BETWEEN AMBIVALENCE AND NECESSITY IN THE NILE BASIN:

OCCLUSIONS ON THE PATH TOWARDS A BASIN-WIDE TREATY

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> "Watersheds come in families; nested levels of intimacy. On the grandest scale the hydrologic web is like all humanity. ... The big river is like your nation, a little out of hand. The lake is your cousin. The creek is your sister. The pond is her child. And, for better or worse, in sickness and in health, you are married to your sink." [1]

Introduction

Basin-wide arrangements such as the Nile Basin Initiative (NBI)[2] are crucial to regulate specific regional problems.[3] If effective, they are better placed to address the special peculiarities of a given hydropolitical region than are the general rules of international law.[4] Conversely, general rules of international law could provide a general framework for basin states that need to negotiate the *modus operandi* of their respective access to common waters like the

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[1] Michael Parfit, quoted in Maude Barlow, and Tony Clarke, *Blue Gold: The Battle against Corporate Theft of the World's Water* (2002) xi.

[2] Launched in February 1999 in Dar Es Salaam, Tanzania, with all the Nile riparian but Eritrea as members, the NBI is a temporary mechanism through which the basin states would establish a basin wide treaty and institutional mechanism for the equitable and reasonable sharing of the common waters. It is expected to draft a basin-wide treaty binding upon all riparian states that establishes a Nile Basin Commission with powers to study and resolve conflicts over the utilization of the Nile waters. It operates from its head quarters in Kampala, Uganda.

[3] Basin-specific treaties complement and supplement the general rules of international law regulating the use of international watercourses. In cases of conflict between the two sets of rules, the basin-wide treaty prevails through the legal maxim that special *rules prevail over the general (lex spacaialis rule)* and the general rules give way to the special ones on the particular subject. See Philippe Sands, 'Watercourses, Environment and

Nile.[5] As Hayward observed, 'a clear view of the requirements of international law can provide States with a reference point from which to assimilate the diverse influences that shape their actions and interactions with their riparian neighbours'.[6] It is in the same vein that Art 3 of the 1997 UN Convention on Non-Navigational Uses of International Watercourses (Watercourse Convention) [7] is worded in such a manner that recognizes 'the "framework" nature of the [Watercourse] Convention…[and it] encourages parties to follow the general principles on the Convention in their specific agreements without preventing them from departing from it.'[8]

Yet, in the regulation of inter-state right and duties over common waters, international law generally leaves much to be desired. Attempts to develop and elaborate rules of international law pertaining to the regulation of a state's right to utilization and management of international waters have been met only with a modest success in terms of codifying binding and universally applicable rules. It has been observed that '[i]nternational river law is one of the most unsettled areas of international law; it is an area where there are few rules of general application or validity.'[9] The only convention that purports to have the potential of universal applicability in the regulation of inter-state non-navigational utilization of international waters to date is the Watercourse

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the International Court of Justice: The Gabcikovo-Nagymaros Case' in Salman M. A Salman, Boisson de Chazournes, Laurence (ed), *International Watercourses: Enhancing Cooperation and Managing Conflict: Proceedings of a World Bank Seminar* (1998) 121.

[4] See R D Hayton, 'The Formation of the Customary Rules of International Drainage Basin Law ' in A H Garretson, R D Hayton and C J Olmstead (ed), *The Law of International Drainage Basins* (1967) 862.

[5] See Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5(1) *The Georgetown International Environmental Law Review* 18.

[6] Keith Hayward, 'Supplying Basin-Wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper River' (2007) 18(3) *Colorado Journal of International Environmental Law and Policy* 633.

[7] Convention on the Law of the Non-navigational Uses of International Watercourses 1997; Adopted by the General Assembly of the United Nations on 21 May 1997. The adoption of the Convention saw 103 states voting in favour, 3 against (Burundi, China and Turkey) and 27 abstain against it. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49, (A/51/49); available at <http://untreaty.un.org/ilc/texts /instruments/english/ conventions /8_3 _1997.pdf >, last accessed 06 February 2008.

[8] Stephen C McCaffrey, and Mpazi Sinjela, 'The 1997 United Nations Convention on International Watercourses' (1998) 92(1) *The American Journal of International Law* 98. See also Arts 3 and 4 of the Watercourse Convention.

Convention which has yet to enter into force as it is awaiting the necessary trigger- ratification.[10]

Various general rules of international law require specific basin or sub-basin agreements for their application. In effect, the regulation of a state's right to access the waters of an international river such as the Nile has been left to the bilateral or multilateral agreements among the riparians of a given water. In the Nile Basin, such a regulatory framework is expected to result from the efforts of the NBI. Obviously, to date the NBI framework is more of a promise than an achievement as it has yet to establish a basin-wide treaty and the Nile Basin Commission.

In the basin that has seen much more of discordance, unilateralism, mutual insecurity and suspicion as well as conflicts among the riparians rather than trust and cooperation, the establishment of the NBI in itself has appeared to throw up a beacon of light. A new dawn of rapprochement seemed to be on the horizon when the Nile riparian states declared that 'there is no regional or international treaty or agreement among the riparian States of the Nile River Basin…on cooperation in the utilization of the waters of the Nile River Basin.'[11] This declaration is of crucial significance as it marked, *prima facie*, a break away from the hitherto prevailing stance of some riparian (notably Egypt and Sudan) that insisted on the continued validity of some colonial and postcolonial treaties and their extended application to non-state parties of the Nile Basin riparian. Although Egypt and Sudan did not expressly renounce the validity of the *status quo*, the embodiment of the principle of equitable utilization of the Nile in NBI's declaration implies a departure from the *status quo* which did not recognize the equitable share of upstream riparians.

Yet there seemed to be a retreat from this stance and an apparent change of heart among the lower riparians. Of late, Egypt and Sudan have come up with the proposition that the *status quo* of the existing uses be respected, in a manner that adversely affects the interests of upper riparians. The official reason for this change of stance has been attributed to the two downstream states' fear of possible threat to 'their water security', who proposed to insert a clause in the draft instrument for the maintenance of the same. According to the Chair of the Nile Council of Ministers, Egypt and Sudan have insisted on the recognition by the other Nile riparians of the 1929 treaty between the UK

[9] Yimer Fisseha, 'State Succession and the Legal Status of International Rivers' in Ralph Zacklin, et. al. (ed), *The Legal Regime of International Rivers and Lakes* (1981) 177.

[10] Thirty-five states should ratify the Convention for it to come into operation. See Watercourse Convention, Art. 36 (1) and (2).

[11] See *Nile Basin Initiative Act* (2002), Preamble, Para 2.

(acting on behalf of Sudan) and Egypt.[12] Where the situation stands now, the move towards basin-wide framework and the establishment of the Nile Basin Commission within the NBI has hit a temporary glitch, casting doubt over the immediate prospect of reaching a final framework agreement over utilization, management and protection of the waters of the Nile. Such an attitude, it will be shown, is never an isolated incident, as similar motives and actions have provided roadblocks to the conclusion of an agreement over the equitable sharing of the Nile waters over the past decades.

This paper argues that three barriers must be overcome for the ongoing NBI efforts to take off the ground: legal paucity, obsession with history and doctrinal wranglings. In the next three sections, the paper grapples with these three barriers in that particular order. In the two sections that follow, the role of basin-specific arrangements and the special role of the NBI will be presented. It will be argued that states have the duty to negotiate in good faith to reach basin-wide agreements. Finally, conclusions and brief recommendatory notes have been forwarded.

1 The State of International Law Regulating Inter-state Water Rights

Analysis of the rules of international law over the management, utilisation and development of transboundary river basins such as the Nile leave one in a penumbra of doubt as to whether there are specific rules capable of resolving the apportionment of the shared waters. Apart from the Watercourse Convention which is yet to become operational after the necessary number of ratifications, rules of international water law have 'always been (and remain [..]) vague and uncertain.'[13] Except for a few principles such as the principles of equitable utilisation, the no-significant harm rule, and the duty to negotiate in good faith that emerge from customary rules (see section 6 below), general

[12] Joseph Ngome, *Daily Nation,* ''News Extra: Clause Holds Key to New Nile Treaty', Nairobi, Kenya, 28 March 2008; available at <Nationmedia_com>, last accessed 28 March 2008. Information pertaining to the negotiation process and its progresses are hardly available as the dialogue is surrounded by a cult of secrecy.

[13] See Lucius Caflisch, 'Regulation of Uses of International Watercourses' in Salman M. A Salman, Boisson de Chazournes, Laurence (ed), *International Watercourses: Enhancing Cooperation and Managing Conflict: Proceedings of a World Bank Seminar* (1998) 316; Ellen Hey, 'Sustainable Use of Shared Water Resources: The Need for a Paradigm Shift in International Watercourses Law' in Gerald H Blake, et. al. (ed), *The Peaceful Management of Transboundary Resources* (1995) 127-130; Dante A Caponera, 'Shared Waters and International Law' in Gerald H Blake, et. al. (ed), *The Peaceful Management of Transboundary Resources* (1995) 121-123.

positive international law has to travel a long distance before declaring itself ready and able to regulate inter-riparian allocation of water resources .

This lacuna points to the heightened importance of basin-specific treaties and mechanisms that should be installed. For example, the basin states of the Niger, the Senegal, the Zambezi river basins and the SADC Protocol have treaties and mechanisms to enforce cooperation among the riparians. In contrast, the Nile Basin States have not entered into any formal permanent arrangements concerning their dividend from their shared water.[14] Saving the dual exceptions of the 1929 and the 1959 treaties between Sudan and Egypt, all the bi-lateral and multilateral agreements over the waters of the Nile failed to apportion the bounty of the river among the riparians.[15] Almost all of the colonial treaties were concluded with the sole aim of freezing upstream projects over the Nile, in order to secure a continuous and undiminished flow of the water to Egypt. Consensus now exists that colonial agreements over the Nile have no legal effect whatsoever.[16]

There has never been a treaty that has brought together all the riparians of the Nile. It is indubitable that 'currently, there is no regional or international Treaty or Agreement among the riparian States of the Nile River Basin.'[17] This has left the basin without any comprehensive regulatory framework wherein an anarchic situation looms large, a scenario that inevitably perpetuates the hitherto prevailing unilateralism. Thus, the ongoing negotiation is all too important for the purpose of establishing a cooperative atmosphere in a basin where unilateralism, inter-state competition and mutual suspicion have been the norm while joint management and cooperation over the common resource have been exceptions. The crux of the analysis, then, is that the basin states would go some way towards the conclusion of a Nile basin treaty if they bring themselves to terms with the fact that the colonial treaties on the

[14] Valentina Okaru-Bisant, 'Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and management of Africa's Shared River Basins' (1998) 9(2) *Colorado Journal of International Environmental Law and Policy* 348-349.

[15] For an excellent discussions of the chronology and current status of the Nile basin treaties, see generally Okon Udokang, *Succession of New States to International Treaties* (1972); O Okidi, 'History of the Nile and Lake Victoria Basins through Treaties' in P P Howell, and J A Allan (ed), *The Nile: Sharing a Scarce Natural resources-A Historical and Technical Review of Water Management and of Economic and Legal Issues* (1996)

[16] See 'The Nile: Water Conflicts' < http:// www.scienceinafrica. co.za/ 2003 /may / nile.htm> , accessed 08 April 2008; See also generally Girma Amare, *Nile Issue: The Imperative Need for Negotiation on the Utilization of Nile Waters*, EIIPD Occasional Papers Vol.2, No.6 (1997).

[17] The Nile Basin Initiative Act (2002), Preamble, Para 1

Nile waters are of no legal significance and that general international law cannot go down to the extent of apportioning shared waters such as the Nile. It is such an awakening that would pave the way for a constructive negotiation that helps start from a clean slate in view of inaugurating a comprehensive Nile Basin treaty and institutional mechanism for the equitable apportionment of the common resource

2. Divorce from the Past: The Role of Colonial Treaties and Colonial Mindset

History of inter-state interactions in the Nile basin is replete with repeated and overlapping efforts of the European colonizers to bring the river under their respective sphere of influence aimed at achieving their imperial objectives. Thus reference to the past, though important, does not offer much towards the harmonization of inter-riparian attitudes in their interactions and joint search for a cooperative framework over the Nile issue. Arguably, therefore, some of the colonial mentalities and traits of colonial motives have remained behind after the departure of the colonial masters, and it is still apparent in the inter-state negotiations over the use of the Nile waters such that these traits continue to hamper joint efforts towards the conclusion of a basin -wide treaty regime.

Historically, the Nile was part and parcel of the colonial scramble for Africa particularly because of the realization that control of Egypt and the Suez Canal by colonial administrations depended heavily upon the possibility of controlling the Nile.

