurisdiction.[25] The duty to protect necessarily requires the state to provide protection for HRDs against abuse from non-State actors. Accordingly, the failure to do so might give rise to State responsibility. To put it differently, the Ethiopian government has to protect HRDs and should adopt strong measures of doing this, embracing the work of the HRDs as an opportunity rather than a threat for them.[26]

Similar to the international human rights instruments, under the African human rights system some instruments recognize and protect the rights of HRDs.[27] Most importantly,

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[23] Article 2 (1) (2) the Declaration

[24] For instance see the following provisions of international human rights documents: Article 2 of the Universal Declaration of Human Rights (UDHR); Articles 2, 9, and 12 of the UN Declaration on Human Rights Defenders; Article 2 of the International Covenant on Civil and Political Rights (ICCPR); and Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

[25] The Ethiopian government shall act with due diligence to prevent violations of the rights of human rights defenders usually by 'taking legal, judicial, administrative and all other measures to ensure the full enjoyment by defenders of their rights; investigating alleged violations; prosecuting alleged perpetrators, and providing defenders with remedies and reparation'. See Sixty-fifth session Item 69 (b) of the provisional agenda, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms UN A/RES/53/144 of 9 December 1998. Available at United National (UN) (April 15, 202). Available at: http://www.un.org/ (Accessed on May 11, 2021).

[26] For instance, the Ethiopian government should harmonize the domestic legal frameworks with the 1998 UN Declaration on Human Rights Defenders. It is because such measures will enhance the protection of human rights defenders and ensure that the rights and freedoms referred to in the UN Declaration on Human Rights Defenders will be protected. This could also involve the Ethiopian government adopting protective measures and programs, like other countries like Brazil has created the Programme for the Protection of Human Rights Defenders. A/HRC/13/22, paras. 77-83; A/HRC/13/22/Add.3, para. 111-113; A/HRC/16/44, para. 90-96; E/CN.4/2006/95, para. 45-56. See The Right to Access Funding, Human Rights Defenders Briefing Papers (International Service for Human Rights, 2009).

[27] Todd Landman, Holding the Line: Human Rights Defenders in the Age of Terror, The British Journal of Politics and International Relations, 2006,2 P: 123-147

the African Charter on Human and Peoples' rights authorizes individuals and NGOs to make complaints about human rights violations.[28] In this regard, under the African Charter, there is a specific provision that regulates the right to access and communicate with the African Commission on Human and Peoples' Rights (the Commission). In these cases, HRDs might demand State protection on the grounds of related African human rights instruments. Under the African human rights system, in 1999, the Commission confirmed in the Grand Bay Declaration the importance of the declaration on HRDs approved the previous year by the UN and called upon African states to implement the declaration in Africa.[29] Furthermore, the Commission has issued other resolutions which refer specifically to HRDs. In 2003, the Commission adopted another declaration called the Kigali Declaration encouraging the activities of HRDs and the need for their protection.[30] A year later, the Commission had issued its Resolution on the Protection of African Human Rights Defenders which announced the role of a Special Rapporteur for Human Rights Defenders in Africa.[31] The Special Rapporteur for Human Rights Defenders in Africa has the mandate to receive urgent petitions from HRDs. It has also mandated on-site visits to countries, submitting activity reports, raising questions on the protection of HRDs during the sessions of the Commission.[32] Moreover, it has the mandate to maintain contact with other stakeholders. In the Pan-African Conference on Human Rights Defenders which was held in Kampala in 2009, the Kampala Plan of Action (KAPA) for the protection of HRDs was launched. In this conference, several African and international Non-Governmental Organizations (NGOs) and the diplomatic corps, four of the African Union commissioners have participated.

3. ETHIOPIAN LAWS APPLIED TO THE PROTECTION AND RESTRICTION OF HRDs

In Ethiopia, as noted above, there is no a separate legislation that acknowledge the work and needs for protection of HRDs. However, there are scattered laws that provide protection for HRDs and their work. The FDRE Constitution is designed to protect principally the human rights and fundamental freedoms of everyone under Ethiopian jurisdiction. It is the primary legal document for demanding the access and full enjoyment of fundamental human rights nationally. The FDRE Constitution provides for a range of rights that all human beings, including HRDs are entitled to. It defines the obligations and duties of the State and recognizes rights that are crucial to the work of HRDs, including the freedom of expression, assembly, movement, and association. Overall, these provisions reinforce the pivotal role that HRDs play in society and legitimize their work. Article 9(4) of the FDRE Constitution determines the status of international treaties ratified by Ethiopia. In this regard, the Constitution considered those treaties including international human rights treaties as an integral part of law of the land.

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[28] Erika Szyszczak, Citizenship and Human Rights, International and Comparative Law Quarterly: 2004, 2 see also http://www.achpr.org/english/_info/charter_en.html (Accessed on May 11, 2021).

[29] Grand Bay (Mauritius) Declaration and Plan of Action, 1999. Available at: .http://www.achpr.org/_english/declarations/declaration_grand_bay_en.html (Accessed on 11 May 2021).

[30] Ibid

[31] María Martín Quintana and Enrique Eguren Fernández, Protection of Human Rights Defenders: Best Practices and Lessons Learnt 2013 https://www.protectioninternational.org/wp-content/uploads/2013/04/Best-Practices-and-Lessons-Learnt.pdf (May 11, 2021)

[32] Ibid

Under the FDRE Constitution, there is an express reference to Ethiopia's immediate international human rights obligations derived from international treaties ratified by the country. Besides, Article 13(2) of the FDRE Constitution briefly acknowledges the importance of international human rights documents in times of interpretation of basic human rights, which are built-in under Chapter Three of the Constitution. The amendment procedure of Chapter Three of the Constitution is also very stringent. In this respect, arguably we can say that human rights matters must have prevalence over any other matter in Ethiopian constitutional law, which, consequently, impacts the making and further application of infra-constitutional legislation. Article 37 of the Constitution provides for recourse to the judicial or quasi-judicial body by any person or organization, to seek orders for redress when their human rights are violated.

Indeed, HRDs are playing an important role and acting on behalf of victims of human rights violations, advocating for redress and accountability of government and non-state actors involved in human rights violations and abuses. Hence, the HRDs themselves are also victims of human rights abuses and violations. In this regard, the international human rights system is placing the principal obligation on the state to ensure human rights standards within their territories and/or subject to their jurisdiction.[33] The Ethiopian government, as a party to several international and regional human rights instruments, has three principal obligations for the HRDs in Ethiopia. These are the obligation to respect, protect and fulfil the human rights of HRDs.[34]

Besides, regarding the human rights abuses made by non-state actors, the Ethiopian government should have the obligation to protect HRDs from attacks made by third parties.[35] It has also the obligation to provide remedies and ensure that HRDs can claim their human rights.[36] Moreover, the Ethiopian government often should ensure that individuals are protected through the laws of the country. In this regard, the Ethiopian government should ensure the protection of HRDs through the laws of the country.[37]

Despite the obligations imposed above, Ethiopian HRDs are facing several risks. According to several reports, the Ethiopian government uses laws to severely restrict freedom of expression and assembly as well as independent human rights monitoring and

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[33] Common Article 2 of ICCPR and ICESCR

[34] Based on these three major obligations, the Ethiopian government is required to refrain from any action that deprives people of their rights. Besides, is also required to prevent third parties, including individuals, armed groups, and nongovernmental institutions, from depriving people of their rights. Moreover, the Ethiopian government is required to take active measures so that individuals and communities can realize their rights. Accordingly, the Ethiopian government should monitor the fulfillment of the human rights of individuals by the government and non-state actors. In addition, it should provide effective remedies when rights are abused by non-state actors including armed groups.

[35] Legally binding international instruments which Ethiopia has ratified including the ICCPR stated that the State has to protect all human rights. Thus, for instance, the right to life, the right to privacy, and the right to freedom of religion should be protected from violations not only by State agents but also by non-state actors. International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, S. EXEC. Doc. E, 95-2, 999 U.N.T.S. 171

[36] This right to an effective remedy is reflected in several human rights instruments, including the UDHR and ICCPR. Article 2(3) of the ICCPR provides that States parties should ensure that "any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". See, for instance, summaries of individual cases raised by the Special Rapporteur on human rights defenders during 2009 and summaries of Government responses (A/HRC/13/22/Add.1 and Corr.1, paras. 696-703, and 1805)(2009)

[37] Ibid

promotion.[38] As a result, Ethiopia's repressive laws provoke fear and self-censorship among HRDs.[39] Besides, HRDs in the country frequently face threats, acts of intimidation, judicial harassment, and arbitrary arrest,[40] surveillance and official restrictions on the movement of HRDs. Accordingly, most of them fled the country and the few who stayed in the country continued to face constant threats.[41] Therefore, on different occasions, Ethiopia has received several recommendations specific to HRDs, committing to guaranteeing the protection of HRDs. Accordingly, in this part of the paper, the writer examines the legal reformative measures by looking at the provisions of the Constitution and some selected Proclamations concerning the protection and promotion of freedom of expression, the rights of assembly, movement, the rights of association and peaceful demonstration of the HRDs in Ethiopia.

3.1 The Protection and Restrictions of Freedom of Expression of HRDs in Ethiopia

Arguably, almost for the last three decades, human rights protection and promotion have not been a primary concern for the Ethiopian government. The situation facing HRDs in Ethiopia has been significantly deteriorated following the 2005 election. Up until 2018, HRDs including politicians, lawyers, bloggers, journalists and CSO leaders were arrested and politically charged, tortured, extra-judicially killed and faced other several forms of inhuman treatments. These abuses and violations of fundamental rights and freedoms of HRDs were committed through the instrument of different laws including the anti-terrorism law. For instance reports indicated that, thousands of charges under the anti-terrorism law including journalist, bloggers, Artists and CSO leaders have been instituted. In addition, the repealed CSO's law, which was enacted in the aftermath of the 2005 election, was seriously affecting human rights defenders in Ethiopia. For instance, the Ethiopian Human Right Council was obliged to close 10 of its 13 branch offices throughout the country due to lack of finance.

It is difficult to imagine practical democracy without the right to freedom of thought, opinion, and expression.[42] It is because they are the basis for a free and democratic society. [43] Based on Article 6 of the Declaration, everyone individually or in the group has the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems.[44]

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[38] Human Rights Watch, Ethiopia: Events of 2015, at 56-57

[39]ISHR, The Situation of Human Rights Defenders in Ethiopia, 2021. Available at: https://ishr.ch/wp-content/uploads/2021/08/ethiopia_-_ishr_briefing_on_hrds.pdf (Accessed on 20 May 2021).

[40] The Association for Human Rights in Ethiopia , Ailing Civic Space In An Authoritarian State, The State of Human Rights Defenders and Cost of Dissent in Ethiopia, 2018. Available at: https://ahrethio.org/wp-content/uploads/2018/01/AilingCivicSpace_large-1.pdf (Accessed on 18 May 2021)

[41] REGIONAL ANALYSIS SUB-SAHARAN AFRICA observatory for the protection of human rights defenders annual report 2011. Available at: http://www.omct.org/files/2011/10/21443/obs_2011_uk_afriqsub.pdf (Accessed on 18 May 2021).

[42] Aidoo, Akwasi. "Africa: Democracy without Human Rights?" *Human Rights Quarterly Vol. 15, No. 4.*, 1993: 703-715.

[43] As per the FDRE Constitution-free flow of information, ideas and opinions are essential to the functioning of the democratic public order, enjoying legal protection to ensure its operational independence, and its capacity to entertain diverse opinions.

[44] Ralph Crawshaw, Leif Holmström, Essential Cases on Human Rights for the Police, 2006

The provision is referred to as communication-related to human rights, which is the apparent focus of HRDs'. Albeit the FDRE Constitution criticized for the categorization of freedom of expression[45] as part of 'Democratic Rights,'[46] it articulated in a similar fashion with the Declaration and consists of the right to thought, opinion, [47] expression and freedom of artistic creativity.

Article 29 of the FDRE Constitution is almost similar to Article 19 of ICCPR except for the Constitution as a principle provides freedom of expression without any interference.[48] The Constitution provides absolute protection of the right to hold opinions. In Article 29(3), the FDRE Constitution protects the press from any form of censorship. Besides, it gives legal protection to the press and clearly states its indispensable role in the development and functioning of a democratic society. However, as noted above, freedom of expression is not an absolute right. It is subject to limitations. The FDRE Constitution prohibits any content and effect-based restrictions.[49] However, a speech may be limited based on its content or effect if the restriction is prescribed by law for the sake of protecting the "well-being of the youth, honour, and reputation of individuals, human dignity, and prevention of propaganda of war."[50] However, the legitimate aims of freedom of expression enshrined in the FDRE Constitution may have a chilling effect on the work of HRDs since it is vulnerable to overly broad and abusive interpretation.[51] Besides, those terminologies have no straightforward meanings in the Ethiopian legal dictionary. However, the UDHR and ICCPR do not follow the identical standards of legitimate aims including the well-being of the youth and human dignity.[52] Moreover, there are more grounds of limitations that are included in international instruments. [53]

Practically, after coming into the power of the Abiy's Administration, the government has formulated a media policy which is aimed to establish a policy framework that regulates the media and targeted to create an enabling environment for better realization of freedom of expression.[54] Therefore, the media policy emphasizes that the media need to accommodate the diversity of the content of the programs broadcasted and to pay attention and ensure coverage of the issues of vulnerable sections of the society in their

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[45] Article 29 of FDRE Constitution.

[46] Gedion Timothewos, Freedom of Expression in Ethiopia: The Jurisprudential Dearth, Mizan Law Review, 4(2) (2010), pp. 213.

[47] Concerning the right to opinion, in addition to Article 29 under Article 54(5) of the Constitution, no member of the house may be prosecuted on account of any vote he casts or opinion he expresses in the house, nor shall any administrative action be taken against any member on such ground. Therefore, even though currently there are no opposition parties in the EPRDF-dominated federal parliament, any opponent party who is a member of the parliament will enjoy the freedom of expression without any fear of prosecution.

[48] In its General Comment No 34, the Human Rights Committee recognizes the freedom to hold opinion as an absolute right. Human Rights Committee General Comment No. 34 (2011), 102nd Session, CCPR/C/GC/34, Para 9. (Hereinafter "General Comment No. 34"). This General Comment is an explanation of Article 19 of ICCPR. It elaborates the elements of freedom of expression and opinion and states' duty to protect, respect, and fulfill the right as guaranteed by Article 19 of ICCPR.

[49] FDRE Constitution, Article 29 (6).

[50] Ibid

[51] Human Rights Watch, Ethiopia: Events of 2015, at 56-57.

[52] See common Article 19 of ICCPR and UDHR

[53] Like ICCPR and General Comment No.31 and Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, doc E/CN.4/1985/4 (1985). Para.17.

[54] Media Policy of the FDRE, 2020, p.1.

programs.[55] Most importantly, the Policy has also emphasized the role of CSOs in the media. It includes a commitment to ensure the representation of CSOs in the board members of public media and demanding them to contribute their part in the implementation of the policy by providing the necessary support to the media.[56] Accordingly, the Ethiopian government, at least at the policy level, recognizes the importance of the CSOs in the democratization process of the country.

Previously**,** there were legislations that have been impacting the freedom of expression of HRDs. One of them is the Mass Media Proclamation.[57] Even if the newly promulgated and the previous Media Proclamations[58] and the Constitution[59] explicitly prohibited pre-publication censorship, both of the Media Proclamations are allowing the Federal or the Regional public prosecutor to impound and stop any publications that may cause a clear and present danger on the national security of the state.[60] In the absence of clear and precise definition for phrases like a clear and present danger on the national security of the state, there will be big threats on the protection and work of HRDs in Ethiopia.

The new Media Proclamation put the requirements of registration of print and online media outlets in preventing duplication of names, recording shareholders and identity of owners, and compelling information on the dissemination of media outlets, registration is maintained under Proclamation 1238/2021. The same Proclamation also gave the power to register for an independent institution called Media Authority and tried to establish an independent registering entity and has no institutional dependence with the executive branch of government. The law also allows individuals to bring legal action if they are aggrieved by the decision of the Authority. HRDs are indeed the watchdog of the domestic implementation of human rights. Thus access to information is necessary for their activities to verify the endeavours of the government. In this regard, the FDRE Constitution and Proclamation No. 1238/2021 are allowing any person including the media to seek and obtain information. However, due to a lack of computer-based information databases, HRDs including journalists are inadequately informed about press briefings.[61] Besides, lack of initiative and capacity are mentioned among the major reasons obstructing the right of access to information held by public bodies.[62]

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[55] Ibid., p.11 and p.13
[56] Ibid., p.11
[57] Freedom of the Mass Media and Access to Information Proclamation 2008, Proclamation No. 590, Neg. Gaz. Year 14, no. 25
[58] Article 3 Ibid
[59] Article 29 (3)(a) of the FDRE Constitution
[60] Article 85 of Proclamation Number 1238/2021 stated that 'Where the Federal or Regional public prosecutor, as the case may be, has sufficient reason to believe that a periodical or a broadcasting service which is about to be disseminated or transmitted contains illegal matter which would if disseminated, lead to a clear and imminent grave danger to the national security which could not otherwise be averted through a subsequent imposition of sanctions, may apply to Federal High Court to get a grant of an order to impound the periodical or an injunction order forbidding transmission of a broadcasting service.'
[61] See United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye Visit to Ethiopia, 2-9 December 2019, End of mission statement, (2019). Retrieved from https://ethiopia.un.org/en/27708-end-mission-statement-special-rapporteur-freedom-expression-ethiopia (Accessed on 21 May 2021).
[62] Ibid

Moreover, according to Article 23(4) of Proclamation No. 1238/2021, Civil Society Organizations that have an ownership stake in broadcasting service shall not include foreigners. Such kinds of stipulations have chilling effects on the work of foreign HRDs. Accordingly; the nationality requirement may have its implication on the work of foreign HRDs in Ethiopia.[63] Besides, this stipulation may conflict with the very essence of the general principle of human rights and the Declaration.[64] In this regard, the Declaration expressly stated that without any nationality requirement everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Besides, Proclamation No. 1238/2021 under Article 84 (1) removed the criminal liability for defamation and stated that defamation shall not entail criminal liability. However, based on the same provision, defamation may entail civil liability. This measure has its positive implication on the work of HRDs, particularly for journalists. However, the moral compensation is very severe and will be up to three hundred thousand Ethiopian Birr.[65] The Proclamation also consists of an important provision that has a positive contribution to the work of HRDs. According to Article 49 of the Proclamation, journalists may not be forced to reveal a source that provided information on a confidential basis. However, exceptionally, the court may order the disclosure of a confidential source when the following two conditions are fulfilled. The journalist may be forced, if it is critical information necessary for prosecution or defense of a serious crime or for preventing clear and imminent danger to the national security and secondly if there is no other alternative means for obtaining the information needed to prosecute or defend the case, or avert the imminent danger. In this respect, it is important to note that these two requirements are cumulative not alternatives. Accordingly, we can argue that Proclamation 1238/2021 is good enough in the protection of journalistic sources which are indispensable for the work of HRDs including journalists.

According to the Human Rights Watch report, in Ethiopia, HRDs and especially national and international bloggers are frequently has been accused of terrorism.[66] Recently, HRDs use social media technologies to conduct human rights campaigning. But the Ethiopian government in 2012 promulgated a Proclamation on Telecom Fraud Offences, Proclamation 761/2012, which creates obstacles to freedom of expression of HRDs through social Media. This Proclamation restricts freedom of expression by punishing the

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[63] For instance, please read the following: 'Every Ethiopian citizen, either privately or through a legal person, has the right to be legally recognized and get a certificate of registration to establish a periodical, an online media and news service based on clear criteria and without discrimination.' Article 22 (1) of Proclamation 1238/2021

[64] Regarding this; arguably it is possible to say that the government has employed this law to exclude foreigners from media ownership as a means of excluding them from human rights promotion and protection through the mainstream and social media outlets.

[65] To avoid arbitrary determination of moral compensation, the law set down some standards including the profitability of the media company and the seriousness of the damage and the effect of compensation shall be taken into account. Moreover, the law stated the conditions that shall not result in civil liability for defamation. See Article 84(2), (3), and (4) of Proclamation 1238/2021.

[66] Human Rights Watch (29 May 2014). "Joint Letter to UN High Commissioner for Human Rights Navanethem Pillay Regarding Violations in the Context of Kenyan Counterterrorism Operations." (21 May 2021). Available at: http://www.hrw.org/news/2014/05/29/joint-letter-un-high-commissioner-human-rights-navanethem-pillay-regarding-violation (Accessed on 10 June 2021).

dissemination of any "terrorising message" connected with a crime punishable under the Anti-terrorism Proclamation 2009 (Article 6(1)).[67] An offence under this section is punishable by 3 to 8 years imprisonment in aaddition to a fine. Accordingly, the Proclamation restricts freedom of expression by punishing the dissemination of any terrorizing message on social media. [68] The Telecom Fraud Offence Proclamation addresses illegal content on the internet and criminalizes the dissemination of any 'terrorizing message' and 'obscene message' through electronic communications including the internet. Besides, Article 6(1) restricts the utilization of telecommunication services for any 'illegal purpose'.[69] Moreover, the Directive issued by the Ministry of Communications and Information Technology in 2011, also prohibits some of the online contents such as messages that promote hatred, violence, or discrimination.[70]Therefore, the presence of such provision in the absence of clear definitions will restrict the activities of HRDs in Ethiopia.

HRDs recently become more familiar with the usage of social media platforms and strategize how they can be used to meet campaigning goals. However, they should also be critically examined for their usefulness, allowing HRDs to make more informed decisions allocating time and resources during the execution of human rights campaigns. Cognizant of the catastrophic effect of hate speech and misinformation, the Ethiopian government enacted Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185/2020 which criminalizes such acts.[71] In this respect, Proclamation No.1185/2020 has its implication on the work of HRDs. The Proclamation is highly criticized for its failure to precisely define the concept of hate speech and other relevant terminologies.[72] For instance, a HRD who is sharing any content on social media may be deemed to be a disseminator of hate speech and will be subject to criminal liability. The definition of 'dissemination' is also very awkward.[73] Lack of precision in the Proclamation may cause arbitrary deprivation of the rights of HRDs and it is in

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[67] Amnesty International, Comments on the Telecom Fraud Offences Proclamation (November 2012), . Available at: http://www.amnesty.org/en/library/asset/AFR25/) (Accessed on 23 June 2020).

[68] Some criticized this proclamation on the ground that Blogs, tweets, and even Facebook status updates could result in jail time and heavy fines for posting information that may be deemed offensive to national security. Sup era n-31

[69] Telecom Fraud Offence Proclamation, Federal Negarit Gazeta, Proclamation No. 761/2012.

[70] Article 11, Ministry of Communications and Information Technology, Value Added Service License Directive No. 3/2011.

[71] በፌዴራል ጠቅላይ ዓቃቤ ህግ የሕግ ጥናት፣ ማርቀቅና ማስረጽ ዳይሬክቶሬት፣ የጥላቻ ንግግር በኢትዮጲያ፣ ህዳር 2011 ዓ.ም። Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185 /2020, Federal Negarit Gazette No. 26th Year, Addis Ababa, March 23rd 2020.

[72] Hate speech is defined under the Proclamation as a "speech that deliberately promotes hatred, discrimination or attack against a person or a discernible group of identity, based on ethnicity, religion, race, gender or disability." Ibid Art 2(2). It is also important to know that the UN Special Rapporteur expressed concerns about the ambiguous formulation of Ethiopia's hate speech and disinformation law, stating that the scope of the law is overbroad and not based on international human rights law. United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression, David Kaye, Visit to Ethiopia, 2-9 December 2019, End of Mission Statement, https://www.ohchr.org/EN/NewsEvents/Pages/ (accessed 15 January 2022). See also Ayalew, Yohannes Eneyew, Defining 'Hate Speech' under the Hate Speech Suppression Proclamation in Ethiopia: A Sisyphean exercise? (December 5, 2020). Ethiopian Human Rights Law Series Volume 12 (2020), in Sisay Alemahu and Abadir Ibrahim eds, Righting Human Rights through Legal Reform: Ethiopia's contemporary experience (Addis Ababa University Press), Monash University Faculty of Law Legal Studies Research Paper No. 3776922, (August 2, 2021) Available at SSRN: https://ssrn.com/abstract=3776922 or http://dx.doi.org/10.2139/ssrn.3776922 (Accessed on 23 October 2021).

[73] The Proclamation under Article 2(7) "Dissemination" means to spread or share a speech on any means for many persons, but it does not include like or tag on social media." See also Ibid.

contradiction with international human rights instruments and the FDRE Constitution. [74] Accordingly, this will endanger the freedom of expression and the activities of HRDs in Ethiopia.[75]

Moreover, according to Yohannes, even if the reading of the preamble of the Proclamation looks as if it is a human rights friendly document, the Proclamation follows 'heckler's veto' doctrine, which is prohibited under international human rights law.[76] Indeed, in the current Ethiopian ethnic politics and the labeling of certain writing and speech with certain groups, the mere presence of heckler's veto may affect the work of HRDs. On the other hand, according to Article 7(4) of the Proclamation, for instance, if a HRD disseminate a kind of speech that may be labeled as 'hate speech' through a Social Media account with more than 5,000 followers, the person may be criminally liable for the act with simple imprisonment not exceeding three years, alternatively or cumulatively with a fine not exceeding 100,000 Ethiopian birr. Accordingly, the Proclamation would have a chilling effect on the freedom of expression of HRDs.[77] This is an instance where HRDs could be targeted for having 5,000 followers.[78]

The HRDs also faced threats that emanated from other legal documents. One of the chilling effects on the right to freedom of expression of HRDs is emanated from the Computer Crime Proclamation which endangers the free enjoyment of the right to freedom of expression and access to information of HRDs..[79] For instance, The Telecom Fraud Offences Proclamation which extended the violations and penalties defined in the criminal code to electronic communications, including both fixed-line and mobile internet services may significantly affect the works of HRDs.[80] Besides, the Computer Crime Proclamation penalizes several actions of online expression and authorizes the investigator to conduct interception or surveillance of computer data without a court warrant.[81] This may severely affect the work of HRDs. Moreover, Proclamation 958/2016 stated that the dissemination of any type of writing or video online that is likely to cause violence shall be punishable with imprisonment.[82] However, the law did not mention the modus operandi and what content would be likely to cause violence.[83]

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[74] Even if the legality requirement of limitation obliges states to enact laws in a clear and certain manner, the Hate Speech Proclamation did not clearly and precisely define what constituted 'hatred', and 'dissemination'.

[75] Hussein Ahmed Tura, Counter Terrorism Law and Freedom of Expression in Ethiopia: The Need to Strike a Right Balance, SSRN Electronic Journal, 2015

[76] According to Yohannes, the law mandates the stifling of speakers when those who are offended choose to show their displeasure through harmful acts. Ibid

[77] Simegnish Yekoye Mengesha, Silencing Dissent, Journal of Democracy: 2016,1 P. 89-94

[78] Ibid

[79] See The Reforms Ethiopia Needs to Advance Internet Freedom, CIPESA Policy Briefing Series, July 2018, p.1. (June 11, 2021) Retrieved from https://cipesa.org/?wpfb_dl=273 (Accessed on 2 October 2021).