> [t]here are about ten agreements dealing with consumptive use of the waters of the Nile and Lake Victoria. Prior to World War I, the treaties show Great Britain, for Egypt, as the contracting state. The United Kingdom, then the administering colonial power over Sudan, concluded an agreement with Italy (1891), Ethiopia (1902), the independent State of Congo (1906), and with Italy and France (1906). There is further agreement with Italy, signed by Britain, in 1925. Since then, Britain and Egypt signed all agreements on the Nile waters, beginning with the 1929 agreement dealing with Egyptian rights generally vis-à-vis those of Sudan, and ending with the agreements for construction and maintenance of the Owen Falls Dam achieved by Exchange of Notes between 1949 and 1953.[18]

Notwithstanding Belgian control of Burundi, Rwanda and Congo (now Democratic Republic of Congo (DRC)), Ethiopia's independence and Italian control of Eritrea, Great Britain had effectively controlled the Nile River

[18] Okidi, note 15 above, 323.

from its origins to the Mediterranean Sea.[19] Although Britain had used every possible means it had at its disposal to achieve the full control of the Nile, the more diplomatic avenue of concluding international treaties with the only independent state in the basin at the time (Ethiopia) and European powers controlling some of the then colonies provided an effective device towards that end. The most striking feature common to all the colonial treaties signed by Great Britain was the fact that in all the treaties the protection and furtherance of Egyptian interests (and colonial interests in Egypt) were the primary consideration.

It may not be that Great Britain intended so much to protect Egyptian interests *per se* as it did to protect its own colonial ambitions. For one thing, no colonial power like Great Britain could have failed to take note of the value of Egyptian Red Sea ports that were of central importance to Britain's colonial trade. Thus, during the colonial period, the 'Nile waters continued to be the lifeline of British colonial economic interest same as they had always been for Egypt.'[20] For another, the Suez Canal commanded a central strategic importance for controlling the shortest route from Europe to India- the 'Jewel of the British Crown'. Besides, the colonial policy of exploiting the huge Egyptian cotton productions for the textile mills in England was contingent upon Egyptian political stability. As Elhance noted, '[t]o a very large extent, this stability became contingent upon satisfying Egypt's growing water needs, without much regard for the interests of the other riparian.'[21]

This colonial policy was also prompted by the desire to manipulate the Nile waters in order to soften the anti-colonial uprising in Egypt.[22] The British were pretty much aware of the fact that unless they control the Nile waters, it would have been impossible to put pressure on Egyptian nationalism that was on the rise against the colonial rule. As Yacob Arsano noted, while Britain acted as a provider of the Nile waters to Egypt, 'it was naïve to believe that the British were dying for Cleopatra's Egypt, but the former was using Egypt's most sensitive resource to soothe the anti-British nationalist anger in Egypt since the end of the First World War'.[23] By 1923, this policy was formulated in an unequivocal manner: 'The power which holds the Soudan (sic) has Egypt at its mercy and through Egypt can dominate the Suez Canal.'[24] Such considerations had been behind the lopsided colonial agreements per-

[19] Arun P. Elhance, *Hydropolitics in the Third World: Conflict and Cooperation in International River Basins* (1999) 68.

[20] Yacob Arsano, *Ethiopia and the Nile: Dilemmas of National and Regional Hydropoitics*(Unpublished, PhD Dissertation, The University of Zurich) (2004) 53.

[21] Elhance, note 19 above, 68

[22] Yacob, note 20 above, 54.

[23] Yacob Arsano, 'Towards Conflict Prevention in the Nile Basin' (Paper pre-

taining to the utilization of the waters of the Nile. In the words of Yacob [25], 'Britain made sure that all Nile related agreements benefited its own colonial interests.' It was almost inevitable, therefore, that the multitude of the colonial agreements that Britain initiated and concluded with the upstream actors 'were far from establishing a regime of reciprocal rights or providing shared benefits on the transboundary water resources.'[26]

The striking similarity of all the colonial agreements lies in the fact that they, rather than establishing basin wide regulatory frameworks, established precedents and informed postcolonial mindset of riparian states whose behaviour, at least partially, are modeled on the colonial era approach to the problem, and that continued to hinder fresh negotiations and agreements upon the equitable utilization of the Nile. [27] The treaties of the colonial era in most cases banned irrigation, power generation and other uses of the Nile waters without the prior agreement of the Egyptian government in order to ensure the constant unreduced flow of the waters to Egypt.[28] Besides, these treaties encouraged unilateralism rather than cooperative management of the common resources; indeed, the utilization of the Nile waters depicts a marked difference between the rhetoric of the river being common to the riparian while remaining private to Egypt and Sudan. As observed by Kinfe, '[t]he British stance, in more sense than one, represents the early embryo of unilateralism which still bedevils the relationship among the riparians in general and that of Ethiopia and Egypt in particular.'[29]

Notwithstanding the departure of the colonizers and the attainment of independence by the former-colonies of the Nile basin, , the colonial era mentality is still refusing to give way to the post independence situations, as it is still lingering only to aggravate the long standing injustice relating to the utilization of the bounty of the Nile. The Egyptian leaders, beginning from the time of Nasser, adopted the concept of 'water security' from the British who had stated: 'No one can hold Egypt securely unless he also holds the

presented at the 5th Nile 2002 Conference, 1997) 491.

[24] John Murray, British Foreign Minister Bureaucrat, in his *Memorandum on the Political Situation of Egypt,* quoted in Terje Tvedt, "The Management of Water Irrigation: The Blue Nile" in *Beyond conflict in the Horn of Africa* (1992) 186.

[25] Yacob, note 20 above, 53.

[26] Ibid.

[27] Y A Mageed, 'The Integrated River Basin Development: The Challenges to the Nile Basin Countries' in J Lundqvist, U Lohm and M Falkenmark (ed), *Strategies for River Basin Management* (1985) 155.

[28] Ibid, 151.

[29] Abraham Kinfe, 'Nile Hurdles: Psycho-Political Roadblocks to An Agreement and the Way Forward toward A Rapprochement' (2000) Occasional *Papers Vol.2, No.6 (Ethiopian International Institute for Peace and Development, EIIPD)* 2.

whole valley of the Nile. The sources of the river in hostile or even in indifferent hands must always be a grave cause of danger.'[30]

Whereas the post independence era has witnessed only one treaty- the 1959 *Agreement for the Full Utilization of the Nile Waters*- concluded between Egypt and Sudan, this treaty has proved, like its colonial era predecessors, to be nothing more than a continuation of the colonial policies. It is only anomalous for two downstream states with extremely marginal water contribution to the Basin, if not none, to agree for 'the full utilisation' of a river originating in and shared by eight other states. Like its colonial predecessors, it was aimed to protect the Egyptian, and, to a lesser extent, Sudanese interests. Like the colonial era treaties, it did not give any consideration to the interests of the other riparians that are equally entitled to the utilisation of the waters of the Nile. Tesfaye has rightly asserted:

> Ever since the signing of the 1959 Agreement Egypt had time and again showed its inflexible stance towards the alteration of the treaty. …It [Egypt] rather considers the 1959 and preceding agreements as unchanging and sacrosanct. In effect, in as far as Egyptians are concerned, any fresh talk on the Nile water utilization beyond the 1959 status quo must by all means be circumvented. Put another way, the bottom line to any talk and the resultant modus vivendi, if any, should first and foremost take the 1959 status quo for granted and rather discuss the possibility of acquiring additional water in the Nile Basin. [31]

As recently as March 2008, Egypt and Sudan maintain that the framework agreement that has been drafted by the NBI should include a clause that reads: "[n]ot adversely affect *the water security of current users* and rights of the Nile Basin countries."[32] It has been reported that the water security of current users referred to here is the uses established under the 1929 and 1959 treaties between Sudan and Egypt.[33] Where the situation stands now, admitted the NBI, the disagreements have presented a significant hitch to the NBI processes and it needs the intervention and negotiation by the political heads of the states to expedite the process.[34]

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[30] Peel, quoted in Kinfe Abraham Kinfe, 'The Nile Issue: Psycho-Political Hurdles to an Agreement and the Way Forward Toward a Rapprochement' (Paper presented at the 5th Nile 2002 Conference, 1997) 599.

[31] Tesfaye Tafesse, *The Nile Question: Hydro Politics, Legal Wrangling, Modus Vivendi and Perspectives* (2001) 79.

[32] See *Daily Nation*, note 12 above (emphasis added).

[33] Ibid.

Yet, it needs no mention of the fact that the two treaties bind only the parties to them: -Sudan and Egypt- and should basin wide treaties be agreed, an entirely different document is needed that is based on a new equilibrium of equitable and reasonable utilisation.[35] The fact that new uses are of equal importance as existing uses cannot be overemphasised. Thus the post independence (1959) agreement and the attitude of some of the riparians in the ongoing NBI process proved to be a continuation of the colonial era mentality wherein the Nile was presumably geared almost exclusively towards the fulfilment of interests of Egypt (and Sudan) .Thus the postcolonial mindset of some of the riparian states is a close imitation of that of the pre-independence period that has served as a strong precedent upon which the Egyptian and Sudanese leaders modelled their post decolonization (1959) agreement on the Nile.

It is just axiomatic, therefore, that the 'colonial era mentality, subsequently inherited by the rulers of independent Egypt [and Sudan], and the resentments it has generated in the newly independent nations have continued to circumscribe hydropolitics in the Nile basin in the post-World War II era.'[36] As a result, the 'current management of Nile waters is one based on the views articulated by British imperial interest in the first half of the twentieth century which were … based on the assumption that Egypt's interests were paramount.'[37] Insistence upon the continuity of the prevailing situation would inevitably mean that the interests of the upstream Nile basin states would continue to play second fiddle to those of the downstream states. Such an imbalance has bred an impasse that has been hindering fresh negotiations over the allocation of the bounty of the Nile.

3. Resolving Doctrinal Controversies [38]

International law has been suffering from fluidity as regards the rules applicable to the consumptive utilization of international rivers. Against the backdrop of such ambiguity, the Nile riparian states have locked horns in their adherence to contradictory doctrines, the choice of which has heavily de-

[34] Ibid.

[35] Okaru-Bisant, note 14 above, 331.

[36] Elhance, note 19 above, 69.

[37] J.A Allan, 'Nile Basin Water Management Strategies' in *The Nile: Sharing a Scarce Natural resources-A Historical and Technical Review of Water Management and of Economic and Legal Issues* (1996) 316.

[38] It is beyond the purpose and scope of this work to delve into the details of the doctrinal controversies revolving around riparains' rights over shared water resources. For the present purposes, the intention is to show that arguments emerging from varying theories have contributed not in bringing the Nile riparians together but have worked to set them apart.

pended on political expediency. Needless to say, certain doctrines have become obsolete. But the tendency of adherence to them by Nile Basin states presents an obstacle that stands in the way of the formation of a new Nile Basin treaty. Of the various doctrines known to international law, two theories deserve a brief revisit here.

3.1- The Theory of Absolute Territorial Sovereignty/ The Harmon Doctrine

The theory follows from the assumption that a state is a master of all persons, things and circumstances existing in its territory. Accordingly, a state may adopt any measures relating to that segment of the waters flowing on its territory and freely dispose of the resource. In so doing a state consults and is guided only by its own national interests. In its bare form the theory advocates that 'an international watercourse situated in the territory of a State constitutes part of the public domain of that State and that since a State has dominium over its territory, another State acquires rights thereon only with the agreement of the first State'.[39]

Historically, the theory was authoritatively stated for the first time by Judson Harmon, Attorney-General of the United States, in a declaration of 1895 concerning the disputes over waters of the Rio Grande River between United States and Mexico. Invited to give his opinion on the position of the United States on the question of whether the United States was obliged to let flow to Mexico parts of the waters of Rio Grande which were diverted upstream, Attorney-General Harmon gave his famous statement:

> The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its territory… . All exceptions … to the full and complete power of a nation within its own territories must be traced to the consent of the nation itself. They can flow from no other legitimate source. … . The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain. … The case presented is not a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to the Department [of Justice]; but that question should be decided as one of policy only, because, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.[40]

[39] Bonaya Adhi Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems* (1985) 32.

[40] Quoted in Stephen C. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001) 115.

This strong statement has provided the genesis and the strength for the theory of absolute sovereignty.[41] The consequence of the theory is that it allows upstream states a complete freedom of action with regard to that segment of international watercourses flowing within their territories, irrespective of any prejudice it might entail in other countries downstream. That the theory is favourable to upper-basin states and, where there are several of them, to the uppermost one needs no further comment. It is not surprising therefore that Ethiopia's *aide-memoire* of 23 September 1957 addressed to diplomatic missions in Cairo seems to incline towards this theory although it did not categorically adhere to it. In fact, the following *aide-memore* was a reaction to Ethiopia's exclusion from the negotiation process between Egypt and Sudan.

> Ethiopia has the right and the obligation to exploit the water resources of the Empire…for the benefit of present and future generation of its citizens…[and]…must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources and, in particular, as regards that portion of the same which is of the greatest importance to its welfare, namely, those waters providing so nearly the entirety of the volume of the Nile, *whatever may be the measure of utilization of such waters sought by recipient states situated along the course of that river.*[42]

At the UN Water Conference held in Argentina (in 1977), Ethiopia pronounced that it is '…the sovereign right of any riparian state, in the absence of an international agreement, to proceed unilaterally with the development of water resources within its territory.'[43] Although this statement sounds stronger than its real content, it does not articulate absolutist utilization in disregard to lower riparians.

The theory of absolute territorial sovereignty has not been received well by state practice or by publicists. Foremost opposition comes from downstream states in many parts of the world whose right to the international waters will be sacrificed to the extent of the validity of the theory. So too, the great majority of writers emphatically reject the theory of absolute territorial sovereignty or the Harmon Doctrine and no support for the doctrine can be found in contemporary literature.[44] Support for the theory from judicial practice is also next to none.[45] Indeed, the theory is 'almost unanimously abandoned today'.[46] In the context of the Nile basin, it has yet to be unanimously re-

[41] McCaffrey, note 40 above, 113.
[42] Quoted in Godana, 39 above, 35-36
[43] Clarke, quoted in Yacob, Supra note 19 at 55.
[44] Godana, note 39 above, 36; McCaffrey, note 40 above, 123.
[45] Godana, note 39 above, 36.
[46] Ibid, 38.

nounced by the riparian states. Nevertheless, the Nile riparian states' unanimous declaration that they seek 'to achieve sustainable socioeconomic development through *equitable utilization* of, and benefit from, the common Nile Basin water resources'[47] seems to be a move towards the renunciation of the doctrine.

3.2- The Theory of Absolute Territorial Integrity

This theory is the polar opposite of the absolute territorial sovereignty doctrine. While the latter advocates an upper riparian's complete freedom of action in relation to international waters, the theory of *absolute territorial integrity* maintains that the upstream state may not do anything that might affect the natural flow of the water into downstream state. According to this theory, therefore, upper riparians of a river that start to develop their water resources more slowly than lower riparians of the river will be seriously affected as they will be prohibited from undertaking any activity that would seriously affect the flow of the river to a state or states downstream.

Indubitably, this theory has been espoused and advocated by downstream riparian states. The fact that life in Egypt has been totally dependent on the waters of the Nile for millennia prompted Egypt to claim that it has 'historical', 'natural' or 'acquired' rights. Such a claim is to find its roots in the theory of absolute territorial integrity. According to Girma,

> The Egyptians, and to a lesser extent the Sudanese, favour the *prior use doctrine*, also known as *prior appropriation doctrine* which provides that 'the first user of the water acquires a definitive right to it, "first in time, first in right".'[48]

For fear of the possibility that Ethiopia and other upper riparians may begin to construct projects that would reduce the amount of water flowing into Sudan and Egypt, the two lower most riparians hold to this doctrine in order that the upstream states remain prevented from using the waters. The doctrine is premised on the fact that the lower riparians have long put the Nile waters to their use before the upper riparians have, and, as a result, have acquired 'historic rights' thereon. In Erlich's view, there are dual moral dimensions to Egypt's 'historic rights': 'first, Egypt has no other option to survive; and, second, Ethiopia has lived without the Nile so far and presumably can do so in

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[47] See Preamble, The Nile Basin Initiative Act, 2002, available at < http:// www. nile-basin.orgindex.php?option=com_docman&task=doc_view&gid=8>, Para 2, accessed 05 April 2008 (emphasis added).

[48] Amare Girma, 'Nile Issue: The Imperative Need for Negotiation on the Utilization of Nile Waters' (1997) Occasional *Papers Vol.2, No.6 (Ethiopian International Institute for Peace and Development, EIIPD)* 8.

the future'.[49] It would come as no surprise that the doctrine of absolute territorial integrity, and its corollary, 'historic rights', has therefore been advocated foremost by lower- most riparian Egypt compared to any other riparian. But it is too much to assume that the moral dimension of the argument will lead to legal right. It has been observed that:

> [t]he Egyptians' legal argument for their exclusive rights to the Nile waters is founded on precedence: Egypt has always used the waters of the Nile without restriction. …Moreover, they argue, the idea …was confirmed by the international agreements signed during the twentieth century. The principle of historic rights was mentioned in the 1929 Egyptian [British]-Sudanese Water Agreement and reiterated in the agreement for the Full Utilization of the Nile Waters of 1959. In fact, Egyptian (and Sudanese) exclusiveness with regard to the Nile waters was recognized by the British in all their colonial agreements.[50]

As Egypt has always been sensitive to the possibilities of development of the Nile by upstream states, its adherence to the doctrine of absolute territorial integrity had remained unchanged over the years. As far back as 1925, during the meeting of the Nile Commission, Egypt expressed its adherence to the theory of absolute territorial integrity on the division of the waters of the Nile among the riparians. More than five decades later, in 1981, Egypt expressed its unchanged stance in its 'Country Report' at an interregional meeting of international river organizations held in Dakar. The Report argued:

> [e]ach riparian country has the full right to maintain the status quo of the rivers flowing on its territory… it results from this principle that no country has the right to undertake any positive or negative measure that could have an impact on the river's flow in other countries. … a river's upper reaches should not be touched lest this should affect the flow of quantity of its water.[51]

Like the theory of absolute territorial sovereignty, the theory under consideration has been a subject of severe criticisms. It is extremist in essence and myopic in orientation. As Godana noted, 'the essential inequity of this theory resides in the fact that it allocates rights without corresponding duties.'[52] Neither state practice, nor the practice of international or domestic tribunals nor the writing of publicists has sufficiently supported this theory. Political statements aside, even Egypt has not been consistent in practice in its adherence to the theory. Suffice for the present purposes to mention that Egyptian agreement of 1949 to projects in upper Nile countries, such as the Owen Falls Dam in Uganda, which is a huge

[49] Haggai Erlich, *The Cross and the River: Ethiopia, Egypt, and the Nile* (2002) 6.

[50] Ibid.

[51] Quoted in Godana, note 39 above, 39.

[52] Godana, note 39 above, 39.

departure in practice from the theory of absolute territorial integrity.[53] Thus the theory, like its opposite, has gone out of favour, and 'may now be considered as discarded.'[54]

Nevertheless, it is odd to witness that insistence on this theory seems to be at the roots of the recent deadlock created in the NBI wherein Egypt and Sudan insisted upon the inclusion of a provision that has the import of maintaining the status quo of prior appropriation of the Nile waters by the two downstream states.[55] That would have made the whole NBI efforts a futile exercise at best. Such a stance in itself is a bottleneck to the formation of any basin wide agreement among the riparians, but most importantly, it has played a knock-on effect by enticing the upper riparians to pay in kind. According to Yacob, adherence to the theory by downstream states of the Nile Basin has provoked the upper riparians to hold to a counter stance, wherein they hold to the principle of absolute territorial sovereignty over the waters flowing in their territories.[56] As stated earlier, Ethiopian position was unambiguously enunciated at the UN Water Conference held in Argentina in 1977 in which Ethiopia pronounced the '… sovereign right of any riparian state, in the absence of an international agreement, to proceed unilaterally with the development of water resources within its territory.'[57] We may, however, consider this statement as a declaration which amplifies an aspect of the theory of equitable utilization because it has the basic theme of claiming equitable share.

3.3- Current Trends towards Equity

As the two doctrines highlighted above are in frontal clash with each other, any direct, indirect, total or partial adherence thereto in negotiations on the optimal utilization of the Nile can only set the countries apart rather than bring them to a point of agreement. Although the respective validity of the doctrines in terms of the contemporary practice of states and of international law has been called into question, the position of the Nile riparian have been, at least in theory, locked in these irreconcilable doctrines, and as such their contribution in hindering a negotiated agreement cannot be ignored.

The doctrine of equitable utilisation made its appearance in the vocabulary of many of the riparian states of the Nile Basin only in recent past, but it may well be said, to use the usual catch-phrase, better late than never. Granted, it is hoped that this new trend would provide a framework from which to work towards equity among the basin states in their respective rights and duties in the utilisation of the Nile waters.

[53] McCaffrey, note 40 above, 131.
[54] Godana, note 39 above, 39.
[55] See Daily Nation, note 11 above.
[56] Yacob, note 19 above, 55.
[57] See Clarke, as quoted in Yacob, note 19 above, 55.

4. Back to the Future: Towards an Equitable and Reasonable Utilisation

4.1 Introducing the Concept

The principle of equitable and reasonable utilisation of common water resources is the pillar of inter-state interaction over the uses of international waters.[58] Predicated on the sovereign equality of states, this theory seeks to ensure to all basin states an access to a reasonable and equitable amount from the shared waters, but it also imposes the duties upon all riparian states to use the resource in an equitable and reasonable manner.[59] It is crucial to stress that at the heart of the principle of equitable utilisation is co-riparian states' 'equality of rights,'[60] which means that riparian states have an equal right to use the common water resources *in accordance with their needs.*[61]

It does not necessarily imply volumetric equality of shares. As Goldberg observed, '[e]quality of rights does not mean in this context the right to an equal division of the waters but rather that each riparian has an equal right to the division of the waters on the basis of its needs, consistent with the corresponding rights of other co-riparians.'[62] Simply put, the principle of equitable utilisation rejects the exclusion of any riparian from the use of a common water resource, while providing for parity of treatment of equally pressing national needs of all the co-riparian states.

The actual dividend of a riparian from the common river thus turns upon multiple objective factors. According to Lipper,[63] three general criteria must be applied for an equitable apportionment of the actual share of a riparian state:

a) examination of the economic and social needs of the co-riparian states by an objective consideration of various factors and conflicting elements relevant to their use of the water;

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[58] See Keith Hayward, 'Supplying Basin-Wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper River' (2007) 18(3) *Colorado Journal of International Environmental Law and Policy* 633 642.See also Salman M. A. Salman, and Kishor Uprety, *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective* (2002) 15.

[59] Godana, note 39 above, 50.

[60] Jerome Lipper, 'Equitable Utilization' in A H Garretson, R D Hayton and C J Olmstead (ed), *The Law of International Drainage Basins* (1967) 44.

[61] Ibid.

[62] David Goldberg, 'World Bank Policy on Pojects on International Waterways in the Context of Emerging International Law and the Work of the International Law Commission' in Gerald H Blake, et. al. (ed), *The Peaceful Management of Transboundary Resources* (1995) 155.

[63] Lipper, note 60 above, 45.

b) distribution of the waters among the co-riparians in such a manner as to satisfy their needs to the greatest extent possible; and
c) accomplishment of the distribution of the waters by achieving the maximum benefit for each co-riparian consistent with the minimum of detriment to each.

It is of paramount importance to stress that the application of the principle of equitable utilization is a process that heavily reposes on the amount of confidence among riparians. Indeed, it is 'a dynamic process, which depended heavily upon active cooperation between states sharing freshwater resources.'[64] Such a cooperative atmosphere among riparians results from knowledge of, *inter alia*, data and information concerning the watercourse and its provision of prior notification to other states of new uses that might affect them.[65]

Be that as it may, the equitable utilization theory is also contingent upon other objective and specific factors. Under the 1997 Watercourse Convention, an illustrative (non-exhaustive) list of seven relevant criteria is provided:[66]

a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
b) The social and economic needs of the watercourse States concerned;
c) The population dependent on the watercourse in each Watercourse State;
d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
e) Existing and potential uses of the watercourse
f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
g) The availability of alternatives, of comparable value, to a particular planned or existing use.

At this juncture, it is important to note that there is no preferential treatment attached to the order of provisions of the criteria listed under Art 6 of the Watercourse Convention. One criterion can be the most important consideration in one context while other criteria may take precedence over the others in other circumstances. The bottom-line is that a factor (criterion) must indeed be relevant as an aid in the determination or satisfaction of the social and economic needs of the co-riparians of the basin. Once this threshold is met, it is not possible to attach a fixed weight to a singular criterion in all cases. The relative weight of a given relevant factor turns upon its merits relative to all the other factors at a given point in time.[67] In the final analysis, 'no other fac-

[64] McCaffrey, note 40 above, 345.
[65] (Id: 343).
[66] See Art .6 (1) (a-g).
[67] See Water Convention, Art 6 (3).

tor occupies a position of pre-eminence *per se* with respect to any other factor.'[68] Some factors may even be irrelevant in a given scenario at a given time for the determination of a case at hand.[69] Under the Watercourse Convention 'all relevant factors are to be considered together and a conclusion reached on the basis of the whole'[70] in the determination of what is a reasonable and equitable use in a particular case. Additionally, the Watercourse Convention clearly guards against temptations to attach a special weight to a given use,[71] and provides that in cases where conflict of uses occurs among the riparians, it instructs to attach 'special regard…to the requirements of vital human needs,'[72] presumably drinking and sanitation.