[80] Proclamation No.761/2012, Telecom Fraud Offence Proclamation, Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, 18th Year No.61, Addis Ababa, 4th September 2012, Article .6.

[81] Proclamation No. 958/2016, Computer Crime Proclamation, Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, 22nd Year No. 83, Addis Ababa,7th July 2016, Articles 3-21; Article 25(3).

[82] Art 14 Computer Crime Proclamation 958/2016, Federal Negarit Gazette, Addis Ababa, 22nd Year 83.

[83] Y Eneyew Ayalew 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 African Human Rights Law Journal 315-345 http://dx.doi.org/10.17159/1996-2096/2020/v20n1a12

Whistle-blowers and witnesses can also be considered as HRDs which are individuals who have and report information of illegal or criminal activities including corruption, terrorism, human trafficking, and other crimes occurring in the country. In this respect, they can be any person who somehow becomes aware of illegal or criminal activities taking place in any place either through witnessing the behavior or being told about it and discloses this information publicly to expose the existing wrongdoing and prevent it from happening in the future. Accordingly, the law should protect whistle-blowers. Instead, they are often fired or treated unfairly for having 'blown the whistle'. However, recent years have seen an increase in whistle-blower protection legislation in Ethiopia.[84]

In the Ethiopian legal system, there are legal regimes that are protecting HRDs, particularly for witnesses and whistle-blowers.[85] The first law that has introduced the idea of witness protection is the Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 235/2001 and its amendment Proclamation No. 433/2005. [86] According to the said Proclamations, the Federal Ethics and Anti-corruption Commission must provide physical and job security protection to witnesses and whistle-blowers.[87] The Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001 and its amendment proclamations, Proclamation No. 434/2005 added witness protection and made reprisal against them illegal. However, the law has failed to set out the procedures for protection and kinds of protection measures that may be taken to protect one type of HRDs called to witness or whistle-blowers.[88] According to Article 38 (2) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005, the public prosecutor may apply to the court to keep the identity of the witness in secret during the preparatory hearing and if the court authorizes, the identity of witness will be kept secret. Therefore, the objective of whistle-blower protection is to encourage disclosure of corruption offenses. However, nothing is said as to how long the witness identity could be kept in secret or whether it could extend to normal hearing. Besides, the protection of whistle-blowers under this Proclamation could be criticized for its failure to provide comprehensive protection to all kinds of witnesses.

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[84] Wekgari Dulume, Oromia Law Journal, Ethiopian Witness Protection System: Comparative Analysis With UNHCHR And Good Practices Of Witness Protection Report, 2017 Vol 6, No. 1, 124

[85] The 2010 Ethiopian Criminal Justice Policy is also an important document in terms of introducing witness protection. On several occasions, witnesses may refuse to testify even though they know the detail of the committed crime. This is because of the fear of reprisal or threat of intimidation. Accordingly, the Policy stated that most of the time criminal justice fails due to lack of witnesses. This happens in most cases as witnesses refrain from testifying because of threats from offenders. So, if they are protected justice would be served. In some cases, the victims even fail to bring their cases to court as they face intimidation and threat from offenders or their relatives. To make sure victims bring their cases to justice overcoming fear of threat, the policy extended protection to victims of a crime. To have effective criminal prosecution especially for heinous crimes, there is a need to protect witnesses who testify against such criminals. Besides, the Amharic version of the Policy can be read as follow: አብዛኛውን ጊዜ የወንጀል ድርጊቶች ቁልፍ ምስክር ሆነው የሚቀርቡት ራሳቸው የወንጀል ተጎጅዎች በመሆናቸው ምክንያት ለምስክሮች የሚደረግ ጥበቃ ለእነሱም በተመሳሳይ መልኩ እንደሚያስፈልግ ይታወቃል። በወንጀል ፍትሕ ሥርዓቱ ውስጥ በሚፈፀሙ ከባድና አደገኛ የሆኑ የወንጀል ጉዳዮች ላይ ሚዛናዊና ውጤታማ ክስ ማቅረብ እንዲቻል ለጥቃት የተጋለጡ ምስክሮችን ለመርዳትና ሥጋታቸውን ለማስወገድ የሚያስችል ሥርዓት መዘርጋት ተገቢ ይሆናል። በመሆኑም፤ ለወንጀል ምስክሮች የሚደረግ ጥበቃን አስመልክቶ በዘርፉ የሚወጡ ሕጎች የሚከተሉትን ፍሬ ጉዳዮች በዋናነት መያዛቸውን ማረጋገጥ ያስፈልጋል። Please see የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ, የካቲት25/2003፣ 3.19(ሐ).

[86] Federal Ethics and Anti-Corruption Commission Proclamation No.235/ 2001, Art. 7(16).

[87] Federal Ethics and Anti-Corruption Commission Proclamation No.235/2001.

[88] Proclamation No. 433/2005, which revised Federal Ethics and Anti-corruption Commission Establishment Proclamation No. 235/2005 governing the same issue.

Ethiopia has a separate and comprehensive legal regime for the protection of witnesses and Whistle-blowers. It is the Ethiopian Witness and Whistle-blowers Protection of Criminal Offences, Proclamation No. 699/2010.[89] It covers both substantive and procedural protections.[90] But it is widely blamed for some drawbacks that hinder its effective implementation. The Proclamation is applicable to a witness who wishes to give testimony or whistle-blower who gives information on a suspect punishable with ten or more years rigorous imprisonment or with death.[91] There are two grounds under which a witness is protected under this Proclamation. The first ground is related to where offense may not be revealed without the testimony of the witness or whistle-blower's information. The second is the existence of danger to the life, physical security, freedom, or property of the witness or whistle-blower.[92] Therefore, the scope of the Proclamation is limited to criminal investigation and be applicable to an investigation undertaken on a suspect punishable with rigorous imprisonment for ten or more years or with death without having regard to the minimum period of rigorous imprisonment. Therefore, it does not include the protection of witnesses and their families who have participated in human rights investigations. However, it is important to know that the protection measures are partially applicable to the protected persons whichever is necessary to guarantee the protection of the witness of a whistle-blower or their families.[93] But the meaning of family provided in the proclamation is limited in terms of scope. According to Article 7(2) of the proclamation, a family only includes the spouse or cohabitant, the children, parents, siblings and the children of the spouse or cohabitant of a person. In this regard, individuals living with the witness but not mentioned in the above lists are not protected by this law.

Similarly, a Proclamation for the Prevention and Suppression of Terrorism Crimes provides legal protection for whistle-blowers and witnesses. In this regard, there is explicit protection for HRDs called whistle-blowers. According to Article 12 of Proclamation No. 1176/2020, any person interferes to prevent a whistle-blower or witness or who has evidence of crime from giving information by threat or violence.[94] The protection also extended to the families of the HRDs.[95] Moreover, Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No. 1178/2020 in Article 25 provides protection for Witnesses and whistle-blowers. According to this Article, where the life or property of any person or his family is

[89] Ethiopian Witness and Whistle-blowers Protection of Criminal Offences, Proclamation No. 699/2010

[90] The Proclamation is consisting of the issues like who will be protected and the type of protective measure that will be taken. Besides, it contains the requirements used to determine necessary protection measures are included.

[91] Article 3 of Ethiopian Witness and Whistle-blowers Protection of Criminal Offences, Proclamation No. 699/2010

[92] But one of the issues here is who will investigate the existence of the threat? In this regard, the law has no clear answer. Currently, there is no established system to identify the prevalence of threats. Besides, according to Proclamation No. 943/2016, the Attorney General is mandated to ensure that whistle-blowers and witnesses of criminal offenses are accorded protection following the law. However, the practical move of the Attorney General is questionable.

[93] Ethiopian Witness and Whistle-blowers Protection of Criminal Offences, Proclamation No. 699/2010, Article 4

[94] Article 12(1) of Proclamation No. 1176/2020, Prevention and Suppression of Terrorism Crimes stated that such person or a person who has a close relationship with him shall be punished with rigorous imprisonment from three years to seven years

[95] Article 12 (1) and (2) of Proclamation No. 1176/2020 stated that a person who assaults, threats, suppresses, or harms any person or a person who has a close relationship with such person, who gave information or evidence to justice authorities or appeared as a witness in an investigation or judicial proceeding of crime

endangered for being a witness or whistle-blower of an offense stipulated under Proclamation No. 1178/2020, protection shall be given for the witness or the whistle-blower. Besides, the Revised Criminal Code of Ethiopia under Article 455 provides legal protection for witnesses.[96] In this regard, the above legal documents have their positive implications for the works of HRDs in Ethiopia. Reports indicated that Ethiopia's human rights record including freedom of expression is now atrocious, crushing independent media, and jailing journalists and activists. So, there is still a need to change the reality in Ethiopia.

3.2 The Protection and Restrictions of Freedom of Association and HRDs in Ethiopia

Freedom of association is another important right for the works of HRDs in Ethiopia. It is recognized in international and regional human rights instruments.[97] More importantly, freedom of association is included under the Declaration as a core right of HRDs[98]. This can be inferred from the provisions of the Declaration. Specifically, Article 5(b) stated that for implementation of human rights and fundamental freedoms, everyone has the right, individually and in association with others, to exercise the right to association.
Similarly, Article 31 of the FDRE Constitution guarantees every person with the right to freedom of association for any cause or purpose. It also mentions the grounds for limitations including, subverting the constitutional order, violation of appropriate laws, or which promotes such activities. But the terms are vague and unclear. For example "to subvert the constitutional order" is alien to international human rights instruments and may be abused to arbitrarily restrict freedom of associations of HRDs.

After a decade of repression, the Ethiopian government repealed the 2009 CSOs legislation and adopted the new one.[99] The new Proclamation is a relatively more democratic legal document that resurrects the space for HRDs and their engagement in human rights activities. It is also important to note that the adoption of the revised Civil Society Proclamation 1113/2019, the participation of local civil societies, and the public hearing before the approval by the House of Peoples Representatives was an important

[96] Article 455: Provocation and Suborning.
Whoever, by gifts, promises, threats, trickery or deceit, misuse of his influence or any other means, induces another to make a false accusation, to give false testimony or to make a false report, application or translation before the concerned organ in judicial or quasi-judicial proceedings, is punishable, even where the act solicited has not been performed, with simple imprisonment, unless he is punishable for incitement following the provisions of the General Part (Art. 35).
Whoever, by violence, intimidation or by promising or offering or giving undue advantage causes another to make a false accusation or give false testimony or obstructs, through interference, the giving of testimony or the production of evidence concerning a crime punishable with rigorous imprisonment for more than two years or obstructs law enforcement officials or public servants while exercising their official duties with the same crime, is punishable with rigorous imprisonment not exceeding seven years.
[97] For instance, UDHR (Article 20), ICCPR (Article 22), ICESCR (Article 8), CRC (Article 15), and ACHPR (Article 10).
[98] Article 5 of the Declaration
[99] Proclamation 1113/2019, which repeals Proclamation No. 621/2009.

indication of the government's promise to revise laws in line with international human rights norms.[100] However, still there are challenges that the new law has failed to address.

According to Article 2(1) of the new CSO Proclamation, Proclamation No. 1113/2019, Organizations of Civil Societies" defined as means a Non-Governmental, Non-partisan, Not for-profit entity established at least by two or more persons on a voluntary basis and registered to carry out any lawful purpose, and includes Non-Government Organizations, Professional Associations, Mass-based Societies and Consortiums. Accordingly, it explicitly acknowledges the establishment of an association made by two or more persons that can agree to voluntarily for any lawful purpose as specified in Article 2(1). In this respect, the Proclamation is compatible with international human rights standards and the FDRE Constitution.

According to Article 57 of Proclamation No. 1113/2019, an organization to be considered as an association needs to be registered by the Agency for CSOs. This requirement has been criticized by the Special Rapporteur on Freedom of Association because it may affect the right to associate.[101] Besides, the Agency is authorized to reject the registration if the organization failed to fulfill the required legal standards.[102] Moreover, the re-registration requirement may also affect the legal personality of many HRDs.[103]In this respect, such kinds of standards may undermine the right to association and the works of HRDs. In this regard, the regional human rights standard indicated that registration shall be administered through a notification process.[104] Accordingly, the organization may be acquiring legal status through notification.

The new CSO Proclamation has taken a liberal position and recognizes that resources of the HRDs can be solicited from any legal sources.[105] Accordingly, it is possible to argue that Proclamation Number 1113/2019 explicitly recognizes resource mobilization as a right of HRDs. However, Proclamation Number 1113/2019 under Article 63(2) consists of a mandatory stipulation on the issue of budget allocation for administrative and operational costs that are creating a challenging condition for HRDs.[106] Such kinds of restrictions may hinder HRDs to engage in their activities in a flexible manner. This restriction affects the HRDs' financial decisions and may be interpreted as a needless

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[100] Kidan Dires Demissie, The 2009 and 2019 CSO Laws in Ethiopia: From Hinderance to Facilitator of CSO Activities? A Research Paper for partial fulfilment of Master of Arts in Development Studies, International Institute of Social Studies, The Hague, The Netherlands, December 2019

[101] African Commission on Human and People Rights Guidelines on Freedom of Association and Assembly in Africa (2017) (May 11, 2021). Available at: www.achpr.org (Accessed on 13 October 2021).

[102] Article 59 of Proclamation No. 1113/2019

[103]According to Article 83 of the Proclamation, an Organization can be dissolved as a result of failure to reregister.

[104] Abebe, Brook Kebede. "The Ethiopian Civil Society Organizations Law and its Role for Social Movement in Ethiopia" (2022) 2:1 Contemporary Sociological Issues 1-17.

[105] Article 63 of Proclamation Number 1113/2019.

[106] The Administrative cost of an organization established for the benefit of the general public or that of third parties may not exceed twenty percent of its total income. For this provision, "Administrative Expense" shall mean expenses that are not related to the project activities of an Organization but are necessary to ensure the continuity of an Organization and related to administrative activities, and shall include: salaries and benefits of administrative employees; purchase of consumables and fixed assets and repair and maintenance expenses related to administrative matters; office rent, parking fees, audit fees, advertisement expenses, bank service fees, fees for electricity, fax, water and internet services; postal and printing expenses; tax, purchase, and repair of vehicles for administrative purposes, and procurement of oil and lubricants for the same; insurance costs, penalties and attorney fees. Article 63(2)

intervention in the internal affairs of HRDs. This is because, based on international human rights standards, the right to access funding and use may be subject only to the requirements in the law that are generally applicable to customs, foreign exchange, the prevention of money laundering and terrorism, and those concerning transparency.[107] However, the Agency has been mandated to issue Directives regarding Organizations exempted from the budget allocation rule.[108]

Under Article 62 of Proclamation Number 1113/2019 organizations that are established by foreign citizens who reside in Ethiopia and who have established foreign organizations or local organizations are prohibited from lobbying political parties, voter education, and elections observation. Accordingly, it is possible to argue that the new Proclamation restricted Foreign HRDs to engage in lobbying activities related to human rights work including training, conducting background researches, coordination work, publication, and public relation campaigns contributing to policy decisions of political parties and their members during the election. Moreover, any HRDs organization should be permitted to undertake actions aimed towards shaping political parties' positions and programs that contribute to the promotion and protection of human rights in Ethiopia.

Article 57 and the following provisions of the new Proclamation designate an appellate mechanism where the agency has failed to register and issue a certificate for the organization. Besides, based on Article 83 of Proclamation Number 1113/2019 a HRD organization can be dissolved when it is decided by the Board of the Agency, by a competent organ of an association according to their internal rule and the Court. Moreover, under Article 9 of the new Proclamation set out a complaint procedure and mechanism for rights violations and the right to appeal decisions made by the Agency's administration. This will be taken as an important development for the work of HRDs because, unlike the repealed legislation, Proclamation Number 1113/2019 is not limited to the right to appeal and is not only extended to the resident or foreign HRDs. In this respect, the Proclamation promotes and protects the right to a fair trial and due process of law which is recognized under international human rights instruments and the FDRE Constitution as well.

Proclamation Number 1113/2019 is more liberal that permits the establishment of an organization by two or more persons either permanently or temporarily.[109] The legislation categorizes CSOs mainly in two types, namely local and foreign organizations where the local organizations, in turn, have their categories. However, the susceptibility of public morals is a rejection ground of CSOs from being certified where freedom of association may be infringed under the pretext of public morality as the word doesn't have an objective definition. The limitation of administrative costs stated under Article 63(2) which is only 20% of the association's annual budget may impede the free decision and

[107] Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and association, Seventy-first session Item 69 (b) of the provisional agenda, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms Report (June 24, 2021). Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/71/385&referer=/english/&Lang=E (Accessed on 14 September 2021).
[108] Article 63(3) of the Proclamation Number 1113/2019.
[109] Article.2(1) and Article 16(1)

restrict its function.[110]Generally, these restrictions on freedom of association are contravening the Declaration on Human Rights Defenders and have their impact on the work of human rights defenders. According to Article 22 (2) of ICCPR, any restriction on the rights to the association should have a legitimate aim, should be necessary, and need to be proportional. Most importantly, the government should show the absence of any other alternatives to achieve the intended objective.[111]

Trade Unions are important associations that can address the imbalance of power between employers and employees and improve working conditions. They are working at the main struggle for human rights and social justice. Sometimes, artificial categorization may be made between labor rights defenders (e.g trade unions) and human rights defenders, but these distinctions are futile.[112] This is because labor rights are also human rights, and any person or organization defending them is a human rights defender as articulated in the UN Declaration on Human Rights Defenders. Having said so, the FDRE Constitution under Article 42 (1) (a) (b) explicitly guarantees trade union rights.

Labour Proclamation, Proclamation No. 1156/2018 is the major source of law that governs the private labour relationships in Ethiopia and it is applicable throughout the country.[113] As an objective, it provides a guarantee for the right of workers and employers to form their respective associations and engage in collective bargaining as stated under its Preamble. Proclamation No. 1156/2018, under Article 114 (1), allows the establishment of a trade union where the number of workers is ten or more. Even if the law sets the minimum number of members of the union, exceptionally workers who work in different undertakings but in similar activities which have less than ten workers may form a general trade union by observing the minimum number of membership requirements.[114] A Trade Union has the function of protecting the rights and interests of its members, in particular, representing members in collective bargaining and labor disputes before the competent organ when so requested or authorized by their members. In this respect, labor rights defenders can effectively engage in the promotion and protection of the rights of employees.

Proclamation 1156/2018 is also protecting the Trade Union and its members. In this regard, it is important to know that to be and not to be a member of a trade union is

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[110] Human Rights Council, Rights to freedom of Peaceful Assembly and Association, Report of the Special Rapporteur on the Rights to freedom of Peaceful Assembly and of Association' A/HRC/41/41, Forty-first Session 24 June 12 July 2019 (17 May 2019) see also Abebe, Brook Kebede. "The Ethiopian Civil Society Organizations Law and its Role for Social Movement in Ethiopia"(2022) 2:1 Contemporary Sociological Issues 1-17.

[111] Ibid

[112] Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and association, Seventy-first session Item 69 (b) of the provisional agenda, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms Report (June 24, 2021). Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/71/385&referer=/english/&Lang=E (Accessed on 14 September 2021).

[113]According to article 55 (3) of the Constitution, the legislative power to enact labor laws is vested in the House of Peoples Representative while the Regional States are left to regulate employment relationships of civil service in their respective state as per article 52 (2) (f) of the Constitution.

[114] Article 114(1) and (2) of Proclamation No. 1156/2018. The law under Article 114(3) allows them to jointly form Trade Union federation and federations may jointly form Trade Union confederations as well.

interest-based and the employer cannot force employees to do that.[115] Besides, terminating the contract of employment based on membership to the trade union may not be legally acceptable ground.[116] More importantly, trade union leaders are legally entitled to leave with pay to present cases in labor disputes, negotiate collective agreements, attend union meetings, and participate in seminars or training courses.[117] According to Article 126 of the Proclamation, any trade union has the right to bargain with one or more employers or their association in selected issues.[118] The law stated the establishment of Permanent, Ad-hoc Labour Relations Boards and Permanent Advisory Board for the Ministry of Social and Labour Affairs.[119]Among the members of the board, representatives of labor unions have their significant seats.[120] The law further protects labor rights defenders and it stated that no service fees shall be levied in respect of labor cases submitted to conciliation, to a Labour Relations Board, and to courts by any worker or trade union.[121] Accordingly, the Labour Law Proclamation has its implications for the protection of labor rights defenders. However, there is a possibility of criminal punishment where a Trade Union or trade union leader violates one of the acts that are mentioned under Article 186(1) of Proclamation No. 1156/2018.

Article 42 of the FDRE Constitution does not recognize the right of all government workers to freedom of association; rather it categorically entitles this right only to lower-level government employees whose work compatibility allows for it.[122] Indeed, the Trade Union rights of government employees are human rights that are recognized by international human rights instruments and guaranteed by the Constitution. The Government should take steps towards ensuring that this right is practically enjoyed by government employees. Adoption of enabling legislation is the first most important step to protect trade union rights. Government employees should be able to form or join trade unions of their choice to promote their economic or work-related interests, by any means available to them including collective bargaining. The absence of a legislative framework implementing this constitutional right has resulted in the denial of rights for employees in the government sector. Like all other human rights, the government has to respect and protect the trade union rights of employees in the public sector.

However, it is important to note that the scope of Proclamations 1156/2018 and 1064/2017 are very limited. Accordingly, there are other legal regimes that regulate

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[115] Particularly, Article 14 stated that it shall be unlawful for an employer where coerce or in any manner compel any worker to join or not to join a trade union; or to continue or cease membership of a trade union, or to require a worker to quit membership from one union and require him to join another union, or to require him to cast his vote to a certain candidate or not to a candidate in elections for trade union offices.

[116] Article 26(2) of Proclamation No. 1156/2018

[117] Article 82 of Proclamation No. 1156/2018

[118] Article 129 of Proclamation No. 1156/2018 stated that 'matters concerning employment relations and conditions of work as well as relations of employers and their associations with trade unions may be determined by a collective agreement.'

[119] Article 171(3) of Proclamation No. 1156/2018

[120] Articles 145 and 146 of Proclamation No. 1156/2018

[121] Articles 162 (1) and (2) of Proclamation No. 1156/2018

[122] See Desset Abebe Teferi, Trade Union Rights of Government Employees in Ethiopia: Long overdue! 2017 (June 11, 2021). Available at: https://www.researchgate.net/publication/312024060_Trade_Union_Rights_of_Government_Employees_in_Ethiopia_Long_overdue (Accessed on 22 September 2021).

employment relations. For instance, Government Officials, Judges[123], Prosecutors[124], members of the police[125] and the defense force[126] and prison wardens[127] are outside of the scope of Proclamation 1064/2017 and they are regulated by their separate legislation. However, the legislation that is enacted to regulate these categories of employees do not recognize trade union rights. Despite the limitation placed on the collective bargaining rights of those employees who are 'engaged in the administration of the state' and members of the police and army forces, the rights of all employees without any distinction to form/join trade unions is guaranteed under Convention 87.[128] Therefore, together with the adoption of legislation recognizing the trade union rights of civil servants, amending the above-listed legislation so as to bring them in line with ILO conventions is another matter that should be deliberated upon by relevant government organs.

According to Article 114 of the newly promulgated the Ethiopian Electoral, Political Parties Registration and Elections Code of Conduct Proclamation, Proclamation No. 1162/2019, interested local election observers including HRDs may observe the electoral process by obtaining the Board's observer accreditation to be issued based on their request.[129] However, international observers need to have a prior invitation letter from the government through the Foreign Minister to observe the electoral process.[130] Besides, based on Article 115(1), those international observers are mandatorily required to take an observers' accreditation from the Board.[131] But the law lacks clarity. For instance, an entity that has submitted an application for observer status may be required to bring any

[123] Proclamation No.1234/2021 Federal Courts Proclamation, 27th Year No.26 ADDIS ABABA 26th April 2021 and Proclamation No.1233/2021, Federal Judicial Proclamation Administration, 27th Year No.18 ADDIS ABABA, 20th May 2021

[124] Council of Ministers Regulations No. 44/1998 Federal prosecutor Administration Council of Ministers Regulations 5th Year No.8 ADDIS ABABA - 20th Nov 1998

[125] Proclamation No. 720/2011 Ethiopian Federal Police Commission Establishment Proclamation, 18th Year No.2 ADDIS ABABA 28th November 2011 and Proclamation No. 944/2016 Ethiopian Federal Police Commission Establishment (Amendment) Proclamation 22nd Year No 63 ADDIS ABABA 2nd May 2016; Federal Police Administration Council of Ministers Regulation No. 86/2003

[126] Proclamation No.1100 /2019 Defense Forces Proclamation, 25th Year No. 19 ADDIS ABABA, 19th January 2019

[127] Proclamation No. 1174/2019 Federal Prison Proclamation 26tn Year. No 14 ADDIS ABABA 17'h February. 2020

[128] C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087 (Accessed on 15 September 2021).

[129] According to Article 115 (1) The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation, Proclamation No. 1162/2019; a local election observer is a local civil society organization with a legal personality. In addition, according to Article 6 of Local Election Observers' Accreditation, Working Procedure, and Code of Conduct Directive No.5/2020, any local civil society organization applying for accreditation as a local election observer: a) Shall have legal personality; b) Shall be non-profit and non-governmental and free from any political affiliation; c) Its board members and leaders shall not be members of any political organization; d) The observers it deploys shall be capable of observing election impartially, and the organization shall have the capacity to enforce this.

[130] According to Article 7(1) of Directive 11/2021 and Article 114(2) of Proclamation No. 1162/2019, the government through the Ministry of Foreign Affairs may invite international observers to observe the electoral process. It is also important to note that accreditation shall not be given to individual observers. However, an individual can be a member of an accredited international election observer group or institution and issued an accreditation card to observe the election only on behalf of the institution or group. See Article 7(4) of Directive on Accreditation, Working Procedures, and Code of Conduct for International Election Observers No. 11/2021

[131] Based on Article 123 of the Proclamation 1162/2019, NEBE is expected to prepare and issue accreditation cards to all stationary and mobile agents, journalists, and election observers.

additional information or evidence that the Board deems necessary.[132] This stipulation is open for arbitrary rejection of the application.

According to Proclamation 1162/2019, NEBE may accredit local CSOs to conduct civic and voter education.[133]But, the accreditation is limited to the registered local NGOs.[134] Conducting civic and voter education is relevant for the realization of the political rights and participation of individuals. However, such stipulation may lead to discriminatory treatment of foreign HRDs.