Apart from its codification in the Watercourse Convention, the principle of equitable utilisation enjoys an overwhelming support of scholarship and state practice such that 'nearly all international accords regarding international rivers are based on this principle.'[73] The 1966 Helsinki Rules (although not binding [74] and the 1994 International Law Commission's Draft Articles (non-binding) [75] had already solemnly espoused the principle before its eventual incorporation into the Watercourse Convention. Historically, the theory of equitable and reasonable shares has been recognized in China and India for many centuries and has acquired prominence over the past 500 years with the development of the nation state.[76] It seems that the principle of equitable and reasonable use is part of international custom.[77] As such, its inclusion in Art 5 of the 1997 Watercourse Convention is a codification of international custom rather than a progressive development of rules of international law regarding non-navigational uses of international watercourses.[78]

Notwithstanding earlier debates as to the applicable theory in the Nile basin, there seems to be a change of heart among the riparian states. In their recent

[68] C J Olmstead, et al, 'Helsinki Rules on the Uses of the Waters of International Rivers' in A H Garretson, R D Hayton and C J Olmstead (ed), *The Law of International Drainage Basins* (1967) 779 785.

[69] Ibid.

[70] Art 5 (3).

[71] Art 10 (1).

[72] Art 10 (2).

[73] Erlich, note 49 above, 7.

[74] See ' The Helsinki Rules on the Uses of the Waters of International Rivers,' Adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966, Art IV.

[75] See 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Arts 4 and 5.

[76] Erlich, note 49 above, 7.

[77] See Richard Paisley, 'Adversaries into Partners: International Water Law and the Equitable Sharing of Downstream Benefits' (2002) 3 *Melbourne journal of international law* 280283.

[78] It must be noted that the (1997) Water Convention explicitly states that it is an embodiment not only of progressive development of international water law but also of codification of an exiting custom. See Preamble, Water Convention, Para 4.

statements, an Egyptian diplomat and Ethiopia's Prime Minister, have stated their adherence to the theory of equitable and reasonable utilization of the waters of the Nile. The statement of Egyptian former Ambassador to Ethiopia, Marwan Badr, given on 7 August 1998 is instructive in this regard:

> Egypt recognizes that each state has the right to *equitable utilization* of its waters in accordance with international law. Egypt further recognizes that existing water agreements do not hinder the utilization of the Nile waters by any of the riparian states.[79]

This theory has been well received in Ethiopia as well. This can be discerned from the recent statement of the Ethiopian Prime Minister, Meles Zenawi:

> What we basically need is to deal with the Nile basin as a single region with shared natural resources. If we take this as a basis for dealing with the Nile issue, we will be able to devise better ways to achieve the maximum benefit from its waters.[80]

The biggest merit of the theory is that it takes into account both the current and future water needs of the riparians and is elastic enough to accommodate changing set of circumstances. A state's regime of utilization that is equitable vis-à-vis its co-riparians today may not be so next year. As McCaffrey noted, a 'new use in one state may change the equitable calculus as among all riparians and therefore should be the subject of notification, consultation, and if necessary, negotiation. And this is true whether the new use is made by an upstream or downstream state… .' [81]

4.2 Variants of Equitable Utilisation: Towards Application

Conceptually it is important to distinguish between two variants or modes of application of the principle of equitable utilization. The *shared uses* variant refers to the classical apportionment method, and it is usually achieved through a treaty among the basin states that allocates the dependable flow of *wet water* of a river among the riparian states, where right to 'water qua water' is created.[82] But each state enjoys complete freedom of action with respect to the choice of the manner of utilization of its quota,[83] presumably, with the major caveat that no state can have the right to cause a significant harm to its neighbors through its usage of the common waters.

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[79] Quoted in Robert O Collins. 'The Inscrutable Nile at the Beginning of the New Millennium' available at < http://www.history.ucsb.edu/faculty /Inscrutable %20 Nile1.pdf.>, accessed 16 December 2007(emphasis added.).

[80] Ibid.

[81] McCaffrey, note 40 above, 345.

[82] Wolf Quoted in A Dan Tarlock , and Patricia Wouters, 'Are Shared Benefits of International Waters an Equitable Appor-

The second variant of equitable utilization, called *shared benefits* principle, springs from welfare economics, and its gist is that water is a scarce resource that can be put to alternative uses but that in water sharing processes among the riparians of a given water states must ensure that water is put to a use that is most valuable as compared to the other uses.[84] The implication in many cases would lead to a situation where 'some nations forgo the actual use of wet water but are entitled to monetary compensation for allowing other states to put the water to its most efficient use.'[85]

In the NBI discussions, references have been made to the principle of equitable utilization but it yet to be seen if the states are ready to commit themselves to the shared benefits variant of the principle. Indeed, the NBI itself started off with a participatory process of dialogue among the Nile riparian states that resulted in their agreeing on a shared vision—to 'achieve sustainable socioeconomic development through the equitable utilization of, and benefit from, the common Nile Basin water resources.'[86]

Due to the usage of the word 'benefits' in the NBI processes, it is instructive to make an overview of the advantages and demerits of the two variants. At one level, the difference between the two variants appears to be little more than semantics. It could be argued that the object of any equitable distribution of an international river being to ensure that all riparian states receive 'water justice', and since 'water justice' can be obtained equally by sharing the use of wet water or by monetary compensation, the dichotomy is a distinction without a difference.[87]

Yet, such a line of argument comes out of a lack of deeper insight into problems associated with the practical application of the two variants of the principle. It may be pointed out that at least three concerns are associated with the 'shared benefits' variant of the principle.[88] Firstly, upstream headwater states are usually less fortunate than the usually wealthier downstream states, and such is the case in the Nile Basin. As a result, they may be tempted into accepting short-term benefits at the expense of forgoing their future uses.[89] Secondly, shared benefits may not directly address problems of poverty alleviation, and they usually fail to benefit those in the watershed of origin.[90]

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tionment?' (2007) 18(3) *Colorado Journal of International Environmental Law and Policy* 526.

[83] Ibid, 526-527

[84] Ibid, 527.

[85] Ibid, 527

[86] See 'NBI Background', < http://www.nilebasin.org/index.php?option=com_ content &task =view &id=13&Itemid=42>, last accessed 05 April 2008. (Emphasis added.).

[87] Tralock and Wouters, note 82, above, 527.

[88] See Ibid, 528

[89] Ibid.

[90] Ibid.

Thirdly, benefit sharing runs the risk that aquatic ecosystem integrity may not be adequately addressed, and the bio-system of the basin may be negatively affected.[91] The problems, as they are, may not be insurmountable but they must be carefully addressed. It can only be hoped that the ongoing negotiation over the cooperative utilization of the Nile waters will carefully address these and other related concerns.

4.3 Equitable Utilisation vis-à-vis No-significant Harm Rule

The principle of equitable utilisation and the 'no-significant harm' rule have been vying for recognition for a long time. Normally, the interplay of the doctrines of equitable utilisation and that of preventing 'significant harm' in the utilization of common waters are presented as a warring company. Historically, the no significant harm rule emerged before the principle of equitable utilisation. It regulated a whole range of neighbourly relations, especially transboundary harms attributable to the commission or omission of a neighbouring state.

The origin of the '*no harm rule'* may be traced to the Roman law maxim: *sic tuo utere ut alienum non laedas* (use your property in such a way as not to harm others).[92] It was originally based on the concept of restrictive enjoyment of one's own property, or limited and regulated proprietary rights subject to the prevention of harm to one's neighbours.[93] Put in the context of inter-state relations, it implied that neghibouring states 'are not allowed to use or to tolerate the use of their territory for causing damage to their neighbours.'[94]

Contrary to the rule of 'no-significant harm' which aspires to regulate the overall relations of neighbouring states, the principle of equitable utilisation is limited in scope to the regulation of inter-states' non-navigational activities on international watercourses.[95] Indeed, its emergence was prompted by the limitations of the 'no-significant harm' rule in relation to allocation of international watercourses. The 'no-significant harm' fails to provide adequate rules for the resolutions of controversies over 'allocation issues on fully-used or over-used international watercourses, or would have done so in an [un] equitable way…by giving complete priority to existing activities and by prohibiting the development of new or the extension of existing uses.'[96]

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[91] Ibid.

[92] Sompong Sucharitkul, 'State Responsibility and International Liability in Transnational Relations' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 289.

[93] Ibid.

[94] Caflisch, note 13 above, 12.

[95] Ibid,13.

[96] Ibid.

According to Caflisch, the no-significant harm rule has strived to play two related roles pertaining to the law of international rivers.[97] First, it seeks to provide guidelines in the allocation of the rights of shared water basins, and, second, it is also of crucial relevance in the area of environmental protection. While it has continued to hold sway in relation to environmental considerations, its water allocation utility has waned in recent years.[98] This is because most international water basins are fully used or overused today and an attempt at a new use by a riparian state would result in causing harm to the existing uses. The effective result of this no-significant harm rule is to maintain the status quo. Considered in the context of the Nile basin, where the water is already fully used and new upper riparian attempt to put the waters to imminent new uses,[99] the application of the 'no-significant harm' rule would deny the upper riparians any possibility of developing or expanding their use of the Nile waters.[100]

It was such a shortcoming associated with the no-significant harm rule that has brought into focus the need for clarification of the interplay of this doctrine with the principle of equitable utilisation. It is sterile to state that the prevention of any harm in a basin such as the Nile where ten states share the common waters is a matter of impossibility. The question that poses itself is as to which one of the two – the principle of equitable and reasonable utilisation or of no significant harm rule-takes precedence in the event that the two happen to contradict each other.

In situations where an upstream state commences a new project that would otherwise be a reasonable and equitable use of a common international river, the new use upstream would almost inevitably result in the reduction of the quantity or quality of the water that flows downstream. Such a reduction would inevitably cause harm to the pre-existing uses of the downstream state by diminishing the quantity or quality of the water owing to the new upstream use.

Under the doctrine of equitable and reasonable utilisation, the fact that there had been prior uses made of the common waters by some of the riparian would be one of the considerations in arriving at the equitable and reasonable allocation of the common waters. A use by a riparian may cause harm to the pre-exiting uses by another riparian. A choice must be made between the applications of the two competing principles.

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[97] Ibid, 12.

[98] Ibid.

[99] Ashok Swain, 'Managing the Nile River: The Role of Sub-Basin Co-Operation' in Manas Chatterji, Saul Arlosoroff, and Gauri Guha (ed), *Conflict Management of Water Resources* (2002) 145146-152.

[100] Caflisch, note 13 above, 13.

Historically, the need for clarification of the interplay of the two principles arose much earlier in the context of the 1966 Helsinki Rules. Thus the International Law Association considered that 'the principle of equitable and reasonable utilization should be the guiding principle… [wherein the no-significant harm] rule was one among the series of elements to be considered for determining whether a given use was "equitable and reasonable".'[101]

It has been observed that there exists unanimity of opinion among scholars that, in the event of conflicts among principles, 'the most fundamental principle of international water law is that of equitable utilisation.'[102] In short, the *principle of equitable utilisation* takes precedence over the *no significant harm* rule. If it were otherwise, the resultant situation would be to freeze the development of many upper riparian states to international basins, and this is perhaps more so in the Nile Basin than anywhere else. An immediate result of the precedence of equitable and reasonable utilisation over the no-significant harm would be to lay to rest the 'prior appropriation' doctrine that has been overly emphasised by the lower riparians of the Nile basin. Thus, the rules of international water law do not approve of downstream states' foreclosure of upstream new projects by demonstrating that the later development would cause it harm.[103]

During the preparation of the draft of what was to later become the Watercourse Convention, the International Law Commission commented that:

> *[prima facie*], utilisation of an international water course is not equitable if it causes other watercourse states appreciable harm. … The Commission recognizes, however, that in some instances the achievement of equitable and reasonable utilisation will depend upon the toleration by one or more watercourse states of a measure of harm.[104]

Applied alongside with the principle of equitable and reasonable utilisation, thus, the no significant harm rule imposes the *duty of due diligence* on the riparian states that start to put the common waters to a new or more use than had been the case. The due diligence duty goes beyond requiring a state to abstain from causing a harm to the other riparians and includes a positive duty to 'take all appropriate measures to prevent the causing of significant harm to other watercourse States.'[105] It has been observed that events that should be prevented in a state's territory could be lawful activities in the par-

[101] Caflisch, note 13 above, 13.

[102] Stephen C McCaffrey, 'The Law of International Watercourses: Some Recent Developments and Unanswered Questions' (1989) 17(3) *Denver Journal of International Law and Policy* 509.

[103] Ibid.

[104] See *Report of the International Law Commission on the Work of its Fortieth Session*, 43 U.N. GAOR Supp. (No. 10), U.N. Doc. A/43/10 (1988), pare 84.

ticular state's territory, but suffice for it to cause the state's international liability so long as they entail a significant harm in a neighbouring state. In the end, everything boils down to the requirements of mutual empathy among the riparian and the search for 'glasses half-full'.[106] There is a compelling need to maintain a delicate balance, and departure to either end from such an equilibrium is equally prejudicial.

5. Back to Point of Departure: The Water Convention and Basin-Specific Arrangements

The analysis of the interplay of the principle of equitable and reasonable utilisation and the no-significant harm rule would take us back to our initial observation that much has to be achieved via basin-specific arrangements such as the NBI. The rules of general international law provide general framework within which basin-specific rules can be made. But, given the adherence of the states to polarised positions, and the concern for sovereignty being still at play, it would take a long time for general international law, not least the Watercourse Convention, to play a major part in the resolution of water allocation in the Nile Basin. Indeed, some have doubted whether the Watercourse Convention would ever become truly operational.[107]

The adoption of the Watercourse Convention has seen an expressed suspicion, and even rejection, from the Nile riparians. Ethiopia complained of the lack of balance between the rights of downstream states and those of upstream states, and retorted that the Working Group that drafted the Watercourse Convention had made 'no serious desire to accommodate' the interests of the upstream states, 'particularly [those of] …a developing country such as Ethiopia.'[108] Rwanda pointed out that the Watercourse Convention lacked regard for sovereignty which it considered a 'sacrosanct principle' in treaty making processes.[109] Burundi outrightly rejected the Watercourse Convention and voted against it alongside China and Turkey. Egypt, Ethiopia, Rwanda and Tanzania have abstained in the voting process and have not signed it to date.[110] The Democratic Republic of Congo, Eritrea, and Uganda were absent and did not vote, and have not acceded to the Watercourse Convention subse-

[105] Art 7 (1), Watercourse Convention. See also Sucharitkul, note 92 above, 289.

[106] I borrow this phrase from Elias N Stebek, 'Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus' (2007) 1(1) *Mizan Law Review* 58.

[107] Caflisch, note 13 above, 16.

[108] Aaron Schwabach, 'The United Nations Convention on the Law of Non-navigational Uses of International watercourses, Customary International Law, and the Interests of Developing Upper Riparians' (1998) 33 *Texas International Law Journal* 275-276.

[109] Ibid, 276-277.

quently. The only two Nile basin states that voted in favour of the Watercourse Convention were Kenya and Sudan, and their ratification is yet to come. That leaves the Nile basin in a desperate situation where any inter-state regulatory framework is utterly absent.

Consequently, the hope of establishing a legal and institutional mechanism of inter-state cooperation over the management, utilisation and development of the Nile waters almost entirely depends on the success of the NBI processes. A regulatory framework that is specific to the basin states should soon be put in place and an effort to that end must tackle a huge task of balancing differing conceptions of sovereignty, the competition between equitable and reasonable utilisation and the no-significant harm rule and the apportionment of common waters for current and future uses of the riparians which in turn demands the accommodation of competing priorities of the Nile Basin states. Achieving such an objective is a task of monumental proportions but much depends upon the level of political will to avoid mutual suicide.

6. Towards an Attitudinal Change: The Duty to Negotiate in Good Faith

The attitudes of the Nile riparian states depict unique features that are contributing to the anarchic state of affairs in the Basin. The White Nile riparian states are known for their reticence and ambivalence in the move towards a negotiated agreement over Nile waters utilization. Until recently, their participation in the negotiations has been minimal .

This attitude is attributable to a variety of factors. The upstream states of the White Nile contribute just a modest share to the Nile, and the consequent gains from the agreed legal frameworks that may come about may seem of minimal significance to them than to the lower riparian and upstream states of the Blue Nile. Thus they may not have much incentive to spend much resource in the search for a negotiated agreement. Their relatively lesser dependence on the waters of the White Nile basin might lie behind such states' behaviour as well. Located as they are in the humid equatorial zone with a relatively reliable rainfall and water sources outside the Nile basin, the equatorial riparians have, to date, a minimal dependence on the waters of the Nile.[111] Besides, the gains that would accrue to them (from a basin-wide agreement) are so uncertain that they were not hitherto willing to risk their relationships with Egypt.[112]

[110] See The African Water Page < http://www.africanwater.org/UNPressWater.htm>, last accessed 08 April 2008.
[111] Tesfaye, note 31 above, 99.

Eritrea, a late comer as the newest state in the Basin, maintains an observer status to date, and is not actively committed to the NBI process. The major Blue Nile upper riparian and major contributor of the waters of the Nile, Ethiopia, has for a long time been a partner without a voice. It maintained an observer status both in *Undugu* and *TeccoNile.* To use comments from one of the external assessors of this article "UNDUGU was an informal forum spurred by Egypt which sometimes raised issues (regarding the Nile at the foreign ministers meeting of the OAU" while Hydromet and TECCONILE were the formal cooperative forerunners to the NBI.

Egypt has always sought to 'dominate rather than coexist with the Nile Valley.'[113] It almost invariably has always preferred the 'do-it-alone' avenue than concerted efforts to develop the basin waters. The construction of the Aswan High Dam, completed in collaboration with Sudan, seems to present an exception, but even that was a project constructed to serve more of Egyptian interests than those of the Sudanese. Egypt saw the importance of using Sudanese land along the common border to build the dam close enough to be monitored and controlled from the Egyptian side. As is well known, the catastrophic human cost of the dam in the form of forced evictions of indigenous populations from their ancestral land on which the Aswan High Dam was built was borne almost solely by Sudan. And in part, it was partly a project they imposed on the only other partner (Sudan) that was in a weaker bargaining position then as it is now.

To date, Egypt is known for its propensity to resort to armed responses to perceived or real hydraulic works on the Nile that would in the slightest way reduce the amount of waters reaching the Aswan. Thus the internal attitude of the countries of the basin is marked either by one of indifference, mutual insecurity or silence and this variation in the levels of enthusiasm for basin wide framework encourages the maintenance of the *status quo* and unilateralism.

It must be stressed that there are rules of international law that require a state to negotiate in good faith with the aim of reaching an agreement.[114.] In the negotiations of water basin agreements, failure to negotiate in good faith, or, alternatively, obstructing the move towards the negotiated legal and institu-

[112] Ibid..

[113] Elhance, note 19 above, 75.

[114] See Watercourse Convention, Arts 3(5), 4 (2), 8 (1), 17 (1) and (2); See also Stephen E. Draper, 'International Duties and Obligations for Transboundary water Sharing' (1997) 123(6) *Journal of Water Resources Planning and Management* 348; Mohamed Sameh Amr, 'Diversion of International Water Courses under International Law' (2003) 10 *African Yearbook of International Law*150-159.

tional framework is in itself a culpable conduct. More importantly, such an obstructive conduct of a state would almost inevitably cause significant harm to other basin states. Moreover, it may lend a hand to unilateral actions of the common river and continue to breed mutual mistrust among the basin states. On all of these counts, all of the Nile Basin states can be considered suspects, and a change of such an attitude and the need for complete good faith in intra -basin negotiations is long overdue. It would not be to assume too much to state that the current intransigence of the downstream riparians in the NBI process is a continuation of the same attitude.

Conclusions

As the old adage has it, *when the elephants fight, the grass gets trampled.* While states of the Nile basin have engaged in legal and doctrinal wrangling on the way to basin wide agreement, each day that passes before the treaty is ratified imposes a heavy but avertable cost on the lives, economic, security and environmental wellbeing of a tenth of the African population that inhabits the Nile Basin. This paper presents a humble effort to identify the causes that hinder or slow down the process of treaty formation over the allocation of the Nile waters among the riparians. Obviously, misconception of these causes leads to misdiagnosis of the nature of the problem, which in turn leads to the mismatch of response that perpetuates conflict and suffering in the Basin. Such a situation is akin to picking ants from one's body while standing on an anthill.

This study has identified triple blockades that hamper the path to the basin wide agreement in the Nile Basin that the NBI has to deal with. The basin suffers from a legal ambiguity, doctrinal controversies and problems of good faith on the part of the states. It is with the removal of these obstacles that the NBI efforts would come to fruition in the establishment of legal and institutional mechanisms and the eventual allocation of the Nile waters in an equitable and reasonable manner.

The impending treaty must be able to establish the substantive and procedural safeguards of the rights and duties of the states vis-à-vis other riparians of the basin. Sufficient and clear mandate must be entrusted to the Nile Basin Commission that would eventually replace the NBI. Success or failure of the impending treaty regime depends on the degree to which it incorporates clear guidelines and institutional arrangement for the resolution of disputes that may ensue from time to time. The impending treaty would do well, therefore, by making provisions that take into account, *inter alia*, the needs of each riparian country, the yield of the river, current uses and new projects. Much of the prospect of success of the NBI ultimately depends upon the political will

and good faith put in the transition through the temporary NBI mechanism to the permanent Nile Basin Commission. It must be acknowledged that the Nile riparians do not have viable alternatives to the joint management and equitable utilisation of the Nile waters, and the choice is one of sailing together or sinking together. Time is running out, and so is water. ■

BETWEEN AMBIVALENCE AND NECESSITY IN THE NILE BASIN:

OCCLUSIONS ON THE PATH TOWARDS A BASIN-WIDE TREATY

Takele Soboka Bulto *

> "Watersheds come in families; nested levels of intimacy. On the grandest scale the hydrologic web is like all humanity. ... The big river is like your nation, a little out of hand. The lake is your cousin. The creek is your sister. The pond is her child. And, for better or worse, in sickness and in health, you are married to your sink." [1]

Introduction

Basin-wide arrangements such as the Nile Basin Initiative (NBI)[2] are crucial to regulate specific regional problems.[3] If effective, they are better placed to address the special peculiarities of a given hydropolitical region than are the general rules of international law.[4] Conversely, general rules of international law could provide a general framework for basin states that need to negotiate the *modus operandi* of their respective access to common waters like the

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[1] Michael Parfit, quoted in Maude Barlow, and Tony Clarke, *Blue Gold: The Battle against Corporate Theft of the World's Water* (2002) xi.

[2] Launched in February 1999 in Dar Es Salaam, Tanzania, with all the Nile riparian but Eritrea as members, the NBI is a temporary mechanism through which the basin states would establish a basin wide treaty and institutional mechanism for the equitable and reasonable sharing of the common waters. It is expected to draft a basin-wide treaty binding upon all riparian states that establishes a Nile Basin Commission with powers to study and resolve conflicts over the utilization of the Nile waters. It operates from its head quarters in Kampala, Uganda.

[3] Basin-specific treaties complement and supplement the general rules of international law regulating the use of international watercourses. In cases of conflict between the two sets of rules, the basin-wide treaty prevails through the legal maxim that special *rules prevail over the general (lex spacaialis rule)* and the general rules give way to the special ones on the particular subject. See Philippe Sands, 'Watercourses, Environment and

Nile.[5] As Hayward observed, 'a clear view of the requirements of international law can provide States with a reference point from which to assimilate the diverse influences that shape their actions and interactions with their riparian neighbours'.[6] It is in the same vein that Art 3 of the 1997 UN Convention on Non-Navigational Uses of International Watercourses (Watercourse Convention) [7] is worded in such a manner that recognizes 'the "framework" nature of the [Watercourse] Convention…[and it] encourages parties to follow the general principles on the Convention in their specific agreements without preventing them from departing from it.'[8]

Yet, in the regulation of inter-state right and duties over common waters, international law generally leaves much to be desired. Attempts to develop and elaborate rules of international law pertaining to the regulation of a state's right to utilization and management of international waters have been met only with a modest success in terms of codifying binding and universally applicable rules. It has been observed that '[i]nternational river law is one of the most unsettled areas of international law; it is an area where there are few rules of general application or validity.'[9] The only convention that purports to have the potential of universal applicability in the regulation of inter-state non-navigational utilization of international waters to date is the Watercourse

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the International Court of Justice: The Gabcikovo-Nagymaros Case' in Salman M. A Salman, Boisson de Chazournes, Laurence (ed), *International Watercourses: Enhancing Cooperation and Managing Conflict: Proceedings of a World Bank Seminar* (1998) 121.