3.3 The Protection and Restrictions of Freedom of Peaceful Assembly and Demonstration and HRDs in Ethiopia

To effectively implement the works of HRDs peaceful assembly, demonstration and petition are basic rights.[135] This can be read from Articles 12(1) and 5(a) of the Declaration, everyone has a right to peaceful assembly and is entitled to organize events such as public and private meetings, vigils, marches, seminars, conferences, and demonstrations. Correspondingly, Article 30 of the FDRE Constitution recognizes the right to assembly, peaceably and unarmed demonstration, and to petition.[136]Based on the stipulation of the FDRE Constitution, assemblies can be indoor, outdoor, static, or moving assemblies.[137] In support of this allegation, the UN Human Rights Committee in its General Comment No. 37 stated that peaceful assemblies may be conducted in all places.[138] In addition, the right is for everyone including foreigners. Therefore, the right can be enjoyed without any kind of distinction. This can be further supported by Article 25 of the FDRE Constitution. More importantly, the writer strongly argues that the right to assembly, demonstration, and petition can be organized and enjoyed by those registered, unregistered, foreign, or local HRDs. In support, Article 2(1) of the Draft Assembly Proclamation stated that any individual, group, or legal person has the right to organize and participate in such assemblies peacefully without arms.

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[132] Article 7(4) of Directive 11/2021

[133] According to Proclamation 1162/2019 and Directive No. 4/2020, to apply for accreditation for voter education, any local civil society organization or educational institution that meets the requirements for providing voters education under the electoral law and based on Article 8 of the Proclamation 1162/2019 and of the Directive. NEBE will ascertain the fulfillment of the following criteria: a) is a legally registered local civil society organization or an accredited higher learning institution that works on elections and related matters following its by-laws; b) meets the requirements for voter education outlined in this directive; c) Can discharge its responsibilities. d) The organization, its leader, or its trainers are independent of any political activity and, after ensuring that the requesting organization and its representatives have accepted and signed to abide by the code of conduct for voter education, issue a voter education accreditation. Based on the same provision of the Directive; NEBE shall not issue accreditation to any organization that does not meet the requirements set in this article. It shall notify the applicant of the reason for such a decision in writing. See Article 124(2) of the Proclamation 1162/2019 and Article 8 of the Voter Education Accreditation and Code of Conduct Directive No. 4/2020.

[134] Article 124 of the Proclamation 1162/2020

[135] Based on article 5(a) of the Declaration to promote and protect human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels to meet or assemble peacefully.

[136] Article 30 of the FDRE Constitution

[137] The Draft Assembly Proclamation under Article 2(3) divides assembly into indoor assembly and public assembly. Accordingly, the Draft legislation tried to make a distinction between public gatherings and individual business meetings.

[138] Human Rights Committee, General Comment No.37 UN Doc. CCPR/C/GC/37 (17 SEPTEMBER 2020) Parg.55

However, these rights may be limited when there is a genuine and necessary cause. In this respect, for legitimate restriction, the FDRE Constitution stated that appropriate regulations can be enacted for the interest of the public convenience concerning the location of outdoor assemblies and the direction of movement of the demonstrators. Based on Article 13(2) of the FDRE Constitution, the protection of the right to assembly, demonstration, and petition under Article 30 of the Constitution and the restriction as well shall be interpreted in line with international human rights instruments adopted by Ethiopia. In this regard, if a demonstration would unquestionably present a serious and imminent danger to the safety of the public, the rights to peaceful assembly and demonstration will be restricted. Besides, under international human rights law, the limitation of particular right should be prescribed by law and justified by the criteria of necessity and proportionality to the legitimate interest required to be protected, particularly, national security, public safety, public order, public order, public health, public morals and the rights of others. The FDRE Constitution under Article 30(1) stated that the right to assembly can be restricted for the protection of democratic rights, public morality, and peace. However, this stipulation can be criticized as only concerned about the protection of democratic rights incorporated in the second part of Chapter Three of the FDRE Constitution and doesn't refer to other rights and fundamental freedoms. The meaning of public morality also may be challenging for the works of HRDs. This is because it varies from place to place, time to time, and situation to situation. Often, the Ethiopian government restricts freedom of assembly in the absence of genuine concerns about public security, public safety, or order. Peaceful Demonstration and Political Meetings Proclamation Number 3/1991 was enacted during the transitional period in 1991. The Proclamation contains the definition of peaceful demonstration and political meetings and it doesn't cover the issue of the petition.[139] According to the Proclamation, the concept of peaceful demonstration may include any kind of outdoor gatherings because it doesn't make a distinction like religious ceremonies and other public meetings like the Great Run with some politically motivated slogans. However, the Draft Assembly Proclamation expressly excludes some assemblies from the scope of its application.[140] For instance, labor strikes, religious and cultural assemblies, and so on are not falling under the umbrella of public gatherings. But it is important to note that, political issues only be discussed in the public political meeting as provided under Article 2(2) of the Proclamation. However, from the spirit of the law, one can understand that non-political issues including in religious and cultural meetings cannot be discussed in public political meetings. In this respect, such kinds of distinction may have a chilling effect on the works of HRDs.

Based on this law, peaceful demonstration and assembly are exercised without the interference of the rights of others.[141] As clearly provided under Article 4 of Proclamation 3/1991, any individual, group or organization, who prepares peaceful demonstration and political meetings, must give notice to city administration or the Awraja administrator. In this regard, HRDs can freely organize and attend meetings.

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[139] Article 2 Proclamation Number 3/1991
[140] Article 3 (2) The Draft Assembly Proclamation
[141] Article 3 Proclamation Number 3/1991.

The Draft Assembly Proclamation obliged the organizer of the assembly to submit their proposal for police and failure to submit a notification may not entail criminal responsibility if the assembly is taking place for a direct response to a sudden occurrence.[142] This is an important aspect of the Draft Proclamation that will help the work of HRDs in cases where there is a need for assembly for immediate responses to human rights violations and abuses. Besides, based on the draft Proclamation, the police is not required to respond to the proposal, rather it is expected to intervene only where there are justifiable grounds to impose restrictions and conditions on the proposed assembly. However, if there is justifiable ground the police need to respond within 48 hours of the receiving of the proposal and may impose restrictions or conditions relating to the time and place of the assembly.[143] Therefore, based on the current application the only requirement attached to these political rights is written notification before 48 hours of the planned demonstration.[144] However, the Draft Assembly Proclamation requires notification 7 days before the intended assembly. But proclamation No. 3/1991 as well as the Draft Assembly Proclamation do not consider oral, online, or telephone notification.[145] As far as the Draft Assembly Proclamation is concerned, notification is only required for public assemblies. In this respect, the Draft Proclamation under Article 4(3) excludes some forms of assemblies including indoor meetings, and other meetings in the premises of higher education institutions are excluded from the requirement of notification. The government body must receive the written notice. The administrator has a mandate up to the extent of prohibition. This is because it has the mandate to postpone or change the place of demonstration or the meeting for an unlimited number of applications. However, there is no means of judicial review and effective remedy provided in cases of unlawful denial of the right to freedom of assembly by state authorities. As a result, the right to a peaceful demonstration of HRDs will depend on the leniency of the government. In this regard, the absence of legal recourse for the postponement or change of the decision made by the Administrator may be challenging for the works of HRDs. But the Draft Assembly Proclamation stated that complaints concerning restrictions and conditions imposed on assemblies shall be submitted to the Federal First Instance Court. Besides, the National Human Rights Institution may receive a kind of complaint from HRDs since the issue is directly related to male administration and human rights violations.[146] However, the failure to respond to the notification might be considered as the authorization to the meeting or the demonstration. In this regard, the law looks as if it is a human right friendly legislation and in support of the works of HRDs.

CONCLUSION

[142] Article 32 (3) The Draft Assembly Proclamation

[143] Most Importantly, the police may dispense assemblies when its peaceful character is lost as a result of violence; in case of manifest deterioration of peace and order; in case of prohibited place (for instance it is prohibited to have assemblies 100-200 meters from worship, embassies, hospitals and so on); and where the participants violate justifiable restrictions imposed on assembly based on court order. Please see Article 30 (1) and Article 17(1) of the Draft Assembly Proclamation

[144] Article 4(2) and Article 5 Proclamation Number 3/1991

[145] Article 15(1) of the Draft Assembly Proclamation

[146] For more please read the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 Federal Negarit Gazeta 6th Year No 40 (4 July 2000) and Ombudsman Establishment Proclamation No. 211/2000 Federal Negarit Gazeta 6th Year No 40 (4 July 2000)

This paper has discussed the protection of HRDs in Ethiopia. It has presented the legal framework for the protection of human rights defenders in Ethiopia. Accordingly, the paper investigates some selected Ethiopian laws in the light of the protection and recognition of the rights of HRDs in Ethiopia. The paper also identifies the positive sides of the selected Ethiopian laws concerning the activities of HRDs. The Constitution is the supreme law of the country that incorporated and recognized international human rights standards. Despite the recognition of human rights of HRDs, from the aforementioned discussions, one can understand the previous repressive laws like the Charities and Societies media and the Anti-Terrorism Proclamations that were severely undermined civil society and independent media. However, the recent legal reform in the country is promising for the work of HRDS in Ethiopia. The overall analysis of the paper shows that the protection of HRDs is conveyed with several legal restrictions. The source of threats against HRDs emanates from different laws, which substantially increase the vulnerability of HRDs in Ethiopia. Most of the restrictions of the laws are discouraging for HRDs. Therefore, the Ethiopian government should need to develop and promulgate specific laws and policies to recognize and implement the Declaration on Human Rights Defenders in Ethiopia. Although there are scattered laws, Ethiopia has no specific legislation and/or institution dealing specifically with the protection of HRDs. Therefore, there is a need to enact a comprehensive law and provide an institutional mandate for independent bodies to provide better protection for HRDs in Ethiopia.

RE-THINKING IMPRISONMENT AS AN APPROACH TO SENTENCING UNDER THE NIGERIAN AND ETHIOPIAN SYSTEMS: LESSONS FROM THE COVID-19 PANDEMIC

*Mariam A. Abdulraheem-Mustapha**

Abstract

Imprisonment of offenders in the prisons or correctional *centres as an approach to punishment in criminal justice system especially on petty or minor offences has been questioned across the world with the outbreak of COVID-19 pandemic which calls for social distancing. The questions bother on the sustainability of imprisonment as a preventive/deterrent approach in view of the fact that* prisons or correctional *centers have become hubs of infections. This is largely due to the fact that in most African countries, there is a high level of congestion, inadequate institutional facilities/services and failure of the courts to effectively discharge their functions. In Nigeria and Ethiopia for example, there are regulatory frameworks which encourage the use of community service sentencing and compulsory labour as alternative approaches to imprisonment. However, the extent of enforcement, effectiveness and adequacy of these regulatory frameworks in Nigeria and Ethiopia largely remain questionable. Using doctrinal and non-doctrinal methods, this paper critically investigates the effectiveness, adequacy and level of enforcement of community service sentencing and compulsory labour as alternative approaches to imprisonment in both jurisdictions with a view to exposing the flaws in both criminal justice regimes. This is inspired by the widely established flaws of imprisonment as a sentencing approach in view of increasing global pandemics such as COVID-19. This paper reveales the current state of criminal justice system in Nigeria and Ethiopia as ineffective. The findings show that imprisonment adopted as major approach to punishment and sentencing has not in any way reduce the rate of crimes. This imprisonment approach has also been revealed to be nonviable as same cannot be sustained in the wake of COVID-19 pandemic. The overall recommendations are calls for strengthening the community service sentencing in Nigeria and reform of the Ethiopian Criminal Code to include community service sentencing as non-custodial measures in reducing prison congestion during this outbreaks of infectious diseases such as COVID-19 pandemic.*

Keywords: Imprisonment, Prisons or correctional centres; Criminal Justice System; Community Service Sentencing; Regulatory framework; Offender

INTRODUCTION

It is generally argued that in any society, crime is inevitable, and every country has a procedure of administering criminal justice. It is therefore clear that one of the cardinal objectives of criminal justice system is to protect the society and ensure that social boundaries that were set out by the law are not violated otherwise, any erring citizen will be punished. Instructively, the major tool used in accomplishing the objectives of criminal

justice system is punishment as the system of many jurisdictions, Nigeria and Ethiopia[1] inclusive are retributive[2]and utilitarian[3]in nature. Thus, punishment is a judicial visitation with a penalty, chastisement or castigation[4] upon the offender as stipulated by the statute creating the offence committed. One of the rationales behind punishment of offenders is to serve as atonement[5] for the offence committed against the victim and the society which is a fundamental way of expressing the society's disapproval of the criminal behaviour of the offender.

The justification of punishment under the utilitarian approach is to cumulatively reform the offender by teaching him/her a lesson and deterring other people of like minds from committing similar offence by way of either isolation or payment of a debt by the offender to the victims and society at large.[6] Thus, the goal of punishment in Nigeria and Ethiopia are diverse and judges or magistrates have discretion to choose the punishment type they believe appropriates in each case especially when the phrases such as "may/or is used in the statute creating the offence rather than 'shall'. In such situation, the judge is enjoined to either sentence the convict to imprisonment, fine or both or community service or compulsory labour etc.

However, in recent times; the evaluation of punishment adopted by way of imprisonment approach in administration of criminal justice globally, Nigeria and Ethiopia inclusive have brought to light the apologetic state of the system as the perception of the criminal justice system in Nigeria and Ethiopia is overwhelmingly bad.[7] Studies have shown that imprisonment of offenders in prisons or correctional centres are more terrible and capable of

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[1] See Article 1, Proclamation No. 414/2004, The Criminal Code of The Federal Democratic Republic of Ethiopia (Hereinafter refers to as "The Criminal Code") which provides for the "object and purpose" of criminal justice system. The nearest provision under the Nigerian criminal justice system is Section 1 of the Administration of Criminal Justice Act (ACJA), 2015.

[2] Although, retributive punishment is not expressly or implicitly listed as an approach to punishment in Ethiopian criminal justice system but most of time, the Ethiopian courts adopt proportionality in their punishment to evolve retributive in nature. See Yilma, Kassahun Molla and Robberts, V. Julian 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (Criminal Law Forum, 2019)30:309-337. available at https://www.doi.org/10.1007/s10609-019-09373-x accessed March 12, 2020. See also, Article 3 of The Revised Ethiopian Federal Supreme Court Sentencing Guidelines, 2010.

[3] Sandra Jacobs, 'Natural Law, Poetic Justice and the Talionic Formulation' (2013) 14 Political Theology Journal 132. See also, Article 1, Proclamation No. 414/2004, The Criminal Code of The Federal Democratic Republic of Ethiopia (Hereinafter refers to as "The Criminal Code"); Edosa and Fenemigho, 'The Judiciary as an organ of government' (2014) An International Multidisciplinary Journal Ethiopia 92-101. It was emphasised in the study of Yelma and Robberts that "the utilitarian philosophy which focuses on prevention of crime, predominates in the punishment goals in Ethiopia". See Yilma, Kassahun Molla and Robberts, V. Julian 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (Criminal Law Forum, 2019)30:309-337. available at https://www.doi.org/10.1007/s10609-019-09373-x accessed March 12, 2020.

[4] Hobhouse L. and Westermarck E. The Rationale of punishment: Monographs on Sociology (Vol. 1, University of London press, London, 2001)

[5] Immanuel Kant, 'The Retributive Theory of Punishment', available at http://www.mrsbernasconi.com/cms/wpcontent/uploads/2014/01/The-Retributive-Theory-of-Punishment.pdf, assessed on 17 July 2018.

[6] Umar Mohammed and Tata Umar, "Philosophical Analysis of the Theories of Punishment in the Context of Nigerian Educational System", 2015, Journal of Research & Method in Education, Vol.5, pg. 12-17

[7]See Amnesty International Report 2017/18, P.282- 286 available at https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF, assessed on 27th April 2018.

breeding the wrongs it is established for and meant to correct.[8] Study has also shown that Ethiopian criminal justice system lacks a number of common sanctions such as community service which undoubtedly contributes to high use of imprisonment.[9]

While in Nigeria, there is no scale of imprisonment as judges and magistrates adopt the imprisonment approach more often by relying on many factors such as crime rates, public opinion towards crime, population, economic factors, levels to which illicit drugs are used, penal principles which are in operation for crimes[10] etc. It is therefore not a surprise to have more offenders/inmates in prisons or correctional centres in both jurisdictions. In support of this position is the response of the respondents in an administered questionnaire by the author on the reasons for having congested prisons or correctional centres in Nigeria?Almost all the respondents representing 90% out of the total population of 200 in table 4 below hold the views that "laws governing the administration of criminal justice in Nigeria contribute to congestion of prison as the laws are not explicit in determining which category of offence(s) should warrant incarceration or imprisonment of inmates in the correctional centres".[11] In another phase of the questionnaire, more than half of the respondents representing 65% in table 4 below expressed their view at two different intervals that "most of the sanctions or punishment in the penal laws either provided for imprisonment, fine or both and many judges use their discretions to adopt the imprisonment approach which leads to congestion of prisons or correctional centres in Nigeria". Table 1 below has demonstrated types of offences committed in Nigeria to support the above assertion that the highest reported offences fall under imprisonment, fine or both after finding the offender guilty by the court.

Arguably, this paper posits some questions that beg for answers thus: (i) Is there a correlation between the rate of imprisonment and the level of crime in Nigeria and Ethiopia? (ii) What lessons have COVID-19 pandemic unraffled in the relation between the rate of imprisonment and level of crime in Nigeria and Ethiopia? (iii) How has COVID-19 impacted upon the approach to imprisonment in Nigeria and Ethiopia? In answering these questions, this paper examines the effectiveness and adequacy of the regulatory framework on punishment and sentencing. It also examines the extent of enforcement of community service sentencing and compulsory labour as alternative approaches to imprisonment under the Nigerian and Ethiopian criminal justice systems for the purpose of reducing congestion of prisons or correctional centres in terms of increasing global pandemic such as COVID-19. This examination is done with a view to exposing the flaws of imprisonment as a sentencing approach in both jurisdictions. Aside the fact that Nigeria is arguably the giant of Africa zoned within Western Africa Sub-region and Ethiopia from Eastern Africa Sub-region, the comparism is also premise on the fact that out of the African countries apart from South Africa, Ethiopia is arguably the country that has a comprehensive guidelines scheme which offers a workable example of how African countries have addressed the problem of structuring judicial discretion on punishment and sentencing.

[8]Adeagbo, O. O., Asubiojo, B. O., Obadare, S. O., & Akindojutimi, B. F. (2016). Re-integration of prison inmates in Nigeria: Advocating for library support. *International Information & Library Review*, *48* (3), 169-175. See also Liebling, A. & Maruna, S. (2005). (eds.). *The effects of imprisonment.* Devon: Willan Publishing

[9]See Yilma, Kassahun Molla and Robberts, V. Julian 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (Criminal Law Forum, 2019)30:309-337. available at https://www.doi.org/10.1007/s10609-019-09373-x accessed March 12, 2020.

[10]Berlatsky, N. (2010). *Imprisonment.* Detroit: Gale Cengage Learning. Bottoms, A., Rex, Sue & Robinson, G. (2004). (eds) *Alternative to prison: options for an insecure society.* Devon: Willan Publishing.

[11]Questionnaire administered to respondents in Bauchi, Enugun, Kwara, Lagos, Porthacourt and Kaduna dated 7/02/2019, 15/04/2019, 28/06/2019 and 6/09/2019 respectively.

Nigeria has also come up with new structuring of its criminal justice regimes in 2015 and 2019 respectively with the enactment of the Administration of Criminal Justice Act (ACJA) and the Nigerian Correctional Service Act (NCSA).Both jurisdictions have some similarities and their differences which can be shared by recommending them to both jurisdictions in reforming their criminal justice regimes that will serve as model for other countries in Africa.

Table 1
Prison Admission by Type of Offences

N/o	Offences	YEAR 2013	YEAR 2014	YEAR 2015
1	Debt	646	934	152
2	Arson	699	808	227
3	Affray	1,012	864	596
4	Assualt	8,982	7,657	3,307
5	Murder	7,172	8,560	2,658
6	Treason	431	358	153
7	Sedition	188	170	2
8	Abduction	1,689	1,349	347
9	Smuggling	636	540	221
10	Immigration	638	564	25
11	Stealing	50,436	46,876	12,991
12	Robbery	13,216	8,505	2,851
13	Armed Robbery	11,858	10,249	4,867
14	Sex Offences	5,797	4,436	1,621
15	Traffic Offences	3,088	1,806	449
16	Currency Offences	2,762	783	252
17	Indian Hemp Offences	4,353	7,060	1,763
18	Contempt of Court Offences	3,911	2,692	1,493
19	Unlawful Possession of Arms	2,716	2,613	1,198
20	Forgery and Altering	1,606	997	398
21	Escaping from Lawful Custody	508	456	52
22	Offences against Native Law and Custom	536	610	52
23	Unlawful Possession of Property	1,508	1,909	653
24	Economic Sabotage	692	91	18
25	Human Trafficking	222	315	40
26	Criminal Lunatic	31	61	32
27	Cultist/Peace	255	179	153
28	Breach of Peace	234	695	359
29	Other Offences	33,074	25,725	8,803
	Total	158,896	135,249	45,733

Source: Nigeria Watch Database. Available at <http://www.nigeriawatch.org/media/html/> (accessed 17 March 2019). See also Crime Statistics: Reported Offences, 2016. Available at <www.nigerianstat.gov.ng> (accessed 19 March 2019); National Bureau of Statistics (NBS), 2019

1. METHOD

Doctrinal and non-doctrinal methods are adopted for this paper. The former involves critical analysis of the existing regulatory frameworks on criminal justice system in Nigeria and Ethiopia in order to identify the flaws in the area of punishment and sentencing approaches adopted. This paper places reliance on the primary and secondary sources of information. While the primary method involves a descriptive survey to collect data directly from the prisons or correctional centres, Judiciary, Legal Practitioners, Civil societies/NGOs and victims in form of questionnaire[12] in Nigeria. The author considers survey as appropriate because according to Babbie,[13] "survey is an excellent method for measuring the attitude and opinions of people within a large population". Also, all the key informants or stakeholders were chosen because the author want representation in all the stakeholders in order to increase the authenticity of the study. This was carried out in the cities of Awka in Anambra, Bauchi in Bauchi, Asaba in Delta, Lagos in Lagos, Ilorin in Kwara, and Sokoto in Sokoto States which represent the six geo-political zones of Nigeria. Domestication of ACJA in Anambra, Delta, Kwara and Lagos States with non-domestication of the Act in Bauchi and Sokoto States[14] form one of the baseswhile the rates of arrest for commission of alleged crimes and imprisonment of inmates are reasonably higher in these States that composed of their zones.[15]

Although, the concept of criminal justice administration involves multiple stakeholders because it is very wide in scope, multi-stage purposive sampling techniques were adopted. Through the support of the research assistance,[16] the author administered questionnaires to 360 key informants or stakeholders in the six geo-political zones as shown in table 2 below. Sixty key informants in each State and a total of 200 key informants returned the questionnaires after careful consideration of ethical issues. The simple size of 200 key informants was considered appropriate for this study by relying on the informed notion of Cozby[17] that "where a population is less than 50,000, then 200 respondents will be appropriate". This survey is limited to the study conducted in Nigeria although, preference could have been to cover other cities in the Federation. This however could not be done due to finance, space and limitation encountered during this COVID-19 pandemic. The secondary sources adopted are some statistical reports and data garnered from some studies published in Nigerian and Ethiopian criminal justice system websites. This is to enable the study to juxtapose the two jurisdictions and to facilitate the triangulation of the scattered primary and secondary data from the two jurisdictions including the questionnaire. The information derived through the questionnaires administered to the key informants/stakeholders in Nigeria and the reports and statistics garnered from Nigeria and Ethiopia were analysed by

[12]Questionnaire was administered between February to June 2019 at Ilorin, Bauchi, Sokoto, Awka, Asaba, Delta and Lagos. February to April 2020 during COVID-19 Pandemic period, another questionnaire was administered in those States.

[13]Babbie, E.R. The practice of social research. Belmont. C.A.: Wadsworth Publishing Company, 2010

[14]The States that have enacted ACJIL for their respective States include Cross River, Ekiti, Anambra, Rivers, Enugu, Delta, Kaduna, Lagos, Akwa Ibom, Oyo, Kwara, Ondo and Federal Capital Territory (FCT-Abuja). See International Centre for Investigative Reporting. <https://www.icirnigeria.org>(accessed 11 May 2019).

[15] Source: Nigeria Watch Database. Available at <http://www.nigeriawatch.org/media/html/> (accessed 17 March 2019). See also Crime Statistics: Reported Offences, 2016. Available at <www.nigerianstat.gov.ng> (accessed 19 March 2019); National Bureau of Statistics (NBS), 2019

[16] The author is grateful to all the research assistance who made this paper possible during COVID-19 pandemic period.

[17]Cozby, P.C. Research methods in the social sciences. Mountain View, California: Mayfield Publishing Company, 2004

using simple percentage to determine the adequacy or inadequacy of the regulatory framework for punishment and sentencing under the Nigerian and Ethiopian criminal justice system. These analyses serve as the basis of this study's findings and recommendations.

Table 2
Background Information of Participants

Participants	Unit of Analysis	Occupation	Location	Age	Return of Questionnaire	Percentage
Key Informants 1-360	Judiciary, prisons or correctional Centres, Legal practitioners, Ministry of Justice, Nigeria Police,NGOs, Accused persons/Defendants, Convicts, Community leaders	Judges, Magistrates, Court Registrars, Prosecutors, prisons or correctional Officers, Legal practice, Federation of Women Lawyers, Nigerian Bar Association, Victims, Ex-convict, Community leaders	Awka (60), Bauchi (60), Asaba (60), Ilorin (60), Sokoto (60), Lagos (60) Total 360	20≤65	Awka (30), Bauch (32), Asaba (30), Ilorin (42) Sokoto (28), Lagos (38) Total 200	Awka 15 Bauchi 16 Asaba 15 Ilorin 21 Sokoto 14 Lagos 19 Total 100

2. CRITIQUE OF THE REGULATORY FRAMEWORK ON PUNISHMENT AND SENTENCING IN NIGERIAN AND ETHIOPIAN CRIMINAL JUSTICE SYSTEMS

The development of the administration of criminal justice in Nigeria and Ethiopia was influenced by various developments.In Nigeria, the development ranges from the Constitutions, Nigerian Penal and Criminal Codes (PC and CC), Criminal Procedure Act and Codes (CPA and CPC); Administration of Criminal Justice Act or Law (ACJA or ACJL) and the Nigeria Correctional Service Act (NCSA). In Ethiopian, Criminal Code (CC); Criminal Procedure Code (CPC); Criminal Justice Policy and Supreme Court Sentencing Guidelines and the Federal Prisons Commission Establishment Proclamation were the regulatory frameworks. These regulatory frameworks addressed issues relating to punishment and sentencing approaches for the purpose of determining the sustainability of imprisonment as a preventive or deterrent approach. This section examines the challenges of imprisonment as a sentencing approach in terms of global pandemic such as COVID-19 and use the findings to determine the over rall effectiveness of imprisonment as a sentencing method generally. This is done in order to interrogate the establishment of police force, court and prisons or correctional centres in Nigeria and Ethiopia. The purpose is to determine whether or not imprisonment approach achieves the primary objective of criminal justice system. Also, the purpose is to determine whether or not imprisonment approach accelerates the spread of COVID-19 in the prisons or correctional centres as this paper interrogates the challenges of social distancing as a means of limiting the spread of the virus. Instructively, an understanding of crime is crucial in grasping the need for a functional and effective criminal justice system in Nigeria and Ethiopia as no society is unaffected by crime or its consequences.While emphasising the need for an apt criminal justice system that will mitigate and control the effects of crime in both jurisdictions. For the purpose of punishment and sentencing with the court that has power to hear and determine any crime, recourse has to be made to the classification of crimes embedded in the statutes of both jurisdictions.