[4] See R D Hayton, 'The Formation of the Customary Rules of International Drainage Basin Law ' in A H Garretson, R D Hayton and C J Olmstead (ed), *The Law of International Drainage Basins* (1967) 862.

[5] See Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5(1) *The Georgetown International Environmental Law Review* 18.

[6] Keith Hayward, 'Supplying Basin-Wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper River' (2007) 18(3) *Colorado Journal of International Environmental Law and Policy* 633.

[7] Convention on the Law of the Non-navigational Uses of International Watercourses 1997; Adopted by the General Assembly of the United Nations on 21 May 1997. The adoption of the Convention saw 103 states voting in favour, 3 against (Burundi, China and Turkey) and 27 abstain against it. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49, (A/51/49); available at <http://untreaty.un.org/ilc/texts /instruments/english/ conventions /8_3 _1997.pdf >, last accessed 06 February 2008.

[8] Stephen C McCaffrey, and Mpazi Sinjela, 'The 1997 United Nations Convention on International Watercourses' (1998) 92(1) *The American Journal of International Law* 98. See also Arts 3 and 4 of the Watercourse Convention.

Convention which has yet to enter into force as it is awaiting the necessary trigger- ratification.[10]

Various general rules of international law require specific basin or sub-basin agreements for their application. In effect, the regulation of a state's right to access the waters of an international river such as the Nile has been left to the bilateral or multilateral agreements among the riparians of a given water. In the Nile Basin, such a regulatory framework is expected to result from the efforts of the NBI. Obviously, to date the NBI framework is more of a promise than an achievement as it has yet to establish a basin-wide treaty and the Nile Basin Commission.

In the basin that has seen much more of discordance, unilateralism, mutual insecurity and suspicion as well as conflicts among the riparians rather than trust and cooperation, the establishment of the NBI in itself has appeared to throw up a beacon of light. A new dawn of rapprochement seemed to be on the horizon when the Nile riparian states declared that 'there is no regional or international treaty or agreement among the riparian States of the Nile River Basin…on cooperation in the utilization of the waters of the Nile River Basin.'[11] This declaration is of crucial significance as it marked, *prima facie*, a break away from the hitherto prevailing stance of some riparian (notably Egypt and Sudan) that insisted on the continued validity of some colonial and postcolonial treaties and their extended application to non-state parties of the Nile Basin riparian. Although Egypt and Sudan did not expressly renounce the validity of the *status quo*, the embodiment of the principle of equitable utilization of the Nile in NBI's declaration implies a departure from the *status quo* which did not recognize the equitable share of upstream riparians.

Yet there seemed to be a retreat from this stance and an apparent change of heart among the lower riparians. Of late, Egypt and Sudan have come up with the proposition that the *status quo* of the existing uses be respected, in a manner that adversely affects the interests of upper riparians. The official reason for this change of stance has been attributed to the two downstream states' fear of possible threat to 'their water security', who proposed to insert a clause in the draft instrument for the maintenance of the same. According to the Chair of the Nile Council of Ministers, Egypt and Sudan have insisted on the recognition by the other Nile riparians of the 1929 treaty between the UK

[9] Yimer Fisseha, 'State Succession and the Legal Status of International Rivers' in Ralph Zacklin, et. al. (ed), *The Legal Regime of International Rivers and Lakes* (1981) 177.

[10] Thirty-five states should ratify the Convention for it to come into operation. See Watercourse Convention, Art. 36 (1) and (2).

[11] See *Nile Basin Initiative Act* (2002), Preamble, Para 2.

(acting on behalf of Sudan) and Egypt.[12] Where the situation stands now, the move towards basin-wide framework and the establishment of the Nile Basin Commission within the NBI has hit a temporary glitch, casting doubt over the immediate prospect of reaching a final framework agreement over utilization, management and protection of the waters of the Nile. Such an attitude, it will be shown, is never an isolated incident, as similar motives and actions have provided roadblocks to the conclusion of an agreement over the equitable sharing of the Nile waters over the past decades.

This paper argues that three barriers must be overcome for the ongoing NBI efforts to take off the ground: legal paucity, obsession with history and doctrinal wranglings. In the next three sections, the paper grapples with these three barriers in that particular order. In the two sections that follow, the role of basin-specific arrangements and the special role of the NBI will be presented. It will be argued that states have the duty to negotiate in good faith to reach basin-wide agreements. Finally, conclusions and brief recommendatory notes have been forwarded.

1 The State of International Law Regulating Inter-state Water Rights

Analysis of the rules of international law over the management, utilisation and development of transboundary river basins such as the Nile leave one in a penumbra of doubt as to whether there are specific rules capable of resolving the apportionment of the shared waters. Apart from the Watercourse Convention which is yet to become operational after the necessary number of ratifications, rules of international water law have 'always been (and remain [..]) vague and uncertain.'[13] Except for a few principles such as the principles of equitable utilisation, the no-significant harm rule, and the duty to negotiate in good faith that emerge from customary rules (see section 6 below), general

[12] Joseph Ngome, *Daily Nation,* ''News Extra: Clause Holds Key to New Nile Treaty', Nairobi, Kenya, 28 March 2008; available at <Nationmedia_com>, last accessed 28 March 2008. Information pertaining to the negotiation process and its progresses are hardly available as the dialogue is surrounded by a cult of secrecy.

[13] See Lucius Caflisch, 'Regulation of Uses of International Watercourses' in Salman M. A Salman, Boisson de Chazournes, Laurence (ed), *International Watercourses: Enhancing Cooperation and Managing Conflict: Proceedings of a World Bank Seminar* (1998) 316; Ellen Hey, 'Sustainable Use of Shared Water Resources: The Need for a Paradigm Shift in International Watercourses Law' in Gerald H Blake, et. al. (ed), *The Peaceful Management of Transboundary Resources* (1995) 127-130; Dante A Caponera, 'Shared Waters and International Law' in Gerald H Blake, et. al. (ed), *The Peaceful Management of Transboundary Resources* (1995) 121-123.

positive international law has to travel a long distance before declaring itself ready and able to regulate inter-riparian allocation of water resources .

This lacuna points to the heightened importance of basin-specific treaties and mechanisms that should be installed. For example, the basin states of the Niger, the Senegal, the Zambezi river basins and the SADC Protocol have treaties and mechanisms to enforce cooperation among the riparians. In contrast, the Nile Basin States have not entered into any formal permanent arrangements concerning their dividend from their shared water.[14] Saving the dual exceptions of the 1929 and the 1959 treaties between Sudan and Egypt, all the bi-lateral and multilateral agreements over the waters of the Nile failed to apportion the bounty of the river among the riparians.[15] Almost all of the colonial treaties were concluded with the sole aim of freezing upstream projects over the Nile, in order to secure a continuous and undiminished flow of the water to Egypt. Consensus now exists that colonial agreements over the Nile have no legal effect whatsoever.[16]

There has never been a treaty that has brought together all the riparians of the Nile. It is indubitable that 'currently, there is no regional or international Treaty or Agreement among the riparian States of the Nile River Basin.'[17] This has left the basin without any comprehensive regulatory framework wherein an anarchic situation looms large, a scenario that inevitably perpetuates the hitherto prevailing unilateralism. Thus, the ongoing negotiation is all too important for the purpose of establishing a cooperative atmosphere in a basin where unilateralism, inter-state competition and mutual suspicion have been the norm while joint management and cooperation over the common resource have been exceptions. The crux of the analysis, then, is that the basin states would go some way towards the conclusion of a Nile basin treaty if they bring themselves to terms with the fact that the colonial treaties on the

[14] Valentina Okaru-Bisant, 'Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and management of Africa's Shared River Basins' (1998) 9(2) *Colorado Journal of International Environmental Law and Policy* 348-349.

[15] For an excellent discussions of the chronology and current status of the Nile basin treaties, see generally Okon Udokang, *Succession of New States to International Treaties* (1972); O Okidi, 'History of the Nile and Lake Victoria Basins through Treaties' in P P Howell, and J A Allan (ed), *The Nile: Sharing a Scarce Natural resources-A Historical and Technical Review of Water Management and of Economic and Legal Issues* (1996)

[16] See 'The Nile: Water Conflicts' < http:// www.scienceinafrica. co.za/ 2003 /may / nile.htm> , accessed 08 April 2008; See also generally Girma Amare, *Nile Issue: The Imperative Need for Negotiation on the Utilization of Nile Waters*, EIIPD Occasional Papers Vol.2, No.6 (1997).

[17] The Nile Basin Initiative Act (2002), Preamble, Para 1

Nile waters are of no legal significance and that general international law cannot go down to the extent of apportioning shared waters such as the Nile. It is such an awakening that would pave the way for a constructive negotiation that helps start from a clean slate in view of inaugurating a comprehensive Nile Basin treaty and institutional mechanism for the equitable apportionment of the common resource

2. Divorce from the Past: The Role of Colonial Treaties and Colonial Mindset

History of inter-state interactions in the Nile basin is replete with repeated and overlapping efforts of the European colonizers to bring the river under their respective sphere of influence aimed at achieving their imperial objectives. Thus reference to the past, though important, does not offer much towards the harmonization of inter-riparian attitudes in their interactions and joint search for a cooperative framework over the Nile issue. Arguably, therefore, some of the colonial mentalities and traits of colonial motives have remained behind after the departure of the colonial masters, and it is still apparent in the inter-state negotiations over the use of the Nile waters such that these traits continue to hamper joint efforts towards the conclusion of a basin -wide treaty regime.

Historically, the Nile was part and parcel of the colonial scramble for Africa particularly because of the realization that control of Egypt and the Suez Canal by colonial administrations depended heavily upon the possibility of controlling the Nile.

> [t]here are about ten agreements dealing with consumptive use of the waters of the Nile and Lake Victoria. Prior to World War I, the treaties show Great Britain, for Egypt, as the contracting state. The United Kingdom, then the administering colonial power over Sudan, concluded an agreement with Italy (1891), Ethiopia (1902), the independent State of Congo (1906), and with Italy and France (1906). There is further agreement with Italy, signed by Britain, in 1925. Since then, Britain and Egypt signed all agreements on the Nile waters, beginning with the 1929 agreement dealing with Egyptian rights generally vis-à-vis those of Sudan, and ending with the agreements for construction and maintenance of the Owen Falls Dam achieved by Exchange of Notes between 1949 and 1953.[18]

Notwithstanding Belgian control of Burundi, Rwanda and Congo (now Democratic Republic of Congo (DRC)), Ethiopia's independence and Italian control of Eritrea, Great Britain had effectively controlled the Nile River

[18] Okidi, note 15 above, 323.

from its origins to the Mediterranean Sea.[19] Although Britain had used every possible means it had at its disposal to achieve the full control of the Nile, the more diplomatic avenue of concluding international treaties with the only independent state in the basin at the time (Ethiopia) and European powers controlling some of the then colonies provided an effective device towards that end. The most striking feature common to all the colonial treaties signed by Great Britain was the fact that in all the treaties the protection and furtherance of Egyptian interests (and colonial interests in Egypt) were the primary consideration.

It may not be that Great Britain intended so much to protect Egyptian interests *per se* as it did to protect its own colonial ambitions. For one thing, no colonial power like Great Britain could have failed to take note of the value of Egyptian Red Sea ports that were of central importance to Britain's colonial trade. Thus, during the colonial period, the 'Nile waters continued to be the lifeline of British colonial economic interest same as they had always been for Egypt.'[20] For another, the Suez Canal commanded a central strategic importance for controlling the shortest route from Europe to India- the 'Jewel of the British Crown'. Besides, the colonial policy of exploiting the huge Egyptian cotton productions for the textile mills in England was contingent upon Egyptian political stability. As Elhance noted, '[t]o a very large extent, this stability became contingent upon satisfying Egypt's growing water needs, without much regard for the interests of the other riparian.'[21]

This colonial policy was also prompted by the desire to manipulate the Nile waters in order to soften the anti-colonial uprising in Egypt.[22] The British were pretty much aware of the fact that unless they control the Nile waters, it would have been impossible to put pressure on Egyptian nationalism that was on the rise against the colonial rule. As Yacob Arsano noted, while Britain acted as a provider of the Nile waters to Egypt, 'it was naïve to believe that the British were dying for Cleopatra's Egypt, but the former was using Egypt's most sensitive resource to soothe the anti-British nationalist anger in Egypt since the end of the First World War'.[23] By 1923, this policy was formulated in an unequivocal manner: 'The power which holds the Soudan (sic) has Egypt at its mercy and through Egypt can dominate the Suez Canal.'[24] Such considerations had been behind the lopsided colonial agreements per-

[19] Arun P. Elhance, *Hydropolitics in the Third World: Conflict and Cooperation in International River Basins* (1999) 68.

[20] Yacob Arsano, *Ethiopia and the Nile: Dilemmas of National and Regional Hydropoitics*(Unpublished, PhD Dissertation, The University of Zurich) (2004) 53.