From the Nigerian perspective, classification of crime is made base on the severity of punishment meted on the offender. Crime may either be a felony,[18] misdemeanor[19] or simple offences.[20] By section 494 of the Administration of Criminal Justice Act (ACJA) in Nigeria, crime may be an indictable or non-indictable offence. That is to say, offences which on conviction attract "a term of imprisonment exceeding two years or imposition of a fine exceeding N400 Naira, not being an offence declared by the law creating it to be punishable in summary conviction" are indictable offences. While non-indictable offence is that offence that "is punishable with imprisonment of less than two years, a fine less than N400 Naira and it is punished by summary conviction".

In Ethiopian perspective, crime which could take form of acusation[21] or complaint[22] has its punishment classified base on the severity of the crime which is either rigorous or simple imprisonment[23] or base on commission of petty offences.[24] By Article 106 of the Ethiopian Criminal Code, simple imprisonment is "a sentence applicable to crimes of a not very serious nature committed by persons who are not a serious danger to society". Simple imprisonment may also extend for a period from ten days to three years or in some circumstances to five years imprisonment"[25] while conviction for petty offences carries a day deprivation of liberty at minimum or three months deprivation at maximum.[26] While Article 108 of the Code defined rigorous imprisonment as "a sentence applicable only to crimes of a very grave nature committed by criminals who are particularly dangerous to society". It is imprisonment for a period of one to twenty-five years, or it may be imprisonment for life".[27] Instructively, from table 1 above and presentation in table 4 below, it becomes clear that 75% of the key informants confirmed that offenders were incarcerated in prisons or correctional centres for all the three classes of crimes by the Nigerian courts. Of particular concern are inmates at the prisons or correctional centres in table 1 that are convicted and imprisoned for offences of "sedition",[28] "affray";[29] "contempt of court";[30] "breach of peace"[31] etc. which carry between three months and two years imprisonment. Table 1 is intandem with UN report where 57% representing 23, 400 people were said to be imprisoned for "minor offences".[32] A similar situation in Ethiopia was shown in the study of Yilma and Robberts where imprisonment was

[18] According to section 3 of the Nigerian Criminal Code, felony is defined as "any offence which is declared by the law to be a felony, or is punishable without proof of previous conviction, with death or with imprisonment for three years or more".

[19]By section 3 of the Criminal Code, misdemeanour is defined as "any offence, which is declared by law to be a misdemeanour, or is punishable by imprisonment for not less than six months, but less than three years".

[20] Simple offences are defined under section 3 of the Criminal Code as "an offence, other than a felony and a misdemeanouris a simple offence".

[21] See Article 211 of the Ethiopian Criminal Code and Article 11, Criminal Procedure Code of Ethiopia, Proclamation No. 185 of 1961

[22] See Article 212 of the Ethiopian Criminal Code and Article 13, Criminal Procedure Code of Ethiopia, Proclamation No. 185 of 1961.

[23] See Article 89 of the Ethiopian Criminal Code, 2004

[24] See generally Articles 746-775 of the Ethiopian Criminal Code, 2004

[25]See Article 106(1). Ibid

[26] See Articles 746 and 747 of the Ethiopian Criminal Code.

[27] See article 120. Ibid

[28] Offence of Sedition by Section 51 of the Criminal Code (Nigeria) carries two years imprisonment after conviction.

[29] Section 83 of the Nigerian Criminal Code carries one year imprisonment for the offence of "Affray".

[30] Section 133 of the Criminal Code provides for three months imprisonment for "Contempt of court".

[31] Section 70 of the Criminal Code provides one year imprisonment for the offence of "breach of peace".

[32] See United Nations Office on Drugs and Crime (UNODC): "Access to Legal Aid in Criminal Justice Systems in Africa- Survey Report", 2011. Available online at https//www.unodc.org dated 26 March 2022.

said to be the most frequently imposed punishment even in minor crimes.[33] This is evidenced in the case of *FEACC Prosecutor vs. Abinet Takele and others* where the accused was charged for abuse of power and he was convicted and sentenced to one year imprisonment with fine of 2000 Birr.[34]

Interestingly, in Nigeria and Ethiopia; the first regulatory framework for recognition of criminal justice system is the Constitution of the Federal Republic of Nigeria, 1999 (as altered) and the Constitution of the Federal Democratic Republic of Ethiopia,1994. It is the *grund norm* from which all other legal instruments derive their flavour as it is supreme[35] as such, all criminal proceedings must be conducted in a manner that does not conflict with constitutional provisions. In Nigeria, issues relating to commission of crime, arrest, trial and conviction of the offenders have been adumbrated in many constitutional provisions.
For example section 33(1) of the Nigerian Constitution, 1999 gave an exception to right to life when it states that "…no one shall be deprive intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria"[36] Under the Ethiopian Constitution, Article 15 states that "…no person may be deprive of his life except as a punishment for a serious criminal offence determined by law".[37] These provisions lay proper foundation for the administration of criminal justice from arrest, arraignment, trial and conviction, punishment or sentencing of the offender in both jurisdictions. In the same vein, Section 33(5) of the Nigerian Constitution and Article 17 of the Ethiopian Constitution both provided for right to personal liberty except on a charge of criminal offence.[38]

Surprisingly, there are three major actors that are saddled with the responsibilities of criminal justice system in Nigeria and Ethiopia and these are- the police/Ministry of Justice, the court/judiciary and the prisons or correctional services. In Nigeria, sections 214 and 215 of the 1999 Constitution established the Police Force with the responsibility of "maintaining law and order, prevention and detecting crime, conducting investigations, arrest, bail and search, execution of a warrant of arrest and protection of persons and property". Similar provisions under the Ethiopian Constitution is Article 51(6) which empowered the Ethiopian Federal government to "establish and administer national defence and public security as well as a federal police force".[39]

It is therefore argued that government is responsible for prevention, reduction and management of crime in any society as well as apt punishment of offenders whenever there is violation of the law. Unfortunately, commission of crimes or increase in the rate of crimes has an adverse effect on the economy[40] as reoccurrence of crime will results in insecurity,

[33]See Yilma, Kassahun Molla and Robberts, V. Julian 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (Criminal Law Forum, 2019)30:309-337. available at https://www.doi.org/10.1007/s10609-019-09373-x accessed March 12, 2020.
[34] See United Nations Office on Drugs and Crime (UNODC):"Country Review Report of Ethiopia" 2010-2015. Available online at https://www.unodc.org dated 26 March 2022.
[35]See sections 1-3 of the Nigerian Constitution, 1999 (as altered) and Article 9(1) of the Ethiopian Constitution.
[36]Underlining is mine. In a similar scenario, see sections 33(2)(b), 35(1)(a)(b)(c) and 36 of the 1999 Constitution.
[37]Underlining is mine. Similar provisions where issues relating to crime are Articles 17, 19; 20; 22; 23; 28 and 29(7).
[38] See generally Chapter IV of the Nigerian Constitution and Articles 18 and 19 of the Ethiopian Constitution to mention a few.
[39]See also Article 55(7) of the Ethiopian Constitution, 1994
[40] Kevin Nwosu, "Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials; Plea Bargains; Non-Custodial Options and Restorative Justice". available at http://docplayer.net/16475331-Criminal-justice-

poor investors' confidence and high rate of imprisonment which will result in the need for more correctional facilities. This is the situation in Nigeria and Ethiopia which causes overcrowding of prisons or correctional centres as the increase in commission of crimes warrant an increase in facilities in order to accommodate the ever-increasing number of offenders.[41] This adverse effect has an implication of devotion of more resources in building new infrastructure, prisons or correctional facilities; maintain; feeding and securing the inmates rather than devoting the resources on the advancement and development of the State and its citizens.This paper therefore posits that the possibility of crime causing a breakdown of law and order as well as the high costs incurred by the government as a result of crime affirms the need for community service sentencing approach of punishment in both jurisdictions. This position is intadem with the British Academy Report[42] and the study of Robert[43] which revealed some wealthier countries such as United States that have introduced mechanisms to restrict the use of custody as a sanction due to high economic and social cost on imprisonment of offenders.

Section 6 and Chapter VII of the Nigerian Constitution, 1999, Article 13 and Chapter NINE of the Ethiopian Constitution, 1994 gave room for the creation, structure; composition and powers of the courts including independent of the judiciary. These provisions delimit the original and appellate jurisdictions of the courts to hear and determine criminal matters. While sections 35(1)(4)(7) and 41(2)(a) of the Nigerian Constitution and Articles 17, 19(4) and 21(1) of the Ethiopian Constitution lay foundation for lawful custody of an arrested person in order to restrict his movement or liberty including deprivation of liberty of convicted prisoners/inmates for the execution of his/her sentence. These provisions show the establishment of prisons or correctional centres of inmates as the third leg of institutional framework for criminal justice system in both jurisdictions. Instructively, section 34(1)(a) of the Nigerian Constitution and Articles 18 and 21 of the Ethiopian Constitution provides for right to suitable confinement of prisoners/inmates in prisons or correctional centres that the minimum standards of treatment must be accorded the inmates. In other words, the dignity of the prisoners/inmates in prisons or correctional centres is guaranteed. These provisions are further coded under Article 5 of the African Charter (Ratification and Enforcement) Act (The African Charter Act) domesticated by both jurisdictions[44] which outlaw torture and inhuman or degrading treatment of the prisoners/inmates.

To this end, the government of Nigeria and Ethiopia were directed under section 17(3)(d)[45] and Article 41(4) of their respective Constitution to formulate policy in Nigeria towards ensuring that "there are adequate medical and health facilities for all persons" including the

reforms-in-nigeria-the-imperative-of-fast-track-trials-plea-bargains-non-custodial-options-and-restorative-justice.html accessed on March 15, 2020, U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, ''Ethiopia, Human Rights Report,'' (2017), p. 3, at: https://www.state.gov/documents/organization/277243.pdf accessed on March 15, 2022; See the ICPS World Prison Brief, Prison data, Ethiopia, available at: http:// www.prisonstudies.org/country/ethiopia accessed on March 15, 2022.

[41] Ibid.

[42] See British Academy, A Presumption against Imprisonment. London: British Academy, 2014. Available online at https://www.thebritishacademy.ac.uk/publications/presumption-against-imprisonment-social-order-social-values/ accessed on March 10, 2022

[43] Roberts, J.V. (2005) Reducing Prison Populations: Exploring Alternative Strategies. Reform. A Journal of National and International Law Reform, 86: 15–19.

[44] See for instance, Cap A9, Laws of the Federation of Nigeria, 2011.

[45] The provision of section 17(3)(d) of the Nigerian Constitution is *im pari* material with sections 9(1)(b), 30(3) and 23-25 of the Nigerian Correctional Services Act, 2019. Although, section 17(3)(d) falls within Chapter II which is "Fundamental Objectives and Directive Principles of State Policy" which is not ordinarily enforceable in the Nigerian Courts.

prisoners/inmates in correctional centres and "to allocate an ever-increasing resources to provide for the public health" including the prisoners in Ethiopia.[46] These provisions were enforced in Nigerian Court in the case of *Odafe and Others v. Attorney-General and Others*[47]where:

> the court declared failure of the prison officials to provide medical attention and treatment for inmates who were tested positive for HIV/AIDS as unconstitutional as same violated the right against torture and a breach of Article 16 of the African Charter and section 8 of the old Prison Act.

However, it is saddening to hear from the findings of the author's fieldwork where majority of the key informants representing 85% lamented about the state of the correctional centres in Nigeria as shown in table 4 that "there are lack of adequate medical health facilities and good hygiene in the prisons or correctional centres". 60% of the key informants in another phase of the questionnaire administered by the author identified "Malaria, High blood pressure; Skin infections; Fever; Vomiting; Severe headaches and Joint pains as the major diseases in the correctional centres".

Aside the constitutional provisions on punishment and sentencing of crime in Nigeria and Ethiopia which have similar provisions, there are other regulatory frameworks which have been enacted or formulated over the years in both jurisdictions. Below are the attempts with a view to drawing the differences. For example, Nigeria unlike Ethiopia operates dual legal system in the administration of criminal justice which accounts for the existence of two Codes and two procedural Codes/Act (Criminal Code and defunct Criminal Procedure Act[48] and Penal and defunct Criminal Procedure Codes[49]) while Ethiopia operates single Code with its procedural Code (Criminal Code and Criminal Procedure Code). The duality of the Codes calls for the enactment of the Code Laws for the thirty-six federating units in Nigeria. Of importance is also the consideration of whether or not the crime falls within the exclusive competence of the National Assembly[50] or Concurrent List[51] which will warrant the enactment by both the National Assembly and Houses of Assembly in Nigeria. In otherwords, there are Criminal Code and the Criminal Code Laws in the Southern parts of Nigeria and Penal Code and the Criminal Code Laws for the Northern parts of Nigeria. The advent of the duality of Codes is further premised on the division of the country into two. That is, the Northern and Southern parts of Nigeria. However, the operation of single Code and its Procedural Code in Ethiopia criminal justice system was as a result of replacement of the 1957 Penal Code with Criminal Code in 2004. Nonetheless, this operation by virtue of

[46] See also Article 16(2) of the African Charter Act which Nigerian and Ethiopian government have domesticated.
[47] (2004) AHRLR 205.
[48] Criminal Procedure Act is no more applicable to the Southern parts of Nigeria that have domesticated the Administration of Criminal Justice Act, 2015. Example of those States in the Northern parts are Lagos, Oyo, Osun and Ondo States respectively.
[49] Criminal Procedure Act is no more applicable in the Northern parts of Nigeria that have domesticated the Administration of Criminal Justice Act, 2015. Example of those States in the Northern parts are Kwara, Niger and Kogi States respectively.
[50] Any crime committed within the items listed under Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 are legislated under the "Exclusive Legislative List"of the National Assembly and by this, the laws regulating such crime will be federal laws.
[51] Any crime committed within the items listed under Part II of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 are legislated under the "Concurrent Legislative List"of both National Assembly and State Houses of Assembly and by this, the laws regulating such crime are to the "Extent of Federal and State Legislative Powers".

Article 55(5) of the Ethiopian Constitution gives room for enactment of Regional/States Laws on criminal matters which have not been covered under the federal criminal Code. Unlike Nigeria, the Ethiopian Legislator has authorized the Ethiopian Federal Supreme Court to issue Sentencing Guidelines and this assignement has been reaffirmed by Article 88(4) of the Ethiopian Criminal Code to show that aside the adjudicatory power of the Federal Supreme Court of Ethiopia, it can also legislate by issuing Sentencing Guidelines which at present determines the imposition of sentencing in Ethiopia together with the Criminal Code.

In Nigerian perspective, Penal[52] and Criminal[53] Codes, are the major legal frameworks currently in force that generally regulate different types or classification of crimes and they provided for sanctions for respective crime. While before 2015 and 2019, Criminal Procedure Code[54] and Criminal Procedure Act[55] regulate the procedural aspect in the administration of criminal justice. The rationale for these provisions is due to duality of the Nigerian legal system.The Police Act,[56] Prison Act;[57] the Economic and Financial Crime Commission Act;[58] the Corrupt Practices and Other Related Offences Act;[59] the Money Laundering (Prohibition) Act;[60] the National Drug Law Enforcement Agency Act;[61] the Examination Malpractice Act;[62] the Shariah (Islamic) Penal Code[63]and the Child Rights Act[64] are some of the other

[52] Penal Code Act, 1960. The Penal Code is the substantive law on crime in the Northern region of Nigeria.
[53] Criminal Code Act, 1965. Cap C38 Laws of Federation 2004. It is applicable only in the Southern States.
[54] Cap 30 Laws of Northern Nigeria, 1963. It was enacted for the then Northern region government in 1963 to govern criminal proceedings in Northern Nigeria.
[55] Cap 43 Laws of Federation 1958 and the Criminal Procedure Laws of Southern States.
[56] Cap P19 Laws of Federation of Nigeria 2004. The Police Act first came into effect on 1 April 1943. The Act has subsequently been amended several times over the years. The most recent amendment was done in 2004. See H Umoru, "Bill to replace 75 years Old Police Act Scales Second Reading". Available at <https://www.vanguardngr.com/2018/07/bill-to-replace-75-year-old-police-act-scales-second-reading/> (accessed 20 August 2018). Section 4 of the Act gives general philosophy behind the establishment and existence of the Police are to prevent crime, apprehend criminals and prosecute the offenders
[57] Cap P29 Laws of the Federation of Nigeria 2004. The Prison Act provides for the organisation and administration of prisons in Nigeria and other matters ancillary thereto. It also sets the goal and orientation of the prison as custody and production of inmates on court order and their rehabilitation and reintegration into the society. The prison system in Nigeria is the institution at the end of the administration of criminal justice process.
[58] Cap E1 LFN 2004. The independent Corrupt Practices and Other Related Offences Commission Act outlined the manifestations of corruption in ss 8–26. They consist broadly of four criminal offences: gratification, fraud, bribery and counselling offences relating to corruption. The Economic and Financial Crimes Commission Establishment Act, on the other hand, has as its objective dealing with "the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally". See generally s 46 of the Economic and Financial Crime Commission Act, 2004 (as amended).
[59]Cap C31, Laws of the Federation of Nigeria (LFN), 2011
[60]Cap 7 LFN, 2011
[61]Cap N30 LFN 2004
[62]Cap E15 LFN 2004
[63]Islamic law or Shari'ah legal systemhas been a part of the main sources of the Nigerian legal system until 1999 when its application was extended to criminal matters and the Shari'ah courts were vested with criminal jurisdiction in some Northern states of Nigeria. One of the States that adopted Shari'ah Law is Zamfara State. Shari'ah Courts Law of 1999 (Zamfara 1-1999) and Zamfara Penal Code were adopted in January 2000
[64]Child Rights Act, Cap C 50 Laws of the Federation of Nigeria 2004. This is a Federal Act which seeks to incorporate the contemporary principles, philosophy and standards of juvenile justice administration into the Nigerian legal system. It is equally seen as an attempt to provide a comprehensive uniform law on the protection of child rights nationwide. It also deals with children who are in conflict with the law. For example Section 208(1) provides: "In view of the varying special needs of children and the variety of measures available, a person who makes determination on the child offenders shall exercise such discretion, as he deems most appropriate in each case, at all stages of the proceedings and at the different levels of child justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions." See also, section 223 of the Act.

specific laws that regulate crime and administration of criminal and juvenile justice in Nigeria. The punishment and sentencing from aforementioned provisions in exception of the Police and Prison Acts range from imprisonment either with minimum, maximum or life imprisonment; fines; death penalty; probation and parole. By section 223 of the Child Rights Act, judges are empowered to "dispose of cases when they are satisfied that an offence has been committed by a child by adopting alternatives to correctional or institutional placement". In other words, diversionary measures must be considered. Studies have shown[65] that despite the retributive and utilitarian approaches to punishment and sentencing in aforesaid legal framework which is arguably posit to serve as improving the bahaviour of the offenders, teaching the offender a lesson and deterring other potential people from committing similar offences; the rate at which crimes are committed in Nigeria is alarming and offenders are sent to prisons or correctional centres on a daily basis where these centres are now overcrowded.[66] Table 4 has confirmed this position when 150 of the key informants representing 75% in an administered questionnaire stated that "offences committed by the inmates that are in prisons or correctional cenres are simple offences". In another phase of the questionnaire, majority of the key informants representing 75% are of the views that "60% of the inmates in the prisons or correctional centres are sentenced for offences that are less than three years imprisonment" and these majority further hold the views in another interval of the administered questionnaire that "60% of the inmates are in prisons or correctional centers due to their inability to pay fines imposed on them by the courts".

Interestingly in 2015 and 2019, the Administration of Criminal Justice Act (ACJA)and Nigerian Correctional Service Act[67]were enacted to replace the Criminal Procedure Code, Criminal Procedure Act and Prison Act. These Acts introduce new provisions for the purpose of improving access to justice. Some of these new provisions especially on punishment and sentencing approaches are the introduction of "plea bargain",[68] "suspended sentence and community service";[69] "remand time limit"[70] and "rejection of more intakes of inmates by the State Controller of Correctional Service in situations where the correctional centres are filled to capacities".[71] From these innovative approaches to punishment and sentencing, the suspended sentence and community service stands out as this approach warrant a complete non-custodial measure as other approaches may warrant for partial imprisonment. "Remand

[65] According to Obioha, "Nigeria's prisons are 'living hell', with twenty to thirty inmates arriving at the prison daily. Thus, overcrowding the reformatory structure, which do not even exist in the true sense, and more regularly stretching the original carrying capacity of the facilities?" See Obioha Emeka E. Challenges and Reforms in Nigerian Prison System: Journal of Social Science, 2011 27(2). This was also evident in a report where the President Muhammadu Buhari lamented on the alarming rate of inmates in prisons when he states that "it was a national scandal that many prisons were overcrowded by 90 percent". He further stressed the "need to put in place urgent new measures to speedily decongest the prisons across the country". See Sunnewsonline, cited in O Tosin, "Time to reform Nigeria's Criminal Justice System". 2015 Journal of Law and Criminal Justice American Research Institute for Policy Development. Available at <http://dx.doi.org/10.15640/jlcj.v3n2a7> (accessed 10 January 2019). See also Jo-Anne Wemmers, "Restorative Justice for Victims of Crime: A Victim-oriented Approach to Restorative Justice". 2002 International Review of Victimology 19: 43–59.

[66] See International Centre for Investigative Reporting. Available at <https://www.icirnigeria.org> (accessed 11 March 2019). See also National Bureau of Statistics, 2016. Available at <https://www.nigerianstat.gov.ng> (accessed 13 March 2019).

[67] The Nigerian Correctional Service Act was signed into law by the Federal government on August 14, 2019. 11 years after it was presented to the floor of the Senate. It repealed the old Prison Act and focus on correction, rehabilitation and reintegration of offenders.

[68]See Section 270 of the ACJA, 2015

[69] See Section 460, Ibid

[70] See Section 296, Ibid

[71] See Section 12(8) of the Nigerian Correctional Service Act, 2019

time limit",“plea bargain”and “rejection of more intakes of inmates by the State Controller of Correctional Service in situations where the correctional centres are filled to capacities” as provided under the Acts also enhance decongestion of prisons or correctional centres. These innovations also avoid delays in the disposition of pending cases, reduce the cost of trial and appeal;[72] reduce imposition of imprisonment and overcrowding but it is not a complete approach to non-custodial measures.[73] For emphasis on community service as complete non-custodial measures, section 460(2)(3)(4) of Administration of Criminal Justice Act is apt and it provides:

> (2) The court may, with or without conditions, sentence the convict to perform specific service in his community or such community or place as the court may direct
> (3) A convict shall not be sentenced to suspended sentence or to community service for an offence involving the use of arms, offensive weapon, sexual offences or for an offence which the punishment exceeds imprisonment for a term of three years.
> (4) The court, in exercising its power under subsection (1) or (2) of this section shall have regard to the need to:
> (a) reduce congestion in prisons;
> (b) rehabilitate prisoners by making them to undertake productive work; and
> (c) prevent convicts who commit simple offences from mixing with hardened criminals.

The implication of the above provisions is that, community service sentence is encouraged in order to enhance the administration of criminal justice, decongest prisons or correctional centres and it also boosts the economy of the country as the government will divert the funds of keeping the inmates by feeding, personnel and infrastructure to another social amenities that will benefit the generality of the populace. More importantly as studies[74] have shown that prisons or correctional centres have become:

> centres of infection with diseases, stacking people; keeping opponents and enemies; as well as a sophisticated training ground for inmates and detainees to specialise in various criminal activities such as armed robbery, drug addiction, etc., partly as a result of congestion.[75]

To buttress the above is another report which shows that Nigerian Prisons are “congested, the inmates records poorly managed, feeding, health and other services for the inmates have

[72] See section 270(5)(*b*)(vii)–(viii) of the ACJA.
[73] See the cases of *Robert M Brady v United States* 397 US 742 (90 S Ct 1463, 25 L Ed 2d 747) and *Federal Republic of Nigeria v Igbinedion* (2014) All FWLR (Pt 734) 101 at 144–147. The implication of the former case is that, the Supreme Court of the United States allows a lesser sentence of 50 years' imprisonment for the act of the defendant who was charged with kidnapping, which carries a punishment of death penalty and also the defendant opted for a lesser sentence for the hope of entering a correctional system. Also, it should be noted that the concept of plea bargaining is employed in high-profile official corruption and banking fraud cases. That is, it is employed in the trial of financial crimes in comparison to what is obtainable in other jurisdictions, such as the United States, as is evident in the case of *Robert M Brady v United States* cited above.
[74] Jewkes, Y. (ed.). (2008). *Prisons and punishment volume 1: The meaning of the prison.* London: SAGE Publications Ltd. See also, Sanda, A. A. (2007). *Prison decongestion: Our responsibility.* Ibadan: Spectrum Books Limited; Adeagbo, O. O., Asubiojo, B. O., Obadare, S. O., & Akindojutimi, B. F. (2016). Re-integration of prison inmates in Nigeria: Advocating for library support. *International Information & Library Review*, *48* (3), 169-175.
[75] Ibid

collapsed, recurring cases of indiscipline, rape and drug abuse have taken over the institutional roles of the prisons".[76]The enactment of ACJA indicates a paradigm shift from retributive criminal justice system to restorative criminal justice system particularly because it pays serious attention to the needs of the society, the victims, vulnerable persons and human dignity generally.[77] In the same vein, section 12(8) of the Nigerian Correctional Service Act empowered the State Controller of Correctional Service "to reject any intake of inmates when the correctional centres within his State is filled to capacities" and by section 12(10) the Controller-General of the Correctional Service after due notification to the Attorney-General of the Federation and Chief Justice of Nigeria to:

> release inmates that are left with less than six months to the completion of their three years sentence, inmates that are sentenced for minor offences; those that are sentenced for civil cases and those inmates consider to be released by the Chief Judge or the Prerogative of Mercy Committee.

Similarly, sections 37 to 43 of the Nigerian Correctional Service Act provides for alternative sentencing measures which include parole, probation; community service; restorative justice measures and other non-custodial measures which are assigned by the courts. The Act also mandated the establishment of the National Committee on the implementation of non-custodial measures incorporated under the Act.

However, the implementation and enforcement of this laudable provisions have been impeded by many challenges. Examples abound as a statistics released by the Nigeria Prisons Service on 31st October 2014[78] gave a breakdown of the convicted prisoners that "total of 7, 992 representing 48% of the total convicts are serving short term imprisonment that is less than two years, 7, 413 representing 41% of the convicts are long term imprisonment of two years and above, 1, 588 representing 8% are condemned convicts (death row) while 551 representing 3% are lifers. The Penal Reform International confirmed the above position in its Global Prison Trends, 2021 that "Prison population increased as did overcrowding in short-term and pre-trial facilities in Nigeria and people are being sentenced to short prison terms for the violation of quarantines adding a heavy burden to congested prisons".[79]

Similarly, findings from the author's fieldwork in table 4 below revealed the responses of the key informants when majority of them representing 75% in an administered questionnaire confirmed with the author that "more than 60% of the inmates in the prisons or correctional centres are serving sentence of imprisonment that are less than three years". 75% of the key informants in another phase of the questionnaire also agreed with the author that "60% of the inmates are serving imprisonment because they are unable to pay fines imposed on them by the courts". The courts are enjoyed under Section 420 of the Administration of Criminal Justice Act, 2015 to impose maximum of two years imprisonment in default of payment of

[76] Akinnawo, E. O., & Akpunne, B. C. (2016). The Influence of gender on the level of drug consumption and psychological health of inmates of Lagos Medium Security Prisons. *International Journal of Gender and Development Issues (IJGDI)*, *1* (4), 196- 207.

[77] See the provisions of sections 8(1), 460(1)–(2), 468 and 314 of the Administration of Criminal Justice Act, 2015, among others.

[78] See Nigeria: World Prison Brief by Institute for Crime & Justice Policy Research 2020 https://www.prisonstudies.org See also, The Nigerian Prisons Service, (2014). The Nigerian Prison Statistics. www.prisons.gov.ng. Accessed Nov. 3, 2015.

[79] Penal Reform International: Global Prison Trends 2021 available online at https://www.cdn.penalreform.org accessed February, 2022. See also, Nigeria: Covid-19 - Prisons Reopen in 28 States, FCT, Admits 9,900 Inmates', *allAfrica. com*, 20 August 2020, allafrica.com/ stories/202008200117.html.

fine by the convict. Instructively, the position of the author is that, ordering "Community Service" could have been appropriate in this regards in as much as the convict is not dangerous to the society. This will go a long way to decongest prisons or correctional centres in Nigeria. The author's position is intandem with the African Commission on Human and People's Right's "Principles on the Decriminalisation of Petty Offences in Africa" which was adopted in November, 2020 to simplify the 2017 version.[80]

In Ethiopian perspective, the major statutory framework aside the Constitution that has comprehensive provisions relating to punishment and sentencing is the Criminal Code which was enacted in 2004.[81] While Criminal Procedure Code Proclamation No.185 of 1961 regulates the procedural aspect of the criminal justice system in Ethiopia. The Criminal Code has the general and special parts governing the generic rules and principles applicable to all crimes under the general part[82] and the Code identifies crimes along with their sentencing ranges under the special part. Recourse is always made to the general part by the Ethiopian courts in arriving at any determination of sentencing on crimes that fall within the special part. Proclamation to Control Vagrancy No.384/2004, Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020; Corruption Crimes Proclamation No.881/2015 and Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No 909/2015; Federal Police Commission Establishment Proclamation No 720/2011,[83] the Criminal Justice Policy, 2011,[84] Supreme Court Sentencing Guidelines, 2010,[85] Federal Prisons Commission Establishment Proclamation No 1174/2019 and Treatment of Federal Prisoners Council Ministers Regulations No.138/2007[86]are some of the regulatory frameworks that regulate crime and administration of criminal justice system

[80] Ibid

[81] The Criminal Code of the Federal Democratic Republic of Ethiopia (Hereinafter refers to as "The Criminal Code) Proclamation No.414/2004. This repealed the Criminal Code of 1957 which was in force after the first modern penal Code of 1930. See Graven, J. ''The Penal Code of the Empire of Ethiopia'', (1964) 1 J. Ethiopian L 267–298.

[82] See generally, Articles 82-86, 88; 90-120 and 179-189 of the Criminal Code, 2004.

[83] The Federal Police Force in Ethiopia has been created as far back as 1995 with the purpose of serving the public, ensuring the observance of human and democratic rights and by Articles 5, 6(1)(2)(3)(10) and 19(1) of the Proclamation, the Federal police is "to maintain the peaceful life and security of the people through prevention of crimes" and "to prevent any crime, investigate crime, execute orders and decisions of the courts, study the causes of crime and design the preventive methods" and "perform his activities in accordance with the criminal Procedure Code and the Constitution…".

[84] The policy comprehensively covers all main features of administration of criminal justice in Ethiopia which among others include the prevention of crime, criminal investigation and prosecution, speedy and fair trial processes, independent role of the judiciary and it also enforces penalties imposed by the courts and any decision making process arrived at in the criminal justice system.

[85] The Supreme Court Sentencing Guidelines issued in 2010 established an orderly ranking punishment which grouped in relation to their relative severity in order for the courts to match offences which will be proportionate and commensurate with severity of the punishments. This is proportionality-based sentencing scheme with 39 penalty levels in the first table that ranges from one-day compulsory labour to death penalty while 23 penalty levels were made for fines. See generally Appendixes 1 and 2 and Article 6(3)(a)(b) of the Revised Sentencing Guidelines. (The levels are further subdivided in to different layers(*erkens*) depending on the gravity of the offence.)

[86] These Proclamation and Regulations provide for the organisation and administration of prisons in Ethiopia and other matters ancillary thereto. These regulatory frameworks regulate prison as an institution at the end of criminal justice system procedural processes. By Articles 5 and 6 of the Proclamation, Prison is also set "to admit upon judicial sentences or warrants and ward prisoners and provide them with reformative and rehabilitative service in order to enable them make attitudinal and behavioural changes and become law abiding, peaceful and productive citizens". Parts of the prison responsibilities are "taking prisoners to court, maintain prisoners' health care, free medical treatment for the prisoners, food and shelter". Prison also enforce judicial decisions.

in Ethiopia. The Code also provides for punishment and sentencing of petty offences which the Criminal Code criminalised.

Being a comprehensive Code, all other legislations mentioned above and guidelines on punishment and sentencing derive their legitimacy from the Ethiopian Constitution, 1994. For instance, Article 88(4) of the Criminal Code empowered the Ethiopian Federal Supreme Court to "issue manual relating to sentencing" as supplementary provisions. This leads to the formulation of the Federal Supreme Court Sentencing Guidelines in 2010 to be interpreted in line with the sentencing provisions under the Criminal Code.[87] The implication of this provision is that, by Article 88 of the Criminal Code, the Federal Supreme Court is saddled with the responsibility assigned to it by the Ethiopian House of Peoples' Representatives to issue sentencing guidelines which must not conflict with the sentencing provisions in the Criminal Code.

By Articles 90-129, 157-168 of the Criminal Code, punishment and sentencing of crimes recognised under the Code ranges from pecuniary sentences, compulsory labour; imprisonment; death penalty;[88] cautions, reprimands, admonishment, coerced apologies, deprivation of civil rights[89] etc. These includes the separate class of measures and sanctions that the Code provides for children who are in conflict with the law. From all indications, The Code provides for principal and secondary punishments whereby the courts are roped with the power to convict the offender under the secondary punishment except with and subject to a principal punishment.[90] In order words, the general provisions of the law must be fulfilled before the secondary punishment can be applied by the court except if there is express direction by the court to that effect. Mostly, this type of punishment is allowed in minor crimes as provided under Article 89 of the Criminal Code. Article 112 also empower the court to give variation of condtions of imprisonment. Secondary punishment can further be imposed on young offenders under Article 157 of the Code.

Instructively, it can be impliedly deduced that all the available approaches to punishment and sentencing may lead to imprisonment which has adverse effect of congesting the prisons. For instance, assuming that the court imposes fine against the convict, the question that will be ready to be answered is what will be the situation if the convict is unable to pay the fine imposed under Articles 93 and 94 of the Criminal Code? In such circumstance, Articles 95 and 96 have provided the answer that the court will impose either "conversion of fine into labour" or "conversion of fine into compulsory labour". To this end, it can be argued that, such criminal or convict will not be taken to prisons and this could be a laudable approach of punishment and sentencing that decongest the prisons. However, the Code allows for discretionary power of the court to determine which approach to be adopted and this most of the time depends on the circumstances of each case. It will be interesting to examine Articles 103 and 104 of the Criminal Code which relates to "compulsory labour with deduction of wages to the benefit of the State" and "compulsory labour with restriction of personal liberty" as another alternative approach to imprisonment which may be adopted by the court to decongest prisons. For emphasis, these provisions are reproduced below for critical analysis.
Article 103 provides:

[87] See Article 4(9), The Revised Sentencing Guideline of the Ethiopian Federal Supreme Court.
[88] Pecuniary sentences, compulsory labour; imprisonment and death penalty fall within the principal punishment. See Articles 90-120 of the Criminal Code
[89] Cautions, reprimands, admonishment, coerced apologies, deprivation of civil rights are some of the secondary punishment. See Articles 121-153 of the Criminal Code
[90] See Article 121 of the Criminal Code.

(1) Where the crime is of minor importance and is punishable with simple imprisonment for a term not exceeding six months, the Court may, if the criminal is healthy and is not a danger to society, sentence him to compulsory labour without any restriction of personal liberty subject however to supervision. This penalty may extend from one day to six months.
(2) The criminal shall serve his sentence of compulsory labour at the place where he normally works or is employed or in a public establishment or on public works. An amount not exceeding one third of the criminal's wages or profits shall be deducted and forfeited to the State.
(3) The amount to be deducted, the place where the sentence is to be served, and the period thereof and the nature of the supervision shall be stated in the judgment.

Article 104 provides:

(1) Where the circumstances of the case show that it is proper or necessary so to do, especially where the criminal fails to discharge his obligation as specified under Article 103(1) above, or where, with a view to keeping the criminal away from unfavourable surroundings or undesirable company, it is expedient so to do, the Court may direct that compulsory labour shall be subject to restriction of personal liberty.
(2) The nature and the duration of such restriction shall be determined by the Court according to the circumstances of the case. Such restriction may require the criminal to discharge the compulsory labour by remaining in a particular place of work, or with a particular employer, or in a particular establishment, or without leaving his residential area or a restricted area under the supervision of government officials.
(3) If the criminal fails to comply with any such requirement, he shall be liable to simple imprisonment for a period equal to any unfinished period of the sentence of compulsory labour.

The Supreme Court Sentencing Guidelines, 2010 ushered in another laudable provisions for decongestion of prisons when the Guidelines provide for non-custodial sentencing options for levels 1-5 of the 39 penalty levels in the first list and 23 levels in the second list.The judges are enjoined to imposing alternatives to custody. The judges are also empowered to either adopt compulsory labour or imposition of fines. The fines from levels 1 to 23 of the fines range up to 1,000 EB to over 2,000,000 EB depending on the gravity of the offence. It should be noted that by Article 6(3)(a)(b) of the Revised Sentencing Guidelines, the last leg of the sentencing on the table which relates to penalties for deprivation of liberty, life imprisonment and death penalty are much slimmer imposed by the courts. However, as laudable as these Sentencing Guidelines are, they cannot take the place of the Criminal Code and the Constitution as provided in Article 4(9) of the Revised Sentencing Guideline that "The guideline shall be interpreted in line with the sentencing provisions in the Criminal Code". The Guidelines serve as supplementary provisions to the Criminal Code and of course, they must also not be inconsistent with the provision of the Constitution otherwise, they will be declared null and void to the extent of their inconsistencies. The implication is that, these Guidelines are not enforceable like the provisions of the Criminal Code and the Constitution. Study of Simeneh shows that the ranking of some offences in the Guideline to be unprincipled and incompatible with the Criminal Code.[91] More importantly, the Guidelines need to be reformed as some provisions seem to amend the Criminal Code when the Supreme

[91] See Simeneh Desta, '' '', Ethiopian Press Agency (4 December 2018) at: https://press.et/?p=1025# cited in Yilma, Kassahun Molla and Robberts, V. Julian 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (Criminal Law Forum, 2019)30:309-337. available at https://www.doi.org/10.1007/s10609-019-09373-x accessed March 12, 2020

Court has no jurisdiction to make such amendments. It has been noticed that some of the Guidelines have ranked some offences which are unprincipled and incompatible with the Criminal Code especially from the Guidelines' approach to ranking of the seriousness of offences.[92]

Similarly, the Criminal Justice Policy, 2011 is another laudable regulatory framework on crime, punishment and sentencing in Ethiopian criminal justice regime. The policy gives an enabling space for creating a procedure for the use of alternative to imprisonment approach to punishment and sentencing. This is to provide a fair and sustainable solution to crime.[93] Mostly, the policy is applicable to offences committed by juveniles, first time offenders and those offences that are punishable with simple imprisonment.[94] This category of offences may be referred to the out-of-court mechanism at any stage of the criminal justice process upon request by either the prosecutor, the accused person or by the court for a rapid and accessible criminal justice system.[95] However, it is saddened to observe that the policy is not a legislative enactment which is enforceable but rather it is the government's policy document that display the aims and focus of the government regarding how the administration of criminal justice should be. It is therefore argued that for this policy to be implemented and enforceable, there should be a separate law from the legislators or an amendment of the extant legal framework. In orderwords, the implication is that, there is need to have legislative amendments for the provisions of the Policy documents to be effective. It is therefore the contention in this paper that, all the regulatory frameworks in Ethiopia unlike in Nigerian perspective, work towards limitation of decongestion of prisons and not full implementation of non-custodial measures.

Interestingly, COVID-19 pandemic has exposed the effectiveness and enforcement of the above analysed regulatory framework to the extent that the Federal government of Nigeria and the Ethiopian government have complied with the World Health Organisation[96] to decongest the prisons or correctional centres in order to limit the spread of COVID-19. Limiting the spread of COVID-19 calls for physical distancing in overcrowded prisons or correctional centres in Nigeria and Ethiopia as it has been reported for instance in Nigeria that many inmates have tested positive for COVID-19.[97] In an attempt to decongest prisons or correctional centres, the Nigeria government has reduced the admission of inmates into the facilities due to the COVID-19 pandemic and further released 6,590 inmates from the correctional centres through the work of the Presidential Committees on the Decongestion of Correctional Centres and the Presidential Advisory Committee on Prerogative of Mercy.[98]

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[92] Article 556(2) of the Criminal Code readily comes to mind to show that the Sentencing Guidelines for common willful appears to have been ranked on arbitrary and unprincipled basis which may result on outcomes of sentencing that are unprincipled. There is no justification in the Guidelines to place the circumstances specified in the Criminal Code at different severity levels. See also Article 665 of the Criminal Code dealing with punishment on crime of theft which carries simple imprisonment or rigorous imprisonment not exceeding 5 years. However, the guideline specifies 8 levels of offence for theft, and it prescribes starting sentence point 20 for offence level 8, which means 4.5–5.5 years. This range thus exceeds the maximum sentence of five years specified by the Code and further violates Article 22(1) of the Ethiopian Constitution.

[93] See generally Section Four of the Policy which deals with the "improving the efficiency and fairness of the criminal justice process".

[94] Ibid

[95] Ibid

[96] See COVID-19 Preparedness and Response in Places of Detention. Available at https://www.peacekeeping.un.org accessed May 10, 2020

[97] For instance, 17 inmates at Bauchi prisons or correctional centres have tested positive for COVID-19 on June 14, 2020. See https://www.channelsTv.com.ng watched live on June 14, 2020.

[98] See www.dailytrust.com.ng accessed June 9, 2020.

While the Ethiopian government by April 2, 2020 has released and pardon 5, 600 prisoners in both the federal and regional prisons in order to help prevent spread of COVID-19.[99] This release covers those prisoners that were given a maximum sentence of three years for minor crimes and those who were about to be released from jail.[100] The case of *FEACC Prosecutor vs. Abinet Takele* (supra) is very apt in this regard.

The above urgent release of the inmates/prisoners for the purpose of decongesting prisons or correctional centres by the Nigerian and Ethiopian governments were done under the proclamation of the state of emergency as provided in section 305 of the Nigerian Constitution, 1999 and Article 93 of the Ethiopian Constitution, 1994. The release confirmed the position of the author that prisons and correctional centres in both jurisdictions under study are congested. Arguably, these proclamations have not been seen to bring forth the complete non-custodial measures in Nigeria and Ethiopia. The reason being that the release of the inmates has not be determined on the full trial and finding of guilt, discharge or upon completion of the jail term compared to processes that need to be met for prosecution and sentencing under section 460 of ACJA, 2015 and Articles 103 and 104 of the Ethiopian Criminal Code. Instructively, the release of prisoners by the Nigerian and Ethiopian governments is argued to be temporary, unprincipled and fails to correct the fundamental cause of prisons or correctional centres overcrowding with the frequently imposed and excessive reliance on imprisonment approach to punishment and sentencing without attempting other viable alternatives to imprisonment such as community service sentencing and compulsory labour.

3. CHALLENGES OF ENFORCEABILITY AND IMPLEMENTATION OF COMMUNITY SERVICE AND COMPULSORY LABOUR AS ALTERNATIVES TO IMPRISONMENT IN NIGERIA AND ETHIOPIA

It has been emphasised in the previous section that the Nigerian and Ethiopian courts are most often inclined to adopting imprisonment over many alternative approaches to punishment and sentencing. In this regard, any offence categorised as simple, petty or minor offence in Nigeria or Ethiopia attracts fine or imprisonment.

3.1 Challenges of enforceability and implementation of community service as alternative to imprisonment in Nigeria

In Nigerian perspective as analysed in the previous section, one of the challenges of enforceability and implementation of community service sentence in Nigeria is lack of willingness on the part of the judges/magistrate. A typical example is a report that revealed a two weeks jail-term imposed by one of the judges at Ilorin, Kwara State judiciary against a man who made calls in courtroom.[101] This is a State out of the thirty-six States in Nigeria that has domesticated Administration of Criminal Justice Act which enjoined the court to impose community service sentence for an offence which attracts less than three years of imprisonment. Findings of the author in a fieldwork survey at table 3 also alluded to the

[99] See https://www.cnn.come>africa accessed May 2, 2020. See also Penal Reform International: Global Prison Trends 2021 available online at https://www.cdn.penalreform.org accessed February, 2022

[100] Ibid

[101] For making calls in courtroom, Justice Oyinloye sentences man to 2 weeks jail-term in Ilorin. Royal News https://royalnews-calls-in-courtroom-justice-oyinloye-sentences-man-to-2weeks-jail-term-in-ilorin/. Accessed January 14, 2020.

unwillingness of the court to adopt community service sentence where majority of the key informants representing 75% confirmed that "lack of willingness of the judges or magistrates to impose community service sentence contribute to overcrowding of correctional centres in Nigeria" especially those states of the federation that have domesticated the Administration of Criminal Justice Act.

Another challenge can be deduced from the classification of offences in Nigeria. For instance, stealing of an item irrespective of the heaviness or weight of the item will still be regarded as stealing or theft within the meaning of the offence under both Penal and Criminal Codes. A person who steals cellphone is equated with a person who steals a car or valuable item that worth more value of a cellphone. Both parties will be sentence for the same offence of stealing or theft.[102] The offence of stealing or theft is categorised under felony which attracts more than six months imprisonment which may also be with fine. This categorisation hinders the enforceability of community service sentence. For instance, as the law does not provide for community service sentence for any person that steal mobile phones because it is categorised as felony offence. This assertion gain credence with the request of the African Commission on Human and People's Rights in 2018 where the commission produced guidelines to be followed by African States in order to decriminalise petty offences for the purpose of addressing prison overcrowding.[103] Also, in support of this position is a report that revealed the detention of "one Abdullahi Mohammed, a 49-year-old man who was forgotten in prison since 2013 for stealing a cellphone".[104]

Nigeria is faced with another challenge of domestication of Administration of Criminal Justice Act (ACJA) and Nigerian Correctional Service Act (NCSA) as both Acts are Federal Acts which are only enforceable at the Fedral Capital Territory, Abuja and applied only by federal courts. The laudable provisions of ACJA and NCSA on decongestion of prisons or correctional centres in Nigeria through community service sentence can only be maximally achieved if both Acts are domesticated. The former is an enactment on criminal proceedings that are not within the exclusive legislative competence of the National Assembly which needs to be domesticated by all the thirty-six States of the Federation of Nigeria.[105] Also, the later Act is also a Federal Act which operates on inmates that are convicted for both States and Federal offences.

It is therefore the contention in this paper that an effective implementation of ACJA and NCSA will entail the domestication of ACJA by all the States and decentralization of the Nigerian Correctional Service. This suggestion will allow the country to address the congestion witnessed in correctional centres and to allow all the thirty-six States to effectively participate through the setting up of their correctional centres to manage offenders who commit States' offences. This is in line with the findings of the author's fieldwork in table 4 below where 85% of the key informants confirmed that "75% of the inmates in the correctional centres in Nigeria were convicted for States offences" ranging from assaults, stealing/theft; criminal trespass; contempt of court; loitering etc.[106] In another phase of the

[102] For emphasis, see Sections 383 and 390 of the Nigerian Crminal Code.

[103] See African Commission on Human and Peoples' Rights, Principles on the Decriminalisation of Petty Offences in Africa, 2018

[104] Voice of Africa (VOA) News, Nigeria's Prisons Set to Undergo Long-Awaiting Reforms dated August 24, 2019

[105] See ANafiu and T Oyesina, "ACJA 2015: So Far, Not Too Good". Available at <https://newtelegraphonline.com/2017/12/acja-2015-far-not-good/> (accessed 25 April 2018).

[106]Author's position/suggestion is in tandem with the proposal of the Federal Government in a webinar/virtual interactive session with the States Attorney-General and head of courts on June 4, 2020 that a policy will be

questionnaire administered by the author as shown in table 3, while 75% of the key informants strongly agreed with the author that "refusal of some states to domesticate ACJA hinder the enforceability of community service sentence in Nigeria" due to political will, majority of them in another interval representing 87.5% are of the view that "enactment of ACJL by all States of Federation will enhance the enforceability of community service sentence in criminal justice system".

3.2 Challenges of Enforceability and Implementation of Compulsory Labour as Alternative to Imprisonment in Ethiopia

It is pertinent to note that the implication of the provisions relating to compulsory labour partially enhances the decongestion of prisons to some extent as offenders or convicts will not be imprisoned. While Article 104 has given multiple alternatives for imprisonment of the convict more especially when the provision allows the convict to be subjected to restriction of his/her personal liberty. The phrase "in a particular establishment" denotes the possibility of imprisonment and Article 104(3) is very explicit by giving the court discretionary power to impose "imprisonment on the convict in a situation when he/she fails to comply with any of the requirements of the sentence of compulsory labour". One may be surprised that Article 107 allows the court to substitute simple imprisonment for compulsory labour which to some extent may decongest the prisons, but this is only allowed whenever there is difficulty in executing the imprisonment which is very rare in Ethiopian criminal justice practice. In addition, compulsory labour as provided under the Ethiopian Criminal Code is misleading and cannot be equated with community service sentencing that is obtainable in Nigeria criminal justice regime.

However, in both jurisdictions, it is unfortunate that in practice, neither community service sentencing nor compulsory labour is imposed by the courts.[107] In support of this assertion is the study that has shown[108] and findings of author's fieldwork in table 3 that has revealed that "there is lack of reliable personnel to be responsible for supervising the work order". Also, there appears only limited awareness or unwillingness on the part of the judges to impose these alternative approaches to imprisonment in Nigeria. More importantly, 85% of the key informants in an administered questionnaire by the author strongly agreed with the author that "there is no clear procedure provided by ACJA which will encourage the judges from imposing these community service sentencing in Nigeria".

It is not surprising why 62.5% of the key informants, as stated in table 3 below, confessed to the author in an administered questionnaire that "they are not familiar with community service sentence and 75% of them in another phase of the questionnaire rated the imposition of community service sentence poor. However, it has been revealed from the findings of the author's fieldwork survey that the consequence of imposition of imprisonment all these while has not yielded any positive result of rehabilitation, reformation and reintegration of the convicts back to the society which are the major cardinal objectives of criminal justice

formulated by the Federal government to decentralise correctional centres and limit the admission of inmates. See Daily Trust dated June 9, 2020. Available online at https://www.dailytrust.com.ng/.fg-to-decentralise-correctional-centres-limit-admission-of-inmates.html accessed June 9, 2020.

[107] See Yilma, Kassahun Molla and Robberts, V. Julian 'Out of Africa: Exploring the Ethiopian Sentencing Guidelines' (Criminal Law Forum, 2019)30:309-337. available at https://www.doi.org/10.1007/s10609-019-09373-x accessed March 12, 2020

[108] Ibid

system. The author's findings is also intandem with the studies of Abrifor et.al[109] and Wilson[110] when Abrifor et al. estimated the prevalence of recidivism in Nigeria prisons at 52.4% in 2010 and Wilson's study has documented that 81% of male criminal inmate offenders and 45% of female criminal inmate offenders were re-arrested within 36 months of discharge/release from the Nigerian prison custody in 2009. To the key informants representing 75% as shown in table 3, "Imposition of imprisonment by the courts has not reduced the rate of crimes in Nigeria" as 65% of them in another interval of the questionnaire strongly agreed with the author that "increase in the rate of crimes is due to non-rehabilitation of convicts in prisons or correctional centres". This position is also being witnessed under the Ethiopian criminal justice system where the Tigray Regional Correctional Administration report revealed that 98 out of 1931 inmates were those rearrested for another felony in 2018 and the correctional centres in Tigray were overcrowded due to the rising number of recidivisists.[111]

The views of the key informants on the enforceability of community service sentence at different interval of the questionnaire are therefore very interesting. For instance, in table 3, almost all the key informants representing 90% hold the view that "Community service approach should be adopted in all crimes that carry imprisonment or option of fine". 90% of them also hold the view that "Community service sentence approach should be adopted in all crimes that carry less than three years of imprisonment". While 65% of them expressed the view that "enforcement and implementation of community service sentence in criminal cases will be more effective to rehabilitate/reform the convicts than being imprisoned in Correctional centres". However, 75% of them identified some factors that contribute to ineffective or non-enforceability of community service sentence thus:

> Insufficient resources to support the implementation, Lack of capacity and personnel to supervise in the community; Lack of collaborative network between non-governmental organizations and government for implementation; Unwillingness of the Judges/Magistrates to adopt community service sentencing even for minor offences; Mandatory minimum sentencing; Pressure exerted for imprisonment of offenders by the public remain the primary instruments of punishment in Nigeria and Negative public perception by regarding prisoners/inmates as outcasts hinder efforts in enforcing community service sentencing.