[21] Elhance, note 19 above, 68

[22] Yacob, note 20 above, 54.

[23] Yacob Arsano, 'Towards Conflict Prevention in the Nile Basin' (Paper pre-

taining to the utilization of the waters of the Nile. In the words of Yacob [25], 'Britain made sure that all Nile related agreements benefited its own colonial interests.' It was almost inevitable, therefore, that the multitude of the colonial agreements that Britain initiated and concluded with the upstream actors 'were far from establishing a regime of reciprocal rights or providing shared benefits on the transboundary water resources.'[26]

The striking similarity of all the colonial agreements lies in the fact that they, rather than establishing basin wide regulatory frameworks, established precedents and informed postcolonial mindset of riparian states whose behaviour, at least partially, are modeled on the colonial era approach to the problem, and that continued to hinder fresh negotiations and agreements upon the equitable utilization of the Nile. [27] The treaties of the colonial era in most cases banned irrigation, power generation and other uses of the Nile waters without the prior agreement of the Egyptian government in order to ensure the constant unreduced flow of the waters to Egypt.[28] Besides, these treaties encouraged unilateralism rather than cooperative management of the common resources; indeed, the utilization of the Nile waters depicts a marked difference between the rhetoric of the river being common to the riparian while remaining private to Egypt and Sudan. As observed by Kinfe, '[t]he British stance, in more sense than one, represents the early embryo of unilateralism which still bedevils the relationship among the riparians in general and that of Ethiopia and Egypt in particular.'[29]

Notwithstanding the departure of the colonizers and the attainment of independence by the former-colonies of the Nile basin, , the colonial era mentality is still refusing to give way to the post independence situations, as it is still lingering only to aggravate the long standing injustice relating to the utilization of the bounty of the Nile. The Egyptian leaders, beginning from the time of Nasser, adopted the concept of 'water security' from the British who had stated: 'No one can hold Egypt securely unless he also holds the

presented at the 5th Nile 2002 Conference, 1997) 491.

[24] John Murray, British Foreign Minister Bureaucrat, in his *Memorandum on the Political Situation of Egypt,* quoted in Terje Tvedt, "The Management of Water Irrigation: The Blue Nile" in *Beyond conflict in the Horn of Africa* (1992) 186.

[25] Yacob, note 20 above, 53.

[26] Ibid.

[27] Y A Mageed, 'The Integrated River Basin Development: The Challenges to the Nile Basin Countries' in J Lundqvist, U Lohm and M Falkenmark (ed), *Strategies for River Basin Management* (1985) 155.

[28] Ibid, 151.

[29] Abraham Kinfe, 'Nile Hurdles: Psycho-Political Roadblocks to An Agreement and the Way Forward toward A Rapprochement' (2000) Occasional *Papers Vol.2, No.6 (Ethiopian International Institute for Peace and Development, EIIPD)* 2.

whole valley of the Nile. The sources of the river in hostile or even in indifferent hands must always be a grave cause of danger.'[30]

Whereas the post independence era has witnessed only one treaty- the 1959 *Agreement for the Full Utilization of the Nile Waters*- concluded between Egypt and Sudan, this treaty has proved, like its colonial era predecessors, to be nothing more than a continuation of the colonial policies. It is only anomalous for two downstream states with extremely marginal water contribution to the Basin, if not none, to agree for 'the full utilisation' of a river originating in and shared by eight other states. Like its colonial predecessors, it was aimed to protect the Egyptian, and, to a lesser extent, Sudanese interests. Like the colonial era treaties, it did not give any consideration to the interests of the other riparians that are equally entitled to the utilisation of the waters of the Nile. Tesfaye has rightly asserted:

> Ever since the signing of the 1959 Agreement Egypt had time and again showed its inflexible stance towards the alteration of the treaty. …It [Egypt] rather considers the 1959 and preceding agreements as unchanging and sacrosanct. In effect, in as far as Egyptians are concerned, any fresh talk on the Nile water utilization beyond the 1959 status quo must by all means be circumvented. Put another way, the bottom line to any talk and the resultant modus vivendi, if any, should first and foremost take the 1959 status quo for granted and rather discuss the possibility of acquiring additional water in the Nile Basin. [31]

As recently as March 2008, Egypt and Sudan maintain that the framework agreement that has been drafted by the NBI should include a clause that reads: "[n]ot adversely affect *the water security of current users* and rights of the Nile Basin countries."[32] It has been reported that the water security of current users referred to here is the uses established under the 1929 and 1959 treaties between Sudan and Egypt.[33] Where the situation stands now, admitted the NBI, the disagreements have presented a significant hitch to the NBI processes and it needs the intervention and negotiation by the political heads of the states to expedite the process.[34]

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[30] Peel, quoted in Kinfe Abraham Kinfe, 'The Nile Issue: Psycho-Political Hurdles to an Agreement and the Way Forward Toward a Rapprochement' (Paper presented at the 5th Nile 2002 Conference, 1997) 599.

[31] Tesfaye Tafesse, *The Nile Question: Hydro Politics, Legal Wrangling, Modus Vivendi and Perspectives* (2001) 79.

[32] See *Daily Nation*, note 12 above (emphasis added).

[33] Ibid.

Yet, it needs no mention of the fact that the two treaties bind only the parties to them: -Sudan and Egypt- and should basin wide treaties be agreed, an entirely different document is needed that is based on a new equilibrium of equitable and reasonable utilisation.[35] The fact that new uses are of equal importance as existing uses cannot be overemphasised. Thus the post independence (1959) agreement and the attitude of some of the riparians in the ongoing NBI process proved to be a continuation of the colonial era mentality wherein the Nile was presumably geared almost exclusively towards the fulfilment of interests of Egypt (and Sudan) .Thus the postcolonial mindset of some of the riparian states is a close imitation of that of the pre-independence period that has served as a strong precedent upon which the Egyptian and Sudanese leaders modelled their post decolonization (1959) agreement on the Nile.

It is just axiomatic, therefore, that the 'colonial era mentality, subsequently inherited by the rulers of independent Egypt [and Sudan], and the resentments it has generated in the newly independent nations have continued to circumscribe hydropolitics in the Nile basin in the post-World War II era.'[36] As a result, the 'current management of Nile waters is one based on the views articulated by British imperial interest in the first half of the twentieth century which were … based on the assumption that Egypt's interests were paramount.'[37] Insistence upon the continuity of the prevailing situation would inevitably mean that the interests of the upstream Nile basin states would continue to play second fiddle to those of the downstream states. Such an imbalance has bred an impasse that has been hindering fresh negotiations over the allocation of the bounty of the Nile.

3. Resolving Doctrinal Controversies [38]

International law has been suffering from fluidity as regards the rules applicable to the consumptive utilization of international rivers. Against the backdrop of such ambiguity, the Nile riparian states have locked horns in their adherence to contradictory doctrines, the choice of which has heavily de-

[34] Ibid.

[35] Okaru-Bisant, note 14 above, 331.

[36] Elhance, note 19 above, 69.

[37] J.A Allan, 'Nile Basin Water Management Strategies' in *The Nile: Sharing a Scarce Natural resources-A Historical and Technical Review of Water Management and of Economic and Legal Issues* (1996) 316.

[38] It is beyond the purpose and scope of this work to delve into the details of the doctrinal controversies revolving around riparains' rights over shared water resources. For the present purposes, the intention is to show that arguments emerging from varying theories have contributed not in bringing the Nile riparians together but have worked to set them apart.

pended on political expediency. Needless to say, certain doctrines have become obsolete. But the tendency of adherence to them by Nile Basin states presents an obstacle that stands in the way of the formation of a new Nile Basin treaty. Of the various doctrines known to international law, two theories deserve a brief revisit here.

3.1- The Theory of Absolute Territorial Sovereignty/ The Harmon Doctrine

The theory follows from the assumption that a state is a master of all persons, things and circumstances existing in its territory. Accordingly, a state may adopt any measures relating to that segment of the waters flowing on its territory and freely dispose of the resource. In so doing a state consults and is guided only by its own national interests. In its bare form the theory advocates that 'an international watercourse situated in the territory of a State constitutes part of the public domain of that State and that since a State has dominium over its territory, another State acquires rights thereon only with the agreement of the first State'.[39]

Historically, the theory was authoritatively stated for the first time by Judson Harmon, Attorney-General of the United States, in a declaration of 1895 concerning the disputes over waters of the Rio Grande River between United States and Mexico. Invited to give his opinion on the position of the United States on the question of whether the United States was obliged to let flow to Mexico parts of the waters of Rio Grande which were diverted upstream, Attorney-General Harmon gave his famous statement:

> The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its territory… . All exceptions … to the full and complete power of a nation within its own territories must be traced to the consent of the nation itself. They can flow from no other legitimate source. … . The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain. … The case presented is not a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to the Department [of Justice]; but that question should be decided as one of policy only, because, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.[40]

[39] Bonaya Adhi Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems* (1985) 32.

[40] Quoted in Stephen C. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001) 115.

This strong statement has provided the genesis and the strength for the theory of absolute sovereignty.[41] The consequence of the theory is that it allows upstream states a complete freedom of action with regard to that segment of international watercourses flowing within their territories, irrespective of any prejudice it might entail in other countries downstream. That the theory is favourable to upper-basin states and, where there are several of them, to the uppermost one needs no further comment. It is not surprising therefore that Ethiopia's *aide-memoire* of 23 September 1957 addressed to diplomatic missions in Cairo seems to incline towards this theory although it did not categorically adhere to it. In fact, the following *aide-memore* was a reaction to Ethiopia's exclusion from the negotiation process between Egypt and Sudan.

> Ethiopia has the right and the obligation to exploit the water resources of the Empire…for the benefit of present and future generation of its citizens…[and]…must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources and, in particular, as regards that portion of the same which is of the greatest importance to its welfare, namely, those waters providing so nearly the entirety of the volume of the Nile, *whatever may be the measure of utilization of such waters sought by recipient states situated along the course of that river.*[42]

At the UN Water Conference held in Argentina (in 1977), Ethiopia pronounced that it is '…the sovereign right of any riparian state, in the absence of an international agreement, to proceed unilaterally with the development of water resources within its territory.'[43] Although this statement sounds stronger than its real content, it does not articulate absolutist utilization in disregard to lower riparians.

The theory of absolute territorial sovereignty has not been received well by state practice or by publicists. Foremost opposition comes from downstream states in many parts of the world whose right to the international waters will be sacrificed to the extent of the validity of the theory. So too, the great majority of writers emphatically reject the theory of absolute territorial sovereignty or the Harmon Doctrine and no support for the doctrine can be found in contemporary literature.[44] Support for the theory from judicial practice is also next to none.[45] Indeed, the theory is 'almost unanimously abandoned today'.[46] In the context of the Nile basin, it has yet to be unanimously re-

[41] McCaffrey, note 40 above, 113.
[42] Quoted in Godana, 39 above, 35-36
[43] Clarke, quoted in Yacob, Supra note 19 at 55.
[44] Godana, note 39 above, 36; McCaffrey, note 40 above, 123.
[45] Godana, note 39 above, 36.
[46] Ibid, 38.

nounced by the riparian states. Nevertheless, the Nile riparian states' unanimous declaration that they seek 'to achieve sustainable socioeconomic development through *equitable utilization* of, and benefit from, the common Nile Basin water resources'[47] seems to be a move towards the renunciation of the doctrine.

3.2- The Theory of Absolute Territorial Integrity

This theory is the polar opposite of the absolute territorial sovereignty doctrine. While the latter advocates an upper riparian's complete freedom of action in relation to international waters, the theory of *absolute territorial integrity* maintains that the upstream state may not do anything that might affect the natural flow of the water into downstream state. According to this theory, therefore, upper riparians of a river that start to develop their water resources more slowly than lower riparians of the river will be seriously affected as they will be prohibited from undertaking any activity that would seriously affect the flow of the river to a state or states downstream.

Indubitably, this theory has been espoused and advocated by downstream riparian states. The fact that life in Egypt has been totally dependent on the waters of the Nile for millennia prompted Egypt to claim that it has 'historical', 'natural' or 'acquired' rights. Such a claim is to find its roots in the theory of absolute territorial integrity. According to Girma,

> The Egyptians, and to a lesser extent the Sudanese, favour the *prior use doctrine*, also known as *prior appropriation doctrine* which provides that 'the first user of the water acquires a definitive right to it, "first in time, first in right".'[48]

For fear of the possibility that Ethiopia and other upper riparians may begin to construct projects that would reduce the amount of water flowing into Sudan and Egypt, the two lower most riparians hold to this doctrine in order that the upstream states remain prevented from using the waters. The doctrine is premised on the fact that the lower riparians have long put the Nile waters to their use before the upper riparians have, and, as a result, have acquired 'historic rights' thereon. In Erlich's view, there are dual moral dimensions to Egypt's 'historic rights': 'first, Egypt has no other option to survive; and, second, Ethiopia has lived without the Nile so far and presumably can do so in

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[47] See Preamble, The Nile Basin Initiative Act, 2002, available at < http:// www. nile-basin.orgindex.php?option=com_docman&task=doc_view&gid=8>, Para 2, accessed 05 April 2008 (emphasis added).