Overall, this paper posits that the Nigerian community service sentencing as an alternative approach to imprisonment will be a viable approach to decongest prisons or correctional centres which will benefit the Nigerian and Ethiopian communities if fully adopted, implemented and enforced especially at period of disease outbreak such as this present COVID-19 pandemic. This approach to imprisonment will limit the spread of the virus as social or physical distancing could not be practicable in prisons or correctional centres which

[109]Abrifor et.al, *Differences, Trend And Pattern Recidivism Among Inmates In Selected Nigerian Prisons,* European Scientific Journal(2010).

[110] Wilson H, (2009). CURBING RECIDIVISM IN OUR SOCIETYhttp://www.pioneerng.com/article.php?title=Curbing_Recidivism_In_Our_Societyandid=2765 (last visited December 20, 2012).

[111] Tigray Regional State Correctional Systems Administration. (2018). Regional correctional centers annual performance evaluation report (Unpublished report) cited in Zenawi z. et al. (2021) "Reintegration of returning citizens in the absence of formal transition programs: experiences from Ethiopia" Journal of Offender Routle Rehabilitation, Routledge available onine at https://doi.org/10.1080/10509674.2021.1909199 accessed on March 20, 2022

have been reported to have been overcrowded.[112] Author's fieldwork survey is in tandem with this assertion where almost all the key informants representing 90% in table 3 hold the view that "enforcement of community service sentence will curtail the spread of COVID-19 in the correctional centres". In another phase of the questionnaire administered by the author, 75% of the key informants strongly agreed with the author that "enforcement of community service sentence enhances social distancing which is one of the major approaches of limiting the spread of COVID-19 pandemic".

Table 3 : Attitude towards the Implementation/Enforceability of Community Service Sentence as an Alternative to Imprisonment in the Nigerian Criminal Justice System

Perception of the Key Informants	**Frequency**	**%**	**Perception of the Key Informants**	**Frequency**	**%**
Are you familiar with community service sentence?			Which of these are advantages of community service sentencing over imprisonment?		
Yes	125	62.5			
No	75	37.5			
Total	200	100	(a) Community service sentencing conforms with African tradition of dealing with offenders	07	3.5
			(b) Community service sentencing heals the damage caused by crime within the community	10	5
Enforcement and implementation of community service sentence in criminal cases will be more effective to rehabilitate/reform the convicts than being imprisoned in Correctional centres			(c) Community service sentencing is a positive and cost-effective measure as against imprisonment	08	4
(a) Strongly agree	70		(d) Community service sentencing enhance the economy as resources		
(b) Agree	60	35	expended on imprisonment of	10	5
(c) Disagree	35	30	inmates could be spent on		
(d) Strongly disagree	25	17.5	improving the life of citizens such		
(e) Undecided	10	12.5	as building schools and		
		5	infrastructure		
Total	200		(e) All of the above	165	82.5
		100	Total		
				200	100
Lack of willingness of the judges or magistrates to impose community service sentence contribute to overcrowding of correctional centers in Nigeria			Community service sentence approach should be adopted in all crimes that carry less than three years		
			Yes	180	90
Yes	150	75			
			No	20	10
No	50	25			
			Total	200	100
Total	200	100			
Community service approach should			Imposition of imprisonment by the		

[112] SeeWorld Prison Brief Data: Nigeria dated July 2018. See also VOA News, Nigeria's Prisons Set to Undergo Long-Awaiting Reforms dated August 24, 2019; the ICPS World Prison Brief, Prison data, Ethiopia, available at: http:// www.prisonstudies.org/country/ethiopia accessed March 15, 2020.

be adopted in all crimes that carry imprisonment or option of fine			courts has not reduce the rate of crimes in Nigeria		
Yes	180	90	Yes	150	75
No	20	10	No	50	25
Total	200	100	Total	200	100
Factors that contributes to ineffective community service sentencing/increase in the imposition of imprisonment in Nigeria			If your answer to the question above is yes, do you agree that increase in the rate of crimes is due to non-rehabilitation of convicts in prisons/custodial cetres		
(a) Insufficient resources to support the implementation	10	5			
(b)Lack of capacity and personnel to supervise in the community	10	5	(a) Strongly agree	70	35
			(b) Agree	60	30
(c)Lack of collaborative network between non-governmental organizations and government for implementation	05	2.5	(c) Disagree	35	17.5
			(d) Strongly disagree	25	12.5
			(e) Undecided	10	5
(d) Unwillingness of the Judges/Magistrates to adopt community service sentencing even for minor offences	10	5	Total	200	100
(e) Mandatory minimum sentencing	05	2.5			
(f) Pressure exerted for imprisonment of offenders by the public remain the primary instruments of punishment in Nigeria	05	2.5	How will you rate the imposition of community service sentence process?		
			Good	45	22.5
(g) Negative public perception by regarding prisoners/inmates as outcasts hinder efforts in enforcing community service sentencing	05	2.5	Poor	150	75
			Undecided	05	2.5
(h) All of the above	150	75			
Total	200	100	Total	200	100
Designing and implementation of programmes which provide an opportunity for the convict to work the sentence off rather than being sent to prison can be adopted in enforcing community service sentence			Enforcement of community service sentence in criminal cases will boost Nigerian economy and enhance the welfare of citizens		
			Strongly agree	85	42.5
			Agree	70	35
	70	35	Undecided	05	2.5
(a) Strongly Agree	80	40	Disagree	25	12.5
(b) Agree	20	10	Strongly disagree	15	7.5
(c) Strongly disagree	25	12.5			
(d) Disagree	05	2.5	Total	200	100
(e) Undecided	200	100			
Total					

Enforcement of community service sentence will reduce overcrowding in the Nigerian correctional centres			Enforcement of community service sentence will curtail the spread of COVID-19 in the correctional centres		
Yes	150	75			
No	45	22.5	Yes	180	90
Undecided	05	2.5	No	20	10
Total	200	100	Total	200	100
Enforcement of community service sentence enhance social distancing which is the major approaches of limiting the spread of COVID-19 pandemic			COVID-19 pandemic creates awareness for the enforceability of community service sentence		
			(a) Strongly Agree	70	35
			(b) Agree	80	40
Yes	150	75	(c) Strongly disagree	20	10
No	45	22.5	(d) Disagree	25	12.5
Undecided	05	2.5	(e) Undecided	05	2.5
			Total	200	100
Total	200	100			
Enforcement of community service sentence is the only viable approach to complete non-custodial measures in compare to other approaches to punishment and sentencing			Enforcement of community service sentence by all the Nigerian Courts on minor cases during this period of COVID-19pandemic should be encouraged		
(a) Strongly Agree	70	35		180	90
(b) Agree	80	40	Yes	20	10
(c) Strongly disagree	20	10	No		
(d) Disagree	25	12.5		200	100
(e) Undecided	05	2.5	Total		
Total	200	100			
Refusal of some states to domesticate ACJA hinder the enforceability of community service sentence in Nigeria			Enactment of ACJL by all States of Federation will enhance the enforceability of community service sentence in criminal justice system		
Strongly agree	70	35			
Agree	80	40	Strongly agree	85	42.5
Undecided	20	10	Agree	70	35
Disagree	25	12.5	Undecided	05	2.5
Strongly disagree	05	2.5	Disagree	25	12.5
			Strongly disagree	15	7.5
Total	200	100	Total	200	100

4. CHALLENGES IN ADDRESSING THE NIGERIAN AND ETHIOPIAN PRISONS OR CORRECTIONAL CENTRES OVERCROWDING

Overcrowding in prisons or correctional centres all over the world, Nigeria and Ethiopia inclusive arises when the numbers of prisoners/inmates either awaiting trials, convicted or convicted but awaiting an appeal of their sentences are higher than the capacity of prisons or correctional centres to provide adequately and effectively for the physical and psychological needs of the prisoners/inmates. Arguably, overcrowding has become a major problem to the government as it leads to waste of public resources and to prisoners/inmates as it may threaten their rights to health, accommodation, health care and ventilation. It may also create conditions that places the inmates at high risk of contracting infectious diseases such as, COVID-19 pandemic due to poor hygiene, lack of staff supervision and poor medical

care.Author's fieldwork survey has confirmed this position where 85% of the key informants in table 4 hold the view that "there are lack of adequate medical health facilities and good hygiene in the prisons or correctional centres" and that "the identified common diseases in correctional centres give room for the spread of COVID-19". Reports on overcrowding are abounded in Nigeria and Ethiopia when the UN Special Rapporteur[113] reported that "the vast majority of detainees are held in detention awaiting trial or held without charge for lengthy periods, as long as 10 years" and according to Chirwa,[114] detention facilities in Ethiopia were found to be overcrowded where "some holding inmates more than twice their capacity". Chirwa's study further revealed that "in Regional Awasa Prisons in Ethiopia, more than 979 prisoners were being held in a facility with a capacity of 450 inmates" and "in Addis Ababa, nearly 70% of prison population was found not to have been sentenced, while in the Awasa prison, 87% of the prisoners were awaiting trial or sentencing". According to Egamberdi,[115] increase rate of infectious diseases and possible death in prisons or correctional centres due to overcrowding may also "have a significant impact on the levels of productivity, which in turn, affect the economy as the resources being expended on pretrial detainees could be more productively spent on building schools, health clinics and other critical infrastructure that would improve the quality of life of citizens". Instructively, overcrowding is a complex and multi-faceted issue which has many contributory factors all over the world. For example, in Nigeria and Ethiopia, some of the contributory factors are examined below:

4.1 Non-existence or failure to utilize non-custodial measures as an alternative to imprisonment contributes to overcrowding. Examples in Nigeria is the author's discussion of community service sentencing which ACJA has provided which is underutilized while in Ethiopia, there is absence of measures for adopting community service and the available partial measures under compulsory labour available under the Criminal Code is also underutilized. The findings from the author's fieldwork in Nigeria revealed the non-uniformity in the administration of criminal justice as almost 20 States of the federation are yet to domesticate ACJA in Nigeria while the old provisions of Criminal Procedure Code and Criminal Procedure Act which has no applicability of community service sentencing approach are still in operation in those States in question. In Ethiopia as well, many scholars such as Chirwa[116] have called for more usage of non-custodial measures such as diversion programs, provisions for bail, community service order among others in order to reduce prison overcrowding.

4.2 Inadequate budgetary allocation, mismanagement and obsolete criminal procedure create inefficiencies that result in poor case flow management and an overreliance on imprisonment which contribute to overcrowding in prisons or correctional centres in

[113]Nowak, M. 2008. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Addendum. Mission to Nigeria. 4 to 10 March*. http://www.unhcr.org/refworld/pdfid/4785d5042.pdfSee also, 2007b. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Mission to Nigeria. 4 to 10 March*. http://www.unhcr.org/refworld/pdfid/4785d5042.pdf

[114]Chirwa, V. M. 2004. *Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to the Federal Democratic Republic of Ethiopia, 15-29 March 2004.* http://www.arhpr.org/english/Mission_reports/ethopia/ Special%20Rap%20_Prisons_Ethopia.pdf

[115]Egamberdi, N. 2007. *HIV and Prisons in Sub-Saharan Africa: Opportunities for Action.* Vienna: United Nations Office on Drugs and Crime. http://www.data.unaids.org/pub/Report/2007/hiv_prison_paper_en.pdf

[116] Chirwa, V. M. 2004. *Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to the Federal Democratic Republic of Ethiopia, 15-29 March 2004.* http://www.arhpr.org/english/Mission_reports/ethopia/ Special%20Rap%20_Prisons_Ethopia.pdf

Nigeria and Ethiopia. For example, feeding and basic necessities are inadequate and rehabilitative programmes are very few. Studies have shown that as at 2018, budgeted cost of feeding for an inmate was three hundred Naira (N300) per day which is equivalent to less than one US Dollar (less than 1 USD).[117] Inadequate data and ineffective case files management process for inmates especially those inmates that have been grated bails by the court has been documented. According to a report from the interview at Anambra prisons, a prison authority disclosed thus:

> We do not have information regarding all the Awaiting Trial Persons that have been granted bail by the court because the information on their bail is not routinely provided by the court in all the cases, it is only endorsed in some of the Awaiting Trial Persons' warrants.[118]

Similarly, lack of comprehensive prison data for all those grated bail has also been documented as one of the notorious features of the prisons or correctional centres overcrowding in Nigeria and Ethiopia. For instance, a study carried out at Enugu Prisons in Nigeria buttress this position when the inmates in an administered questionnaire on the issue of whether or not they are aware of the bail granted by the court. The response goes thus:

> 45 of the Awaiting Trial Persons indicated that they had bail. Of this number, only 5 were among the 45 Awaiting Trial Persons whose prison records indicated that they had been granted bail. 20 out of them whose record indicated that they were on bail were not aware and the records of the remaining Awaiting Trial Persons did not show that they were on bail when they were in true sense grated bail by their respective courts.[119]

In a study conducted at Ethiopian Prisons by "the African Child Policy Forum",[120] limited resources are noticeable as the major problem in the Ethiopian prisons as it was revealed that "there are insufficient financial resources available for accommodation, health, education, services for counseling, qualified psychologist/psychiatrist and other services" as the prisoners are at the mercy of the NGOs. especially at the Addis Ababa and Jimma's Prisons in Ethiopia". The study further revealed that "lack of a complete and up to date record of detainees by relevant authorities has created a basic programming problem since intervention efforts by the government or other actors could not be properly designed without such information". It is therefore argued that management of prisons or correctional centres effectively will enhance the effective classification of inmates based on risk and needs in order to have a safe institutional environment and opportunity to treat those affected with the disease. This challenge is observed by many scholars[121] especially for juveniles who are confined in facilities with adults to be more at risk in addition to the risk of sexual assault and exploitation.

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[117] Francisca Anene and Laura Osayamwen, "Remembring the Forgotten: Benefits of Prison Education for Awaiting Trial Inmates in Nigeria. Pan-Commonwealth Forum, Edinburgh, 2019.

[118] Ibid. See also Premium Times Special Report: Inside Nigeria's Prisons where thousands languish for years without trial. Dated June 25, 2019.

[119] Otuu Fred and Shu Elvis, "Prevalent Diseases among Inmates in Three Federal Prisons in South-East Geographical Zone of Nigeria: A Peep into Environmental Factors" Journal of Environmental Science and Public Health, Volume 3, Issue 1, 2019.

[120] See the African Child Policy Forum, 2007 available at www.africanchildforum.org or www.africanchild.info

[121] See for instance, Sloth-Nielsen, J. 2008. "Children in African Prisons." In J. Sarkin, ed. *Human Rights in African Prisons*. Athens, Ohio: Ohio University Press. pp. 117-133.

4.3 Inadequate personnel, poor institutions, decaying infrastructure and logistic support are identified as some of the challenges facing the Nigerian and Ethiopian prisons or correctional centres. Prisons or correctional centres' facilities in both jurisdictions are antiquated and in need of replacements as all most of the facilities were built during the colonial eras.In an administered questionnaire by the author on the effectiveness of the three core institutions (Police/Ministry of Justice, Court and prisons or correctional centres) saddled with the responsibility of administration of criminal justice in Nigeria, majority of the key informants representing 50% rated police low followed by 25% that rated prisons or correctional centres low, Director of Public Prosecution (DPP) from the Ministry of Justice was rated 15% low while courts was rated 10% to be low. The African Child Policy Forum[122] in another interval of its study on the challenges of Ethiopian prisons revealed lack of adequate and qualified personnel in the administration of prisons in Ethiopia. It was revealed in its interview with a Psychologist who left Addis Ababa's prison that:

> Personnel such as judges, prosecutors, police, prison officials, psychologists often complained about the inadequacy of their salaries with respect to the workload and the living standard and due to low salary scales, few individuals with the required qualification would be willing to join the institutions.

This is argued to be one of the major factors contributing to the low stimulus and lack of commitment on the part of the officials towards their careers.

4.4 Refusal or stringent bail conditions and vulnerability of the poor inmates are also some of the challenges as poor inmates may be at high risk of not able to afford bail conditions while some may be vulnerable to being confined for inability to pay for fine imposed by the court upon conviction. Table 4 shows the response of 75% of the key informants who confirm this assertion that 60% of the inmates are those that are unable to pay fines imposed on them by the courts.

Another example is the report which revealed that:

> a large majority of respondents were not granted bail by the court and those that were granted bail could not perfect the bail condition because it was stringent, or they could not meet the conditions given by the court. Also, in the report, 32.5% of the respondents had bail granted while 67.5% of those that responded to the question were not granted bail. 81.4% of those granted bail could not perfect their bail and thus they continue to remain in prison custody despite the fact that they have been granted bail. Of this number, 67.7% indicated that they could not meet their conditions while 13.8% described their bail to be stringent.[123]

The study went further to reveal the situation in Kano Prisons thus:

> In kano, 71.8% were able to meet with the bail conditions while the remaining 28.2% were unable to meet with the bail conditions. Examples of the stringent bail conditions include the following: N50,000 to N2million and one to two sureties in like sum depending on the nature of offences; the sureties must be resident and/or owned landed property within the area of jurisdiction of the court; sureties must be a civil servant not below salary of Grade

[122] See the African Child Policy Forum, 2007 available at www.africanchildforum.org or www.africanchild.info
[123] PRAWA and NPS Nigerian Prisons Survey Report, Volume 1 Summary: A Research on Pre-Trial Detention in Nigeria. Dated February 1, 2018.

> level 13 or that a surety must deposit title documents of a landed property situated within the jurisdiction of the court or that one of the sureties must be ward or village head of the area where the accused reside. On the issue title documents most of the accused are from rural areas whose properties do not have a formal and verifiable title documents. Or the issue of village/ward head to be a surety, there is a recent order from the emirate council restraining traditional title holders from using their traditional title office to act as sureties.[124]

It was documented from the findings of Chirwa[125] in his study conducted at Ethiopia that

> there is lengthy period of incarceration without bail of the detainees on the basis of incomplete investigations by the police and there is no limit on the number of extensions requested as persons being detained were without charge in Ethiopia.

The implication of these positions is that, these set of Awaiting Trail Persons grated bails that are still in Nigerian correctional centres and those without charges being proffered against them at Ethiopia prisons will overcrowd the prisons or correctional centres cells and will pose threat to the remaining inmates which may increase the spread of COVID-19 pandemic.

4.5 Lockdown and Restriction of Movement Mechanisms for Preventing the Transmission of COVID-19 Pandemic is another challenge for prisons or correctional centres overcrowding. The World Health Organization declared the COVID-19 outbreak as a pandemic on the 11th March 2020 and recommended for temporary lockdown and restriction of movement of people all over the world.[126] In compliance with this directive, Nigerian and Ethiopian government directed the closure of boarders and impose lockdown and inter-state movement of persons within their respective country.[127] From the directive of the Nigerian government, the Chief Justice of Nigeria (CJN) ordered closure of judiciary in all the 36 States of the Federation and the Federal Capital Territory, Abuja on March 23 and April 8, 2020 vide a letter with reference numbers NJC/CIR/HOC/11/631 and NJC/CIR/HOC/11/656 addressed to all heads of courts, Federal and States Judiciaries tagged "Re: Preventive measures on the spread of Coronavirus (COVID-19) and the protection of Justices, Judges and Staff of Courts".

In a similar vein, the Ethiopian Supreme Court on March 18, 2020 ordered a partial closure of the courts and this was extended again on June 6, 2020 in order to halt the spread of COVID-19 pandemic. This is aimed at maintaining the safety of judges, court workers and community coming to courts.[128] To this end, these directives and orders of the courts have

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[124] Ibid

[125] Chirwa, V. M. 2004. *Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to the Federal Democratic Republic of Ethiopia, 15-29 March 2004.* http://www.arhpr.org/english/Mission_reports/ethopia/ Special%20Rap%20_Prisons_Ethopia.pdf

[126] See Update WHO recommendations for COVID-19 available online at https://www.who.int accessed April 20, 2020.

[127] Nigerian Federal Government made pronouncement for lockdown on April 1, 2020. See Authorities in Nigeria must uphold human rights in fight against COVID-19 available online at https://www.amnesty.org accessed April 20, 2020. In Ethiopia, the government has declared a state of emergency under Article 93 of the Constitution and has directed the closure of boarders and restriction of movement on April 8, 2020. See Ethiopia declares state of emergency to fight coronavirus available at https://www.aljazeera.com accessed April 20, 2020.

[128]See Ethiopian Supreme Court Extends Partial Closure of Courts over COVID-19 available online at https://www.apanews.net accessed on June 2, 2020.

halted the court proceedings and overcrowded the prisons or correctional centres as all inmates in Nigeria and Ethiopia were locked up including those that are about to be released on bails and those that are awaiting judgements which probably might have been favourable to them for their discharge and acquittal. The author has not lose sight on the release of prisoners/inmates done by the Nigerian and Ethiopian governemnts under the guise of the Constitutional provision on the proclamation of the state of emergency. However, the release of the prisoners' has not been seen as panacea to decongestion of prisons or correctional centres comparing with the enforcement of non-custodial measures. The later measure of non-custodial model can been viewed as a model for rehabilitation, reformation and deterrence to others intending to commit such crimes. Whereas, the former measure of release done by Nigerian and Ethiopian governments may aggravate the tendency of the prisoners for being recidivists.

Table 4: Perceptions of the Key Informants on the prisons or correctional **centres Overcrowding**

Perception of the Key Informants	**Frequency**	%	**Perception of the Key Informants**	**Frequency**	%
The existing laws and policies dealing with the category of offenders that should be committed to prisons are not explicit?			Were you aware that major sentencing in the criminal justice system range from fine, imprisonment or both, death penalty, probation, parole and community service?		
Strongly Agree	120	60			
Agree	60	30	Yes	130	65
Strongly disagree	08	4	No	70	35
Disagree	07	3.5			
Undecided	05	2.5			
Total	200	100	Total	200	100
Do you know these categories of crimes?			If your answer in above question is yes, which of the punishment or sentencing approach from the above is often imposed by the court?		
Felony Offence					
Misdemeanour Offence					
			(a) Fine	40	20
Simple Offence			(b) Imprisonment	130	65
			(c) Death penalty	15	7.5
Yes	150	75	(d) Community service	10	5
No	50	25	(e) Others	05	2.5
Total	200	100	Total	200	100
Were you aware that Misdemeanour and simple offences carries sentence less than three years?			Which of these is the major cause(s) of prisons or correctional centres overcrowding?		
				02	1
Yes	100	50	(a) Imprisonment	03	1.5
No	100	50	(b) Awaiting trials	05	2.5
			(c) Inability to pay fine imposed		
Total	200	100	by the courts	10	5
			(d) Lack of awareness about		

			community service sentence by the courts	180	90
			(e) All of the above	200	100
			Total		
Were you aware that Felony offences carries punishment of three years above?			Which of the following is a complete approach of non-custodial measures?		
			(a) plea bargain	10	5
Yes	80	40	(b) community service	185	92.5
No	120	60	(c) remand time limit	05	2.5
			(d) rejection of more intakes of	03	1.5
Total	200	100	inmates by State Controller of Correctional Service when correctional centres reach maximum capacities		
			Total	200	100
Category of offences committed by the inmates that are in prisons or correctional centres is			Category of inmates in correctional centres		
(a) Felony Offence	10	5			
(b) Misdemeanour Offence	10	5	60% of inmates are unable to	150	75
(c) Simple Offence	30	15	pay the fines imposed on them by the courts		
(d) All of the above	150	75			
	Total 200	100	40% are convicted for imprisonment	50	25
			Total	200	100
Inmates in prisons that are serving sentences are			Offences committed by the inmates that are in prisons or correctional centres reflect		
(a) 60% serving sentence that are less than three years imprisonment	150	75	(a) 75% of the offences are State offences	170	85
(b) 25% serving sentence that are more than three years imprisonment	30	15	(b) 20% of the offences are federal offences	25	12.5
			(c) 5% of the offences are local	05	2.5
(c) 10% are serving life imprisonment	15	7.5	offences		
(d) 5% inmates are convicted for death penalty	5	2.5			
			Total	200	100
Total	200	100			

There are lack of adequate medical health facilities and good hygiene in the prisons or correctional centres			Common diseases in prisons or correctional centres are		
			(a) Malaria	20	10
			(b) High blood pressure	05	2.5
(a) Strongly agree	150	75	(c) Skin infections	15	7.5
(b) Agree	30	15	(d) Fever	10	5
(c) Disagree	15	7.5	(e) Vomiting,	10	5
(d) Strongly disagree	5	2.5	(f) Severe headaches	12	6
			(g) Joint pains	08	4
Total	200	100	(h) All of the above	120	60
			Total	200	100
Rate of effectiveness of institutions of criminal justice system from the lowest			The identified common diseases in correctional centres give room for the spread of COVID-19		
(a) Police	100	50	(a) Strongly agree	150	75
(b) Ministry of Justice	30	15	(b) Agree	30	15
(c) Court	20	10	(c) Disagree	15	7.5
(d) prisons or correctional centres	50	25	(d) Strongly disagree	5	2.5
Total	200	100	Total	200	100
Congestion in the correctional centres' cells can aggravate the spread of COVID-19			Lack of qualified medical personnel can engender the spread of COVID-19 in the correctional centres		
(a) Strongly agree	150	75	(a) Strongly agree	130	65
(b) Agree	30	15	(b) Agree	60	30
(c) Disagree	15	7.5	(c) Disagree	15	7.5
(d) Strongly disagree	5	2.5	(d) Strongly disagree	5	2.5
Total	200	100	Total	200	100

5. COVID-19 AND IMPRISONMENT OF INMATES IN NIGERIAN AND ETHIOPIAN PRISONS OR CORRECTIONAL CENTRES

By July 2018, an estimated 74,000 inmates were imprisoned in Nigerian correctional centres out of which 70% were awaiting trials[129] and 104,467 prisoners as at 2010 were in Ethiopian Prisons.[130] It has been reported that between 2013-2014, Ethiopia prisons was the second highest prisons population in Africa which housed at 127 prisoners per 100,000 population.[131] Instructively, the offences that warranted the imprisonment of the inmates in

[129] World Prison Brief Data: Nigeria dated July 2018. See also VOA News, Nigeria's Prisons Set to Undergo Long-Awaiting Reforms dated August 24, 2019.

[130] See the ICPS World Prison Brief, Prison data, Ethiopia, available at: http:// www.prisonstudies.org/country/ethiopia.

[131] See the ICPS World Prison Brief, , Highest to Lowest - Prison Population Total, at: http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=15 accessed April 20, 2020.

both jurisdictions range from assaults, property and property related crimes which mostly carries one to less than three years imprisonment or an option of fines which the convicts were unable to pay. The regulatory framework examined in the previous section emphasizes the purpose of imprisonment of prisoners/inmates in prisons or correctional centres in Nigeria and Ethiopia which is to safeguard the society against crime and to reduce the rate of recidivism. The prisons or correctional centres are empowered to rehabilitate and reintegrate the prisoners/inmates into the society as law-abiding citizens during the period of their imprisonment.

However, the protracted nature of imprisonment and the resultant effect pose grave threats to reasonable standard of living for all the inmates and accelerate the spread of COVID-19 pandemic where the only available means of limiting the spread now are social and physical distancing. Instructively, it has been shown that reasonable standard of living for all inmates in the prisons or correctional centres entails the rights of inmates to suitable accommodation, feeding, potable water, good environmental hygiene, sewage disposal, clothing and toiletries etc. which flow from the right to adequate medical and health facilities.

From the Nigerian perspective, fieldwork by the author where majority of the key informants representing 78% in an administered questionnaire on the health condition of inmates at the Nigerian correctional centres revealed that "there are inadequate medical and health facilities in the correctional centres and poor hygiene and that there is no prompt medical attention in emergency cases". To buttress this position is the report[132] that shows that in 2016, 1451, 1056 and 364 prisoners were reported sick at Ikoyi in Lagos, Kano Central in Kano and Enugu prisons in Enugu States respectively.This situation is similarly observed by the Human Rights Watch[133] where it was reported thus:

> Nearly all the inmates described their cells that there is no enough room for all detainees to sit or lie down and that at night, detainees would sleep on their sides, packed one next to another. They further said, we were closed you couldn't put one finger between one person and the next. Sleeping arrangement were like razorblades in a pack, once in position, no one would be able to move or roll over until the morning. Some inmates said, they developed sores on their bodies from restricted movement and sleeping or sitting on hard floors for prolonged periods.

Another report revealed the overcrowdings of the Nigerian prisons thus:

> Kaduna Prison which has capacity for only 473 inmates, now has 1,480 prisoners; while Enugu Maximum Security Prison with capacity for 638, now has 2,077 prisoners. The Port Harcourt Maximum Security Prison has capacity for only 804 but currently has 4,576 locked up. Kirikiri Prison in Lagos has capacity for only 500 prisoners but now accommodates 1,601 prisoners.[134]

In support of these assertions is another response at another interval of the questionnaire administered by the author where 85% of the key informants alluded to the fact that "inmates suffer from malaria by describing symptoms that include high blood pressure, skin infections;

[132]Amnesty International, Nigeria: Detained Protesters Denied Medical Care dated August 19, 2019
[133] Human Rights Watch interview, Maiduguri, June 21, 2019
[134] Amnesty International 'Nigeria: Authorities must uphold human rights in fight to curb COVID-19' (1 April 2020). Available at: https://www.amnesty.org/en/latest/news/2020/04/nigeria-covid-19/ (accessed 28 April 2020).

fever, vomiting, severe headaches and joint pains". The study of Fred and Elvis corroborate the author's fieldwork where it was shown that:

> Malaria was the most prevalent disease with 81.06%, 77.67% and 73.33% at Federal Prisons in Enugu, Ebonyi and Anambra States under study followed by cough and catarrh at 63.79%, 68.67% and 60.0% respectively. Diarrhea, rashes, headache; hypertension/high blood pressure and sore throat/tuberculosis were revealed to be 42.90%, 43.67% and 37.44%; 58.77%, 59.27% and 58.97%; 47.08%, 30.67% and 39.49%; 41.23%, 15.67% and 20.0%; 28.41%, 36.67% and 18.97% respectively.[135]

Recent statements by the Vice President Yemi Osinbajo and Minister of Interior Abdulrahman Dambazau confirm the above assertions when the former lamented over the deplorable state of the country's prisons and denigration of the cruel care of the inmates, while the later states thus "there is no room for prisoners and anybody who goes into that place as a human being is coming out as an animal".[136]

From the Ethiopian perspective, it has been reported by the US State Department in 2017 that Ethiopian prisons were "unhealthy, unsanitary and they remained harsh and life-threatening".[137] According to this US State Department report, it has also been revealed that "sleeping quarters at the Ethiopian prisons are grossly overcrowded" Further, "one of the prisons in Asella with capacity for 400 prisoners housed 3,000 prisoners".[138] This was confirmed by the Penal Reform International that as at 2011, "the number of detainees at the Ethiopian Prisons has been risen from 55,000 to 93,000.[139] According to a report, "61.9% of the prisoners at Kaliti Federal Prisons in Addis Ababa, Ethiopia was reported to have high levels of mental distress"[140] this was confirmed from the report to be as a result of "prisons' overcrowding, lack of privacy, lack of meaningful activity, inadequate health services especially mental health services in prison, lack of social support, dissatisfaction before and after imprisonment, status of prisons"[141] among others. A recent survey conducted by Beyen et al. on the health condition of prisoners at Ethiopia Prisons revealed that "almost 17 out of 20 representing 83.4% of the total population of sampled prisoners were victims of psychological distress, 7 of every 20 representing 36.1% of them were at risk of anxiety while 5% of them were current smokers".[142]

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[135] Otuu Fred and Shu Elvis, "Prevalent Diseases among Inmates in Three Federal Prisons in South-East Geographical Zone of Nigeria: A Peep into Environmental Factors" Journal of Environmental Science and Public Health, Volume 3, Issue 1, 2019.

[136] See the statement of Vice President Yemi Osinbajo and Abdulrahman Dambazau on the Nigerian Prison Service. The Guardian Nigeria on the condition of Nigeria's Prisons dated February 19, 2018.

[137] See U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, ''Ethiopia, Human Rights Report,'' (2017), p. 3, at: https://www.state.gov/docu ments/organization/277243.pdf.

[138] Ibid

[139] Penal Reform International. Global prison trends 2015; special focus pull-out section drugs and imprisonment. 2015.

[140] World Health Organization. ECOSOC meeting addressing noncommunicable diseases and mental health: major challenges to sustainable development in the 21st century. World Health Organization; 2009. p. 1–32. See also, Ministry of Health of Ethiopia. A report of the assessment of the mental health system in Ethiopia using the World Health Organization- Assessment Instrument for Mental Health System (WHO-AIMS), Addis Ababa, Ethiopia. 2006.

[141] Ibid

[142] Teresa Kisi Beyen, Abel Fikadu Dadi; Berihun Assefa Dachew; Niguse Yigzaw Muluneh; and Telake Azale Bisetegn; "More than Eight in Every Nineteen Inmates were living with Depression at Prisons of Northwest Amhara Regional State, Ethiopia, A Cross Sectional Study Design" Journal of BMC Psychiatry (2017) 17:31

Tuberculosis was reported to be another major disease in Ethiopian prisons as "the number exceeds 3,000 per 100,000 prisoners, 163 new smear positives per 100,000 persons and a prevalence of 579 per 100,000 population".[143] Ethiopia was generally ranked "the 7th country in the whole world and 3rd highest African countries with tuberculosis disease in 2008".[144] Arguably, this disease poses threat to both prisoners and the communities where the prisons situated as this disease often involves resilient tensions in the country. This position was confirmed in another survey that "out of 15, 495 suspected prisoners tested for tuberculosis in 13 Prisons in Ethiopia, 765 representing 4.9% of them had tuberculosis".[145] In another survey at South, East and North Ethiopia prisons especially at Gamo Gofa, Hadiya; Bedele Woreda and North Gondar zones revealed the prevalence of tuberculosis disease where 8.9% out of 371, 19.4%; 1.83%; 21.9% out of 196; 8.0%; 10.4% out of 250; 8.9% and 12.3% out of 114 prisoners were tested positive for tuberculosis at different intervals.[146] A diagnosis report shows that tuberculosis disease can be easily contracted as "it spreads from person to person through air by droplet nuclei produced when a person with tuberculosis infection coughs, sneezes, talks or sings".[147] Another diagnosis report also revealed that "congregation places such as overcrowded prisons, close living conditions, insufficient ventilation, insufficient laboratory capacity and diagnostic tools, interrupted supply of medicines, inadequate infection control measures, poor healthcare services, night sweating and length of imprisonment"[148] were identified among others as commonest risk factors of tuberculosis.
Surmise the above with ClOVID-19, studies have shown that this virus can be contracted either through "direct contact with infected persons, contact with infected surfaces;

[143] See the Federal Democratic Republic of Ethiopia, "First Ethiopian National Population based Tuberculosis prevalence survey, Addis Ababa, Ethiopia," 2011.
[144] See D.Masoud,G.Malgosia,E.Michael,R.Harnan,andZ.Andrey, "Guidelines for control of Tuberculosis in prisons: Tuberculosis coalition for Technical Assistance and International committee of the Red Cross," 2009.
[145] S. Ali, A. Haileamlak, A.Wieseretal.,"Prevalence of Pulmonary Tuberculosis among Prison Inmates in Ethiopia, a Cross- Sectional Study," *PLoS ONE*, vol. 10, no. 12, Article ID e0144040, 2015 cited in Mucheye Gizachew Beza, Emirie Hunegnaw and Moges Tiruneh, "Prevalence and Associated Factors of Tuberculosis in Prisons Settings of East Gojjam Zone, Northwest Ethiopia" Hindawi International Journal of Bacteriology, 2017. See also, D.S. Abebe, G. Bjune, G. Ameni, D. Biffa and F. Abebe, "Prevalence of Pulmonary tuberculosis and Associated Risk Factors in Eastern Ethiopian Prisons". The International Journal of Tuberculosis and Lung Diseases. Vol. 15, No. 5, 2011. 668-673
[146] D. S. Abebe, G. Bjune, G. Ameni, D. Biffa, and F. Abebe, "Prevalence of pulmonary tuberculosis and associated risk factors in Eastern Ethiopian prisons," *The International Journal of Tuberculosis and Lung Disease*, vol. 15, no. 5, pp. 668–673, 2011. See also, Z. Zerdo, M. Girmay, W. Adane, and A. Gobena, "Prevalence of Pulmonary Tuberculosis and Associated Risk Factors in Prisons of Gamo Goffa Zone, South Ethiopia: A Cross-Sectional Study," *American Journal of Health Research*, vol. 2, no. 5, pp. 291–297, 2014; T. G. Fuge and S. Y. Ayanto, "Prevalence of smear positive pulmonary tuberculosis and associated risk factors among prisoners in Hadiya Zone prison, Southern Ethiopia Infectious Diseases," *BMC Research Notes*, vol. 9, no. 1, article no. 201, 2016; B. B. Winsa and A. E. Mohammed, "Investigation on Pulmonary Tuberculosis Among Bedele Woreda Prisoners, South- west Ethiopia," *International Journal of Biomedical Science and Engineering*, vol. 3, no. 6, pp. 69–73, 2015; F. Biadglegne, A. C. Rodloff, and U. Sack, "A first insight into high prevalence of undiagnosed smear-negative pulmonary tuberculosis in Northern Ethiopian Prisons: Implications for greater investment and quality control," *PLoS ONE*, vol. 9, no. 9, Article ID e106869, 2014; B. Moges, B. Amare, F. Asfaw et al., "Prevalence of smear posi- tive pulmonary tuberculosis among prisoners in North Gondar Zone Prison, northwest Ethiopia," *BMC Infectious Diseases*, vol. 12, article no. 352, 2012; Z. Addis, E. Adem, A. Alemu et al., "Prevalence of smear positive pulmonary tuberculosis in Gondar prisoners, North West Ethiopia," *Asian Pacific Journal of Tropical Medicine*, vol. 8, no. 2, pp. 127–131, 2015; M. Beyene, A. Bemnet, A. Fanaye, M. Andargachew, T. Belay, and K. Afework, "High prevalence and poor treatment outcome of tuberculosis in North Gondar zone prison, North west Ethiopia," *International Journal of Medicines and Medicines*, vol. 5, no. 9, pp. 425–429, 2013.
[147]See Department of Health, "National Tuberculosis Management Guideline, Republic of South Africa," 2014.
[148] T. G. Fuge and S. Y. Ayanto, "Prevalence of smear positive pulmonary tuberculosis and associated risk factors among prisoners in Hadiya Zone prison, Southern Ethiopia Infectious Diseases," *BMC Research Notes*, vol. 9, no. 1, article no. 201, 2016

respiratory droplets when an infected person coughs, sneezes or talks; air-bone transmission in poorly ventilated and non-sanitized spaces or through faecal contamination".[149] Studies have also shown that "COVID-19 virus survives longer and travel farther in the air of closed and poorly ventilated spaces like patients' bathrooms and doctors changing rooms"[150] etc. This shows that inmates are one of the groups that are most predisposed to COVID-19 infections and transmission due to closed and overcrowded nature of the cell units[151] at the Nigerian and Ethiopian prisons or correctional centres to wit COVID-19 can be contracted as social distancing which is a core mechanism for limiting the spread and preventing the transmission of COVID-19 is impracticable in these centres. More importantly, the diseases identified in Nigerian and Ethiopian prisons or correctional centres are some of the infections that can aggravate the spread of COVID-19 pandemic. More appalling is the response of respondents in an interview by the Human Rights Watch in Nigeria where 96% of them confirmed that "inmates excrete and urinate in their overcrowding cell units".[152] This is argued by the author that the situation exposes the inmates to the risk of transmission of the virus through contact with the faecal waste of infected inmate. This is in-tandem with the interview conducted by the International Centre for Investigative Reporting where some inmates at Kaduna Central Prisons, Kirikiri Minimum Prisons Lagos; Warri Prisons, Delta State and Kuje Prisons, Abuja lamented thus: "We have nothing to wash our toilet. All we use is ash to try and reduce the smell. I have not spent two weeks here without having one infection or the other".[153]

This analysis so far demonstrates that, despite all these efforts and developments in the administration of criminal justice in Nigeria, it continues to be unclear whether or not the enactments of the regulatory framework for reformation have been able to offer a panacea to the problems associated with punishment and sentencing approaches and this calls for re-think by evaluating the enforcement of community service sentence and addressing the overcrowding of the prisons or correctional centres in the next sections of this paper. This paper return to explore remedial actions in the concluding part.

CONCLUSION/RECOMMENDATIONS

It has been revealed in this paper that the current state of criminal justice system in Nigeria and Ethiopia is not effective as the outbreak of COVID-19 has exposed the flaws in the system of both jurisdictions. Imprisonment as the major approach to punishment and sentencing adopted in Nigeria and Ethiopia has not in any way reduce the rate of crimes. Also, there is no iota of report in this paper that shows that those convicts that were imprisoned in the prisons or correctional centres in Nigeria and Ethiopia have been successfully reformed and reintegrated back into the society. Whereas, studies, reports and author's fieldwork survey are abounded on the challenges encountered in the imposition of

[149]See for instance, Worldometer 'SARS-CoV-2 Transmission' (16 April 2020) available at https://www.worldometers.info/coronavirus/transmission/ (accessed 28 April 2020). See also Y Liu *et al* 'Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals' (2020) *Nature*available at https://www.nature.com/articles/s41586-020-2271-3_reference.pdf (accessed 28 April 2020).

[150]Y Liu *et al* 'Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals' (2020) *Nature*available at https://www.nature.com/articles/s41586-020-2271-3_reference.pdf (accessed 28 April 2020).

[151] Report has shown that in Nigeria, some prisons are 200 to 300 per cent over capacity. See Australian Government, Department of Foreign Affairs and Trade, DFAT Country Information Report: Nigeria dated March 9, 2018.

[152] Human Rights Watch interview, Maiduguri, June 21, 2019

[153]International Centre for Investigative Reporting, In Nigeria's Crowded Prisons, Inmates describe terrible feeding, sanitation. Dated July 9, 2019.

imprisonment of the convicts in both jurisdictions which calls for rethink of the administration of criminal justice. Therefore, this paper has questioned the imprisonment approach to punishment on how it can be sustained with this period of COVID-19 pandemic.

It is therefore recommended that the courts in both Nigeria and Ethiopia should rethink by changing from the imprisonment approach currently adopted to more reformative and rehabilitative approaches such as community service sentence that has the objective of not only reforming the convicts but also enhancing the economy and having the positive and cost-effective measure as against imprisonment. This position is in line with the studies of Davies et al., Redpath & Brandner who questioned the effectiveness of rehabilitation and deterrence approaches to punishment and sentencing that these approaches have high probability of convicts to re-offend after correctional rehabilitation.[154]

It is further recommended that community service sentence should be strengthened by domestication of ACJA by all the thirty-six States of the federation. This paper calls for proper guidelines and training of the stakeholders in the administration of criminal justice system in Nigeria in order to have full implementation of community service sentence. This assertion is in agreement with the views expressed by 75% of the Key informants in the administered questionnaire by the author as shown in table 3 above that "Designing and implementation of programmes which provide an opportunity for the convict to work the sentence off rather than being sent to prison can be adopted in enforcing community service sentence". Further, this paper recommends allocation of funds and employments of adequate personnel to supervise community service sentence.

In Ethiopia, studies and reports have shown that imprisonment approach cannot also be sustained in the wake of COVID-19 pandemic and as such there is much agitation for viable approach such as community service sentence. This is evident from the report in the study conducted by Chirwa in Ethiopia[155] that "the Ethiopia government should explore the development of alternative sentences to incarceration, including community service and government should consider creating special small claims courts or courts to hear the cases of persons charged with minor offences". It is the contention in this paper that had it been that the provision of compulsory labour in Ethiopian Criminal Code is adequately implemented and enforced, there will be likelihood of decongestion of prisons. This paper therefore calls for reform of the Ethiopian Criminal Code to include the community service sentence as same has been argued to be more viable for complete non-custodial measures in the administration of criminal justice system. In the interim, this paper recommends for the enforceability of compulsory labour pending the amendment of the Ethiopian Criminal Code.

[154] Davis, C., Bahr, S., & Ward, C. (2013). The process of offender reintegration: Perceptions of what helps prisoners reenter society. Criminology & Criminal Justice, 13(4), 446–469.

[155] Chirwa, V. M. 2004. *Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to the Federal Democratic Republic of Ethiopia, 15-29 March 2004.* http://www.arhpr.org/english/Mission_reports/ethopia/ Special%20Rap%20_Prisons_Ethopia.pdf

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

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አመልካች፡- ወ/ሮ ፍሬህይወት ገበየሁ
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መዘገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍርድ

ጉዳዩ በውጪ ሀገር የተሰጠ ፍርድ የሚፈፀምበትን አግባብ የሚመለከት ነው፡፡ አመልካች ለፌደራል ከፍተኛ ፍ/ቤት በቀን 19/07/2009 ዓ.ም ፅፈው ባቀረቡት የአፈፃፀም አቤቱታ የአሜሪካን የዱስትሪክት ፍ/ቤት በአመልካችና በተጠሪ መካከል የነበረውን የባልና ሚስት ፍቺና ንብረት ክፍፍል ክርክር መርምሮ እንደ አውሮፒውያን አቆጣጠር በቀን 1/02/2013 ዓ.ም በሰጠው ውሳኔ መሠረት ተጠሪ እንዲፈፅሙ ይወሰንልኝ በማለት ዳኝነት ጠይቀዋል፡፡

ፍርድ ቤቱም የአመልካችን አቤቱታ መርምሮ በውጪ ሀገር የተሰጠ ፍርድ በኢትዮጵያ ውስጥ እንዲፈፀም ሊሟሉ ከሚገባቸው ቅድመ ሁኔታዎች አንዱ እንዲፈፀም የተጠየቀውን ፍርድ የሰጠው ፍርድ ቤት የሚገኝበት ሀገር በኢትዮጵያ የተሰጠውን ፍርድ የሚፈፀም መሆኑ ሲረጋገጥ በመሆኑ ይህንኑ መሠረት በማድረግ የኢትዮጵያ ፍ/ቤቶች የሚሰጡት ውሳኔ በአሜሪካን ፍርድ ቤቶች የሚፈፀሙ ስለመሆን አለመሆኑ እንዲሁም ይህንኑ በተመለከተ የሁለቱ ሀገራት የሁለትዮሽ ስምምነት ስለመኖር አለመኖሩ ለፍ/ቤቱ እንዲገለፅ ለኢ.ፌ.ዲ.ሪ የውጪ ጉዳይ ሚኒስቴር በቀን 01/03/2010 ዓ.ም ትዕዛዝ ሰጥቶ በቀን 10/04/2010 ዓ.ም በተፃፈ ምላሽ በሁለቱ ሀገራት መካከል ፍርድን ለማስፈፀም የሚያስችል ስምምነት አለመኖሩ የተገለፀ በመሆኑና የኢትዮጵያ ፍርዶችም በአሜሪካን ሀገር የማይፈፀሙ ስለመሆኑ በቀን 27/04/2010 ዓ.ም በተፃፈ ደብዳቤ ከኢ.ፌ.ዲ.ሪ የውጪ ጉዳይ ሚኒስቴር ስለተገለፀ አመልካች ያቀረቡት የፍርድ ይፈፀምልኝ አቤቱታን አልተቀበልኩትም በማለት መዝገቡን ዘግቶታል ፡፡ በዚህ ውሳኔ ቅር የተሰኙት አመልካች ይግባኛቸውን ለፌደራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ይግባኝ ቢያቀርቡም የይግባኝ አቤቱታቸው ተቀባይነት ሳያገኝ ቀርቷል፡፡

ለዚህ ፍርድ መነሻ የሆነው የሰበር አቤቱታ የቀረበውም እነዚህ በስር ፍርድ ቤት የተሰጡትን ውሳኔዎች ለማስለወጥ ነው፡፡ አመልካች በጠበቃቸው አማካኝነት ሐምሌ 18 ቀን 2010 ዓ.ም በተፃፈ 03 ገፅ የሰበር አቤቱታ በስር ፍርድ ቤቶች ተፈፅመዋል ያሏቸውን ስህተቶች ዘርዝረው በማቅረብ እንዲታረሙላቸው ጠይቀዋል፡፡ የአመልካች የሰበር አቤቱታ ይዘት በአጭሩ የስር

ከፍተኛ ፍ/ቤት በሁለቱ ሀገሮች መካከል የአንዱን ሀገር ፍርድ እንዴት እንደሚፈፀም የጋራ ስምምነት የለም ተብሎ ተረጋግጦ እያለ በተዘረጋለት ስርዓት ጉዳያችንን ሊያስተናግድ ሲገባ "የተለየ ስምምነት ከሌለ ..." የሚለውን ሀረግ በስህተት በመተርጎም ፍርድ ሊፈፅም አይገባም በማለት መወሰኑ ተገቢነት የሌለው በመሆኑ ሊታረም ይገባዋል የሚል ነው።

ጉዳዩም በሰበር አጣሪው ተመርምሮ አመልካች በአሜሪካን ሀገር ፍ/ቤት የተሰጠዉን ዉሳኔ መሠረት አድርገው በኢትዮጵያ ፍ/ቤት ያቀረቡት የአፈፃፀም ክስ በሁለቱ ሀገራት መካከል ፍርድን ለማስፈፀም የሁለትዮሽ ስምምነት የለም ተብሎ ውድቅ የመደረጉን አግባብ ከፍ/ብ/ስ/ስ/ህ/ቁ. 256 እና ተከታዮቹ አንፃር ለማጣራት መዝገቡ ለሰበር ችሎት ቀርቧል። በጉዳዩ ላይ አመልካች መልስ እንዲሰጥበት በጋዜጣም ጭምር ጥሪ ቢደረግለትም ሊቀርብ ባለመቻሉ መልስ የማቅረብ መብታቸው ታልፎ ክርክሩ በሌለበት እንዲቀጥል ትዕዛዝ ተሰጥቷል።

የጉዳዩ አመጣጥ እና የክርክሩ ይዘት አጠር ባለ መልኩ ከላይ የተገለፀውን ሲመስል ይህ ችሎትም የአመልካችን የሰበር አቤቱታ በሰበር አጣሪ ችሎት ከተያዘው ጭብጥና ከተገቢው የህጉ ድንጋጌዎች ጋር በማገናዘብ በሚከተለው መልኩ መርምሮታል። ከፍ ሲል እንደተገለጸዉ ይህ ጉዳይ በዉጭ አገር የተሰጠ ፍርድ የሚፈፀጸምበትን ሁኔታ የሚመለከት ነዉ። በፍ/ብ/ሥ/ሥርዓት ህጉ የተመለከተው የፍርድ አፈጻጸም ጉዳይ በሁለት ዓብይት ምዕራፎች የተመለከተ ሲሆን፣ በምዕራፍ 1 ላይ የተመለከተው በኢትዮጵያ ግዛት ውስጥ የተሰጠን ፍርድ በማስፈፀም ረገድ ተፈጻሚነት ያላቸው ድንጋጌዎች ሲሆን፣ በምዕራፍ 2 (ከፍ/ብ/ሥ/ሥ/ሕ/ቁ 456 እስከ 461 የተጠቀሱት ድንጋጌዎች) ደግሞ በውጭ ሀገር የተሰጠ ፍርድ ወይም ብይን የሚፈፀምበትን ሁኔታ የሚመለከቱ ናቸው። በዉጭ አገር የተሰጠን ፍርድ በኢትዮጵያ ፍርድ ቤቶች ከማስፈጸም ጋር በተያያዘ መሠረቱ (principle) በህጉ አንቀጽ 456 ላይ የተመለከተ ሲሆን፣ በዚህ አንቀጽ ንዑስ ቁጥር 1 ላይ የተመለከተዉ ድንጋጌ 'በኢንተርናሲዮናል ስምምነት በተለየ እንዲፈጸም የሚደረግ ልዩ ህግ ከሌለ በቀር ከኢትዮጵያ ዉጪ የተሰጠ የፍርድ ዉሳኔ ወይም ብይን የሚፈጸመዉ በዚህ ህግ በተመለከተዉ ድንጋጌ መሠረት ነዉ" በማለት የሚያስቀምጥ ሲሆን፣ የድንጋጌዉ የእንግሊዘኛ ትርጉምም 'Unless otherwise expressly provided by international law conventions, foreign judgments may not be executed in Ethiopia except in accordance with the provisions of this chapter" በማለት ያስቀምጣል። የዉጭ አገር ፍርድ በኢትዮጵያ ፍርድ ቤቶች ሊፈጸሙ የሚችሉባቸዉ ሁኔታዎችም በህጉ አንቀጽ 458 ላይ ተመልክተዋል። እነዚህም ሁኔታዎች እንዲፈጸም የተጠየቀዉን ፍርድ የወሰነዉ ፍርድ ቤት የሚገኝበት አገር በኢትዮጵያ የተሰጠዉን ፍርድም የሚያስፈጽም መሆኑ ሲረጋገጥ፤ ፍርዱ የተሰጠዉ በህግ በተቋቋመ ፍርድ ቤት መሆኑ ሲታወቅ፤ የፍርድ ባለዕዳዉ ቀርቦ መቃወሚያዉን ለማሰማት መብት የተሰጠዉ መሆኑ ሲረጋገጥ፤ ፍርዱ የመጨረሻና ተፈፃሚነት ያለዉ መሆኑ ሲታወቅ እና የፍርዱ መፈጸም ለህዝብ ሞራልና ጸጥታ ተቃራኒ ያለመሆኑ ሲታወቅ ስለመሆኑ በድንጋጌዉ ላይ ከተቀመጡት ድንጋጌዎች መረዳት ይቻላል።

ከእነዚህ ሁሉ መገንዘብ የሚቻለዉ፣ በዉጭ አገር የተሰጠ ፍርድ በኢትዮጵያ ፍርድ ቤቶች ሊፈጸም የሚችለዉ በመርህ ደረጃ በኢትዮጵያ እና ፍርዱን በሰጠዉ ፍርድ ቤት አገር መካከል ይህን አስመልክቶ የተደረገ ስምምነት (bilateral agreement) መኖሩ ሲረጋገጥ ሲሆን፣ በልዩ ሁኔታ በህጉ አንቀጽ 458 ስር የተመለከቱት ቅድመ ሁኔታዎች ተሟልተዉ ሲገኙ ነዉ። በመሆኑም በህጉ አንቀጽ 458 የተመለከቱት ቅድመ ሁኔታዎች መሟላታቸዉ ከተረጋገጠ ምንም እንኳ የዉጭ አገር ፍርድ የሚፈጸምበትን ሁኔታ በተመለከተ የተደረገ የሁለትዮሽ ስምምነት ባይኖርም፣ የኢትዮጵያ ፍርድ ቤቶች ፍርድን ተቀብለዉ ማስፈጸም የሚችል መሆኑን ነዉ። ስለሆነም በዉጭ አገር የተሰጠን ፍርድ እንዲያስፈጽም ዳኝነት የቀረበለት የኢትዮጵያ ፍርድ ቤት በቅድሚያ እንዲያጣራ የሚጠበቅበት ለአፈፃፀም የቀረበዉን ፍርድ በሰጠዉ ፍርድ ቤት አገር እና በኢትዮጵያ መካከል የፍርድ አፈፃፀምን አስመልክቶ የተደረገ የሁለትዮሽ ስምምነት መኖር አለመኖሩን፣ ስምምነት የሌለ መሆኑ ከተረጋገጠ በህጉ አንቀጽ 458 ሊይ የተመለከቱት ቅድመ ሁኔታዎች የተሟለ መሆን አለመሆኑን ነዉ።

ወደ ተያዘዉ ጉዳይ ስንመለስ፣ ከፍ ሲል እንደተገለጸዉ፣ የስር ከፍተኛ ፍርድ ቤት በአመልካች የቀረበዉን የአፈፃፀም ጥያቄ ዉድቅ ያደረገዉ፣ ከፍርድ አፈፃፀም ጋር በተያያዘ በኢትዮጵያ እና በአሜሪካን ሀገር መካከል የተደረገ የሁለትዮሽ ስምምነት አለመኖሩንና በኢትዮጵያ የተሰጡ ፍርዶች በአሜሪካ የማይፈጸሙ ስለመሆኑ የኢፌዲሪ የዉጭ ጉዳይ ሚኒስቴር ከጻፈለት ደብዳቤ ማረጋገጡን ነዉ። ይሁንና ከላይ እንደተገጸዉ የሁለትዮሽ ስምምነት መኖር ብቸኛዉ ቅድመ ሁኔታ አይደለም። በመሆኑም የአሜሪካን አገር ፍርድ ቤቶች በኢትዮጵያ የተሰጡትን ፍርዶች የሚፈጽሙ መሆን ያለመሆኑን ጨምሮ ሌሎች በህጉ አንቀጽ 458 ላይ የተጠቀሱት ቅድመ ሁኔታዎች በተጨባጭ ማስረጃ ሊረጋገጡ የሚገባቸዉ ናቸዉ። የአሜሪካን አገር ፍርድ ቤቶች በኢትዮጵያ የሚሰጡትን ፍርድ የሚፈጽሙ መሆን ያለመሆኑና ሌሎች በህጉ የተመለከቱት ሁኔታዎች ፍርድ ቤቱ የአፈፃፀም አቤቱታዉን ተቀብሎ ለማስተናገድ ስልጣን ያለዉ መሆን ያለመሆኑን በመወሰን ረገድ ሊረጋገጡ የሚገቡ መሠረታዊ የፍሬ ነገር ጭብጦች በመሆናቸዉ እና ፍሬ ነገሩን ለማስረዳት ሊቀርብ የሚገባዉ የማስረጃ ዓይነት በህግ ተለይቶ የተወሰነ እስካልሆነ ድረስ፣ ፍርድ ቤቱ ማናቸዉንም ማስረጃ በማስቀረብ እና በመመርመር እነዚህን ፍሬ ነገሮች የማረጋገጥ ኃላፊነት ይኖርበታል። ይህ በመሆኑም የስር ከፍተኛ ፍርድ ቤት እነዚህን ፍሬ ነገሮች በዚህ መልኩ አጣርቶ መወሰን ሲገባዉ፣ ከኢፌዲሪ የዉጭ ጉዳይ ሚኒስቴር የቀረበዉን ደብዳቤ ብቻ መሠረት በማድረግ የሰጠዉ ትዕዛዝ መሠረታዊ የህግ ስህተት የተፈጸመበት ሆኖ ተገኝቷል። ስለሆነም ተከታዩ ዉሳኔ ተሰጥቷል።

ዉ ሳ ኔ

1. የፌዴራል ከፍተኛ ፍርድ ቤት በመ/ቁጥር 193868 በቀን 14/06/2010 ዓ.ም በዋለዉ ችሎት እንዲሁም የፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት በመ/ቁጥር 156444 በቀን 30/08/2010 ዓ.ም በዋለዉ ችሎት የሰጡት ትዕዛዝ በፍ/ብ/ሥ/ሥርዓት ህጉ አንቀጽ 348(1) መሠረት ተሽረዋል።

2. የፌዴራል ከፍተኛ ፍርድ ቤት ተዘግቶ የነበረዉን መዝገብ በማንቀሳቀስ፣ የአሜሪካን አገር ፍርድ ቤቶች በኢትዮጵያ የተሰጠዉን ፍርድ የማስፈጸም ልምድ ያላቸዉ መሆን ያለመሆኑን ሌሎች በህጉ አንቀጽ 458 ሊይ የተመለከቱትን ሁኔታዎች አመልካች በሚያቀርቡትና ስለጉዳዩ ማስረዳት የሚችል ማንኛዉንም ማስረጃ በማስቀረብ እና በመመርመር ተገቢ ነዉ የሚለዉን ዉሳኔ እንዲሰጥ መዝገቡ በፍ/ብ/ሥ/ሥርዓት ህጉ አንቀጽ 343(1) መሠረት ተመልሶለታል፡፡

3. በዚህ ችሎት የተደረገዉ ክርክር ያስከተለዉን ወጪና ኪሳራ ግራ ቀኝ የየራሳቸዉን ይቻሉ፡፡

መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰ.መ.ቁ 179416

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

ሰኔ 23 ቀን 2012 ዓ.ም

ዳኞች፡- እትመት አሠፋ
ፀሐይ መንክር
ኑረዲን ከድር
መላኩ ካሣዬ
እስቲበል አንዱዓለም

አመልካች፡- ሀለቃ ንጉሴ አብርሃ

ተጠሪ፡- የትግራይ ክልል ፍትሕ ቢሮ

መዝገቡ ለምርመራ የተቀጠረ ነው፡፡ በመሆኑም መርምረን ተከታዩን ፍርድ ሰጥተናል፡፡

ፍርድ

የሰበር አቤቱታው ሊቀርብ የቻለው አመልካች ሰኔ 07 ቀን 2011 ዓ.ም ጽፈው ባቀረቡት የሰበር አቤቱታ በትግራይ ብሔራዊ ክልላዊ መንግስት የቃፍታ ሁመራ ወረዳ ፍ/ቤት በመ.ቁ 1800/11 በቀን 16/07/2011 ዓ.ም አመልካች በሕግ እንደሚፈለግ አውቆ ሆነ ብሎ ሲደበቅ የነበረ እና ሕግን በተከተለ የመጥሪያ ስነ ስርዓት መጥሪያ የተላከለት መሆኑ ስለተረጋገጠ ጉዳዩ ደግም እንዲታይለት ያቀረበው አቤቱታ ተገቢ አይደለም ሲል የሰጠው ውሳኔ፤ ይህንኑ ውሳኔ በማጽናት የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ 115243 ሚያዚያ 28 ቀን 2011 ዓ.ም የሰጠው ትዕዛዝ መሠረታዊ የሕግ ስሕተት የተፈጸመበት በመሆኑ ሊታረም ይገባል በማለት አቤቱታ በማቅረባቸው ነው፡፡

ጉዳዩ በሌለሁበት ታይቶ የተሰጠ ውሳኔ ይነሳልኝ በሚል የቀረበን አቤቱታ የሚመለከት ነው፡፡ አመልካች በስር ፍ/ቤት ባቀረቡት አቤቱታ በቃፍታ ሁመራ ቀበሌ ዓዲሹሁ ነዋሪና ባለትዳር እና ገበሬ መሆናቸውን፤ ወንጀል ፈጽመዋል ተብለው ወደ ሕግ አካል ቀርበው የማያውቁ መሆኑን፤ የመጥሪያ ትዕዛዝ ሳይሰጣቸው በስርቆት ወንጀል የአራት ዓመት ፍርደኛ ነህ ተብለው በቀን 25/06/2011 ዓ.ም ከመኖሪያ ቤታቸው በፖሊስ የተያዙ መሆኑን በመግለጽ ከሕግ ውጪ በሌለሁበት ታይቶ የተሰጠው ውሳኔ ተነስቶ ጉዳያቸው ባሉበት እንዲታይ ይወሰንላቸው ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡

ተጠሪ በሰጠው መልስ አመልካች የተከሰሱበት የወንጀል ሕግ አንቀጽ 669/3/ለ ድንጋጌ በወ/መ/ሥ/ሥ/ሕ/ቁ 162 መሠረት በሌሉበት መታየት የሚችል መሆኑን፤ በፖሊስ መጥሪያ እንዲቀርቡ ታዘ ሊቀርቡ ያልቻሉ መሆኑን፤ በአድራሻቸው እንደሌሉ የሚገልጽ ማስረጃ

አመልካች ከሚገኙበት አድራሻ የቀረበ መሆኑን፤ በጋዜጣ ጥሪ ተደርጎላቸውም ስላልቀረቡ ጉዳያቸው በሌሉበት ታይቶ ውሳኔ ያገኘ መሆኑን በመግለጽ አቤቱታው ውድቅ ሊደረግ ይገባል በማለት ተከራክሯል፡፡

ፍ/ቤቱም ጉዳዩን መርምሮ አመልካች በተደጋጋሚ እንዲያቀርቡ ታዘ በአድራሻቸው እንደሌሉ ማስረጃ ቀርቧል፤ በመቀጠልም በመቃልህ ጋዜጣ ጥሪ ተደርጎላቸው ሊቀርቡ አልቻሉም፤ አመልካች በክሱ ላይ በተገለጸው እና መደባይ ዛና ወረዳ ቀበሌ ዓዲ ጸጉራ ቀጠና ወይና አምባ በሚባለው አድራሻ እንዳለ እና ለግዜው ተሰውረው እንደነበር የሚገልጽ ማስረጃ ከቀበሌው ጸጥታ አስተዳደር ቀርቧል፤ ይህ ማረጋገጫም አመልካች በሕግ የሚፈለጉ መሆኑን እያወቁ ሆን ብለው ሲደበቁ እንደነበረ የሚያሳይ ነው፤ ዓዲ ጎሹ በሚባል ቦታ ነው የነበርኩት በማለት የሚከራከሩ ቢሆንም ማስረጃ አላቀረቡም፤ ለአመልካች የደረሰው መጥሪያ ሕግን የተከተለ የመጥሪያ ስነ ስርዓት በመሆኑ አቤቱታቸው ተቀባይነት የለውም በማለት ውድቅ አድርጎታል፡፡ አመልካች ይህን ውሳኔ በመቃወም ለክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቤቱታ ያቀረቡ ቢሆንም አቤቱታቸው በትዕዛዙ ውድቅ ተደርጓል፡፡

የሰበር አቤቱታው የቀረበው ይህን ውሳኔ በመቃወም መሠረታዊ የሕግ ስሕተት ተፈጽሞበታል በሚል ሲሆን ይዘቱም፡- አመልካች ገበሬ ባለትዳር እና የልጆች አባት መሆኔ በስር ፍ/ቤት ተረጋግጧል፤ አመልካች በወንጀል ጥፋተኛ መባሌን ያወቅኩት በቀን 25/06/2011 ዓ.ም በፖሊስ ከተያዛኩ በኋላ ነው፤ ከዚህ ቀን በፊት ለመርማሪ ፖሊሰ የሰጠሁት ቃል የለም ክስ እንደቀረበብኝ አልተነገረኝም፤ በምኖርበት አካባቢም የተለጠፈ መጥሪያ የለም፤ አመልካች በመርማሪ ፖሊስ ፊት ቀርቤ ትክክለኛ ስሜን እና አድራሻዬን ባልሰጠሁበት ሁኔታ እና ትክክለኛ ስሜም አለቃ ንጉሰ አብርሃ ተክለ አብዝጊ ሆኖ ሳለ አቶ ንጉሰ አብርሃ ተክሉ ተብሎ በመቃልህ ጋዜጣ መታወጁ አግባብ አይደለም፤ በስር ፍ/ቤት የተሰጠው ፍርድ አመልካችን የሚመለከት መሆኑ ሳይረጋገጥ በሌለሁበት የተሰጠው ፍርድ ተነስቶ ጉዳዩ ባለሁበት እንዲታይ ያቀረብኩትን አቤቱታ ውድቅ በማድረግ የተሰጠው ውሳኔ መሠረታዊ የሕግ ስሕተት የተፈጸመበት በመሆኑ በሰበር ታይቶ ሊታረም ይገባል የሚል ነው፡፡

የአመልካች የሰበር አቤቱታ ተመርምሮ አመልካች በተጠቀሰው አድራሻ የሚገኝ ስለመሆኑ ፖሊስ ቃል ከሰጠ ያስመዘገበው አድራሻ ስለመኖሩ እንዲሁም በአድራሻው የማይገኝ ከሆነም ማረጋገጫ እንዲቀርብ ሳይደረግ፤ የጋዜጣ ጥሪውም በአመልካች ማመልከቻ በተጠቀሰው አግባብ ስለመደረጉ ሳይረጋገጥ ጉዳዩ በሌለበት እንዲታይ መደረጉ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ 942277 ከሰጠው ውሳኔ ጋር በማገናዘብ ለመመርመር ሲባል ጉዳዩ በዚህ ችሎት እንዲታይ ተደርጓል፡፡ ለተጠሪ ጥሪ ተደርጎም ግራቀኙ በጽሑፍ እንዲከራከሩ ተደርጓል፡፡

የተጠሪ መልስ ይዘት በአጭሩ፡- ስነ ስርዓቱ በሚያዘው መሠረት መጥሪያ ለአመልካች እንዲደርሰው ተደጋጋሚ ትዕዛዝ ለፖሊስ ተልኳል፤ ፖሊስ ለፍ/ቤቱ በሰጠው ምላሽ አመልካች በአድራሻው እንደሌለ እና ሊያቀርቡት እንደማይችሉ በመግለጽ ምላሽ በመስጠቱ በጋዜጣ እንዲጠራ ተደርጓል፤ አመልካች በጋዜጣ ተጠርቶ ስላልቀረበ ጉዳዩ በሌለበት ታይቷል፤ አመልካች በአድራሻው የነበረ መሆኑን በማስረጃ አላረጋገጠም፤ አመልካች በሌለበት ጉዳዩ

ታይቶ የተሰጠው ውሳኔ የመጥሪያ አሰጣጥ ስርዓትን የተከተለ በመሆኑ የስር ፍ/ቤቶች የአመልካችን አቤቱታ ውድቅ በማድረግ የሰጡት ውሳኔ ሊጸና ይገባል የሚል ነው፡፡ አመልካችም የሰበር አቤቱታቸውን በማጠናከር የመልስ መልስ ሰጥተዋል፡፡

የጉዳዩ አመጣጥ በአጭሩ ከላይ የተገለጸው ነው፡፡ ይህ ችሎትም በሰበር አጣሪ ችሎት ለተያዘው ጭብጥ ምላሽ ከመሰጠቱ በፊት ከመነሻውም ቢሆን አመልካች የተከሰሱበት የወንጀል ሕግ አንቀጽ 669/3/ለ በሌሉበት የሚታይ ነው ወይስ አይደለም የሚለውን ጭብጥ በመያዛ ጉዳዩን እንደሚከተለው መርምሮታል፡፡

በመሠረቱ የተከሰሱ ሰዎች በሕግ ከተጠበቁላቸው መብቶች መካከል አንዱ የተከሰሱበት ጉዳይ በፍርድ ቤት ሲታይ በችሎት ተገኝቶ የቀረበባቸውን ማስረጃ የመመልከት፣ የቀረበባቸው ምስክሮችን የመጠየቅ፣ ለመከላከል የሚያስችላቸውን ማስረጃ የማቅረብ ወይም የማስቀረብ እንዲሁም ምስክሮቹ ቀርበዉ እንዲሰመላቸው የመጠየቅ መብት ነዉ፡፡ ኢትዮጲያ የተቀበለችው ዓለም አቀፍ የሲቪል እና የፖለቲካ መብቶች ስምምነት አንቀጽ 14 ድንጋጌም የተከሰሱ ሰዎች ፍትህ የማግኘት እና በገለልተኛ ፍ/ቤት የመዳኘት እና በአካል ተገኝቶ የመከራከር መብት እንዳላቸው ይደነግጋል፡፡

ከላይ የተመለከቱት ድንጋጌዎች እንደተጠበቁ ሆነው በልዩ ሁኔታ በግልጽ በሕግ ከተመለከቱትና ከተፈቀዱት በስተቀር በመርህ ደረጃ የወንጀል ክስ የሚታየዉም ሆነ ክርክር ተደርጎ ዉሳኔ የሚሰጠዉ ተከሳሽ በችሎት በተገኘበት ነዉ፡፡ በልዩ ሁኔታ ሕግ ፈቅዶ ጉዳዩ ተከሳሽ በሌለበት የሚታየዉም ከአሥራ ሁለት ዓመት በማያንስ ጽኑ እሥራት የሚያስቀጡ ወይም በመንግስት ኢኮኖሚ ሊይ የሚፈጸሙ ወንጀሎች ሆነዉ በጽኑ እስራት ወይም ከብር 5,000 በላይ የሚያስቀጡ ከባድ ወንጀሎችን የሚመለከቱ ወንጀሎችን ብቻ ስለመሆኑ ከወ/መ/ሕ/ሥ/ሥ/ቁ 162(2) ድንጋጌ ይዘት መገንዘብ ይቻላል፡፡ ሕጉ እነዚህን ወንጀሎች አስመልክቶ በልዩ ሁኔታ ተከሳሽ በሌለበት እንዲታዩ የፈቀደበትና አብዙኛዎችን ወንጀሎች ተከሳሽ እስካልተገኘ ድረስ ወይም በአግባቡ መጥሪያ ደርሶት በችሎት ቀርቦ የመከራከር መብቱን እስካልተወ ድረስ ጉዳዩ እንዳይታይ የተደነገገበት ዓላማ በአንድ በኩል ተከሳሽ ከባድ ወንጀል ፈጽሞ ከፍትሕ በመሠወሩ የወንጀል ተጎጂዎችን ፍትሕ የማግኘት መብት ለማረጋገጥ ሲሆን በሌላ በኩል ደግሞ ሕጉ ለይቶ ባስቀመጣቸው ከባድ ወንጀሎች ውጪ ባሉት ጉዳዮች የተከሳሽ በችሎት ተገኝቶ የመከራከር መብት ከሚጣስ ይልቅ ተከሳሽ እስኪገኝ ድረስ የፍርድ ሂደቱ እንዳይካሄድ ስለመሆኑ ከላይ በዝርዝር ከተደነገጉት ድንጋጌዎች ይዘት መገንዘብ ይቻላል፡፡

በያዝነው ጉዳይ አመልካች የተከሰሱበት የወንጀል ሕግ አንቀጽ 669/3/ለ ድንጋጌ ከአንድ ዓመት በማያንስ ቀላል እሥራት ወይም ከአሥራ አምስት ዓመት የማይበልጥ ጽኑ እሥራት የሚያስቀጣ ነው፡፡ ይህ ድንጋጌ አማራጭ ቅጣቶችን የያዘ ሲሆን በዚህ ድንጋጌ መሠረት ክስ የቀረበበት ተከሳሽ አንድም በቀላል እሥራት አልያም በአማራጭ ከተቀመጠው የጽኑ እሥራት ቅጣት ከ12 ዓመት በታች ወይም ከአሥራ ሁለት ዓመት በላይ በሆነ ጽኑ እሥራት ሊቀጣ እንደሚችል እንገነዘባለን፡፡ በመሆኑም በዚህ ድንጋጌ መሠረት የተከሰሰ ተከሳሽ አስመልክቶ ተመራጭ የሚሆነው የፍርድ ሂደት የወንጀል ተጎጂዎችን ፍትሕ የማግኘት መብት ለማረጋገጥ

ሲባል ከአሥራ ሁለት ዓመት በላይ በሆነ ጽኑ እሥራት ሊቀጣ እንደሚችል ከወዲሁ ግምት በመውሰድ ጉዳዩን በሌለበት ማየት ነው? ወይስ የተከሳሽ በችሎት ተገኝቶ የመከራከር መብት ከሚጣስ ይልቅ ተከሳሽ እስኪገኝ ድረስ የፍርድ ሂደቱ እንዳይካሄድ ማድረግ? የሚለው በጥንቃቄ ታይቶ ምሊሽ ሊሰጠው ይገባል።

በአካል ፍ/ቤት ተገኝቶ የመከራከር መብት ለተከሰሱ ሰዎች በሕገ መንግስቱ አንቀጽ 20/4 እና ኢትዮጲያ በተቀበለችው ዓለም አቀፍ የሲቪል እና የፖለቲካ መብቶች ስምምነት አንቀጽ 14 ላይ የተጠበቀላቸው መሠረታዊ መብት በመሆኑ፤ አመልካች የተከሰሱበት የወንጀል ሕግ አንቀጽ 669/3/ለ ከባድ የስርቆት ወንጀል ሕግ አውጪው ሊያሳካው ያሰበው ልዩ ዓላማ ኖሮት ለብቻው የሕግ ማዕቀፍ የወጣለት ሳይሆን በመደበኛው የወንጀል ሕግ የተደነገገ በመሆኑ፤ ይህ ድንጋጌም አማራጭ ቅጣቶችን የያዘ በመሆኑ፤ በዚህ ድንጋጌ መሠረት አመልካች ጥፋተኛ ቢባሉ በቀላል እሥራት፤ ከ12 ዓመት በታች በሆነ ጽኑ እሥራት ወይም ከአሥራ ሁለት ዓመት በላይ በሆነ ጽኑ እሥራት ሊቀጡ የሚችሉ በመሆኑ ተመራጭ የሚሆነው የፍርድ ሂደት አመልካች በድንጋጌው የተቀመጠው ከፍተኛ ቅጣት ሊቀጡ ይችላሉ ብሎ ከወዲሁ በማሰብ ጉዳዩን በሌለበት እንዲታይ ማድረግ ሳይሆን የተከሳሽ በችሎት ተገኝቶ የመከራከር መብት ከሚጣስ ይልቅ ተከሳሽ እስኪገኝ ድረስ የፍርድ ሂደቱ እንዳይካሄድ ማድረግ ነው። በመሆኑም አመልካች የተከሰሱበት የወንጀል ሕግ አንቀጽ 669/3/ለ ተከሳሹ በሌለበት ሊታይ የሚችል አይደለም። የስር ፍ/ቤት ጉዳዩን በዚህ አግባብ በማየት አመልካች የተከሰሱበት የሕግ ድንጋጌ በሌለበት የሚታይ አይደለም በማለት አመልካች እስኪገኙ ድረስ የፍርድ ሂደቱ እንዳይካሄድ ማድረግ ሲገባው አመልካች የተከሰሱበት ድንጋጌ በሌለበት የሚታይ እንደሆነ ግምት በመውሰድ የሰጠው የጥፊተኝነትም ሆነ የቅጣት ውሳኔ እና አመልካች ጉዳያቸው ባሉበት ያቀረቡትን አቤቱታ ውድቅ በማድረግ የሰጠው ውሳኔ መሠረታዊ የሆነ የሕግ ስሕተት የተፈጸመበት ሆኖ አግኝተነዋል። ስለሆነም ተከታዩን ውሳኔ ሰጥተናል።

ውሳኔ

1. በትግራይ ብሔራዊ ክልላዊ መንግስት የቃፍታ ሁመራ ወረዳ ፍ/ቤት በመ.ቁ 1800/11 አመልካች በሌሉበት ጉዳያቸውን በማየት የሰጠው የጥፊተኝነት እና የቅጣት ውሳኔ እንዲሁም በቀን 16/07/2011 ዓ.ም አመልካች በሌሉበት ታይቶ የተሰጠው ውሳኔ ተነስቶ ጉዳያቸው ባሉበት እንዲታይ ያቀረቡትን ማመልከቻ ውድቅ በማድረግ የሰጠው ውሳኔ፤ ይህንኑ ውሳኔ በማጽናት የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ 115243 ሚያዚያ 28 ቀን 2011 ዓ.ም በወ/መ/ሥ/ሥ/ሕ/ቁ 195/2/ለ/2 መሠረት ተሽሯል።

2. ከላይ በፍርድ ሐተታው ላይ በተገለጸው ምክንያት አመልካች የተከሰሱበት የወንጀል ሕግ አንቀጽ 669/3/ለ ድንጋጌ ተከሳሽ በሌለበት ሊታይ የሚችል አይደለም በማለት ወስነናል።

3. ስልጣን ያለው ሌላ ችሎት አመልካች ባሉበት ክርክሩን እንዲያይ እና ዓቃቤ ሕጉም ክሱን ስልጣን ላለው ፍ/ቤት እንዲያቀርብ በወ/መ/ሥ/ሥ/ሕ/ቁ 202 መሠረት ተወስኗል።

ትዕዛዝ

- አመልካች በስር ፍ/ቤት ቀርበው በዋስትና ላይ እስኪከራከሩ ድረስ ለብር 10,000 / አሥር ሺህ/ የሚበቃ ዋስ ሲያቀርቡ ወይም ገንዘቡን በሞዴል 85 ሲያስይዙ ከእስር እንዲለቀቁ በአብላጫ ድምጽ ታዟል፡፡

-የሚመለከተው ማረሚያ ቤት አመልካች በሌሉበት ታይቶ በስር ፍ/ቤቶች የተሰጠው የጥፊተኝነት እና የቅጣት ውሳኔ ተሽሮ አመልካች ባሉበት ጉዳያቸው እንዲታይ የተወሰነ መሆኑን አውቆ በዚህ ችሎት እንዲያስይዙ የተወሰነውን የዋስትና ገንዘብ ማስያዛቸው ሲረጋገጥ በሌላ ጉዳይ የማይፈለጉ መሆኑን አረጋግጦ ከእሥር እንዲለቀቅ ታዟል፡፡

-መዝገቡ ውሳኔ ስላገኘ ተዘግቷል፡፡ ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

SCHOOL OF LAW

UNIVERSITY OF GONDAR

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LL.M in Environmental and Water Laws (Extension)

LL.M in Health Law (On Progress)

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