[48] Amare Girma, 'Nile Issue: The Imperative Need for Negotiation on the Utilization of Nile Waters' (1997) Occasional *Papers Vol.2, No.6 (Ethiopian International Institute for Peace and Development, EIIPD)* 8.

the future'.[49] It would come as no surprise that the doctrine of absolute territorial integrity, and its corollary, 'historic rights', has therefore been advocated foremost by lower- most riparian Egypt compared to any other riparian. But it is too much to assume that the moral dimension of the argument will lead to legal right. It has been observed that:

> [t]he Egyptians' legal argument for their exclusive rights to the Nile waters is founded on precedence: Egypt has always used the waters of the Nile without restriction. …Moreover, they argue, the idea …was confirmed by the international agreements signed during the twentieth century. The principle of historic rights was mentioned in the 1929 Egyptian [British]-Sudanese Water Agreement and reiterated in the agreement for the Full Utilization of the Nile Waters of 1959. In fact, Egyptian (and Sudanese) exclusiveness with regard to the Nile waters was recognized by the British in all their colonial agreements.[50]

As Egypt has always been sensitive to the possibilities of development of the Nile by upstream states, its adherence to the doctrine of absolute territorial integrity had remained unchanged over the years. As far back as 1925, during the meeting of the Nile Commission, Egypt expressed its adherence to the theory of absolute territorial integrity on the division of the waters of the Nile among the riparians. More than five decades later, in 1981, Egypt expressed its unchanged stance in its 'Country Report' at an interregional meeting of international river organizations held in Dakar. The Report argued:

> [e]ach riparian country has the full right to maintain the status quo of the rivers flowing on its territory… it results from this principle that no country has the right to undertake any positive or negative measure that could have an impact on the river's flow in other countries. … a river's upper reaches should not be touched lest this should affect the flow of quantity of its water.[51]

Like the theory of absolute territorial sovereignty, the theory under consideration has been a subject of severe criticisms. It is extremist in essence and myopic in orientation. As Godana noted, 'the essential inequity of this theory resides in the fact that it allocates rights without corresponding duties.'[52] Neither state practice, nor the practice of international or domestic tribunals nor the writing of publicists has sufficiently supported this theory. Political statements aside, even Egypt has not been consistent in practice in its adherence to the theory. Suffice for the present purposes to mention that Egyptian agreement of 1949 to projects in upper Nile countries, such as the Owen Falls Dam in Uganda, which is a huge

[49] Haggai Erlich, *The Cross and the River: Ethiopia, Egypt, and the Nile* (2002) 6.

[50] Ibid.

[51] Quoted in Godana, note 39 above, 39.

[52] Godana, note 39 above, 39.

departure in practice from the theory of absolute territorial integrity.[53] Thus the theory, like its opposite, has gone out of favour, and 'may now be considered as discarded.'[54]

Nevertheless, it is odd to witness that insistence on this theory seems to be at the roots of the recent deadlock created in the NBI wherein Egypt and Sudan insisted upon the inclusion of a provision that has the import of maintaining the status quo of prior appropriation of the Nile waters by the two downstream states.[55] That would have made the whole NBI efforts a futile exercise at best. Such a stance in itself is a bottleneck to the formation of any basin wide agreement among the riparians, but most importantly, it has played a knock-on effect by enticing the upper riparians to pay in kind. According to Yacob, adherence to the theory by downstream states of the Nile Basin has provoked the upper riparians to hold to a counter stance, wherein they hold to the principle of absolute territorial sovereignty over the waters flowing in their territories.[56] As stated earlier, Ethiopian position was unambiguously enunciated at the UN Water Conference held in Argentina in 1977 in which Ethiopia pronounced the '… sovereign right of any riparian state, in the absence of an international agreement, to proceed unilaterally with the development of water resources within its territory.'[57] We may, however, consider this statement as a declaration which amplifies an aspect of the theory of equitable utilization because it has the basic theme of claiming equitable share.

3.3- Current Trends towards Equity

As the two doctrines highlighted above are in frontal clash with each other, any direct, indirect, total or partial adherence thereto in negotiations on the optimal utilization of the Nile can only set the countries apart rather than bring them to a point of agreement. Although the respective validity of the doctrines in terms of the contemporary practice of states and of international law has been called into question, the position of the Nile riparian have been, at least in theory, locked in these irreconcilable doctrines, and as such their contribution in hindering a negotiated agreement cannot be ignored.

The doctrine of equitable utilisation made its appearance in the vocabulary of many of the riparian states of the Nile Basin only in recent past, but it may well be said, to use the usual catch-phrase, better late than never. Granted, it is hoped that this new trend would provide a framework from which to work towards equity among the basin states in their respective rights and duties in the utilisation of the Nile waters.

[53] McCaffrey, note 40 above, 131.
[54] Godana, note 39 above, 39.
[55] See Daily Nation, note 11 above.
[56] Yacob, note 19 above, 55.
[57] See Clarke, as quoted in Yacob, note 19 above, 55.

4. Back to the Future: Towards an Equitable and Reasonable Utilisation

4.1 Introducing the Concept

The principle of equitable and reasonable utilisation of common water resources is the pillar of inter-state interaction over the uses of international waters.[58] Predicated on the sovereign equality of states, this theory seeks to ensure to all basin states an access to a reasonable and equitable amount from the shared waters, but it also imposes the duties upon all riparian states to use the resource in an equitable and reasonable manner.[59] It is crucial to stress that at the heart of the principle of equitable utilisation is co-riparian states' 'equality of rights,'[60] which means that riparian states have an equal right to use the common water resources *in accordance with their needs.*[61]

It does not necessarily imply volumetric equality of shares. As Goldberg observed, '[e]quality of rights does not mean in this context the right to an equal division of the waters but rather that each riparian has an equal right to the division of the waters on the basis of its needs, consistent with the corresponding rights of other co-riparians.'[62] Simply put, the principle of equitable utilisation rejects the exclusion of any riparian from the use of a common water resource, while providing for parity of treatment of equally pressing national needs of all the co-riparian states.

The actual dividend of a riparian from the common river thus turns upon multiple objective factors. According to Lipper,[63] three general criteria must be applied for an equitable apportionment of the actual share of a riparian state:

a) examination of the economic and social needs of the co-riparian states by an objective consideration of various factors and conflicting elements relevant to their use of the water;

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[58] See Keith Hayward, 'Supplying Basin-Wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper River' (2007) 18(3) *Colorado Journal of International Environmental Law and Policy* 633 642.See also Salman M. A. Salman, and Kishor Uprety, *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective* (2002) 15.

[59] Godana, note 39 above, 50.

[60] Jerome Lipper, 'Equitable Utilization' in A H Garretson, R D Hayton and C J Olmstead (ed), *The Law of International Drainage Basins* (1967) 44.

[61] Ibid.

[62] David Goldberg, 'World Bank Policy on Pojects on International Waterways in the Context of Emerging International Law and the Work of the International Law Commission' in Gerald H Blake, et. al. (ed), *The Peaceful Management of Transboundary Resources* (1995) 155.

[63] Lipper, note 60 above, 45.

b) distribution of the waters among the co-riparians in such a manner as to satisfy their needs to the greatest extent possible; and
c) accomplishment of the distribution of the waters by achieving the maximum benefit for each co-riparian consistent with the minimum of detriment to each.

It is of paramount importance to stress that the application of the principle of equitable utilization is a process that heavily reposes on the amount of confidence among riparians. Indeed, it is 'a dynamic process, which depended heavily upon active cooperation between states sharing freshwater resources.'[64] Such a cooperative atmosphere among riparians results from knowledge of, *inter alia*, data and information concerning the watercourse and its provision of prior notification to other states of new uses that might affect them.[65]

Be that as it may, the equitable utilization theory is also contingent upon other objective and specific factors. Under the 1997 Watercourse Convention, an illustrative (non-exhaustive) list of seven relevant criteria is provided:[66]

a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
b) The social and economic needs of the watercourse States concerned;
c) The population dependent on the watercourse in each Watercourse State;
d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
e) Existing and potential uses of the watercourse
f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
g) The availability of alternatives, of comparable value, to a particular planned or existing use.

At this juncture, it is important to note that there is no preferential treatment attached to the order of provisions of the criteria listed under Art 6 of the Watercourse Convention. One criterion can be the most important consideration in one context while other criteria may take precedence over the others in other circumstances. The bottom-line is that a factor (criterion) must indeed be relevant as an aid in the determination or satisfaction of the social and economic needs of the co-riparians of the basin. Once this threshold is met, it is not possible to attach a fixed weight to a singular criterion in all cases. The relative weight of a given relevant factor turns upon its merits relative to all the other factors at a given point in time.[67] In the final analysis, 'no other fac-

[64] McCaffrey, note 40 above, 345.
[65] (Id: 343).
[66] See Art .6 (1) (a-g).
[67] See Water Convention, Art 6 (3).

tor occupies a position of pre-eminence *per se* with respect to any other factor.'[68] Some factors may even be irrelevant in a given scenario at a given time for the determination of a case at hand.[69] Under the Watercourse Convention 'all relevant factors are to be considered together and a conclusion reached on the basis of the whole'[70] in the determination of what is a reasonable and equitable use in a particular case. Additionally, the Watercourse Convention clearly guards against temptations to attach a special weight to a given use,[71] and provides that in cases where conflict of uses occurs among the riparians, it instructs to attach 'special regard…to the requirements of vital human needs,'[72] presumably drinking and sanitation.

Apart from its codification in the Watercourse Convention, the principle of equitable utilisation enjoys an overwhelming support of scholarship and state practice such that 'nearly all international accords regarding international rivers are based on this principle.'[73] The 1966 Helsinki Rules (although not binding [74] and the 1994 International Law Commission's Draft Articles (non-binding) [75] had already solemnly espoused the principle before its eventual incorporation into the Watercourse Convention. Historically, the theory of equitable and reasonable shares has been recognized in China and India for many centuries and has acquired prominence over the past 500 years with the development of the nation state.[76] It seems that the principle of equitable and reasonable use is part of international custom.[77] As such, its inclusion in Art 5 of the 1997 Watercourse Convention is a codification of international custom rather than a progressive development of rules of international law regarding non-navigational uses of international watercourses.[78]

Notwithstanding earlier debates as to the applicable theory in the Nile basin, there seems to be a change of heart among the riparian states. In their recent

[68] C J Olmstead, et al, 'Helsinki Rules on the Uses of the Waters of International Rivers' in A H Garretson, R D Hayton and C J Olmstead (ed), *The Law of International Drainage Basins* (1967) 779 785.

[69] Ibid.

[70] Art 5 (3).

[71] Art 10 (1).

[72] Art 10 (2).

[73] Erlich, note 49 above, 7.

[74] See ' The Helsinki Rules on the Uses of the Waters of International Rivers,' Adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966, Art IV.

[75] See 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Arts 4 and 5.

[76] Erlich, note 49 above, 7.

[77] See Richard Paisley, 'Adversaries into Partners: International Water Law and the Equitable Sharing of Downstream Benefits' (2002) 3 *Melbourne journal of international law* 280283.

[78] It must be noted that the (1997) Water Convention explicitly states that it is an embodiment not only of progressive development of international water law but also of codification of an exiting custom. See Preamble, Water Convention, Para 4.

statements, an Egyptian diplomat and Ethiopia's Prime Minister, have stated their adherence to the theory of equitable and reasonable utilization of the waters of the Nile. The statement of Egyptian former Ambassador to Ethiopia, Marwan Badr, given on 7 August 1998 is instructive in this regard:

> Egypt recognizes that each state has the right to *equitable utilization* of its waters in accordance with international law. Egypt further recognizes that existing water agreements do not hinder the utilization of the Nile waters by any of the riparian states.[79]

This theory has been well received in Ethiopia as well. This can be discerned from the recent statement of the Ethiopian Prime Minister, Meles Zenawi:

> What we basically need is to deal with the Nile basin as a single region with shared natural resources. If we take this as a basis for dealing with the Nile issue, we will be able to devise better ways to achieve the maximum benefit from its waters.[80]

The biggest merit of the theory is that it takes into account both the current and future water needs of the riparians and is elastic enough to accommodate changing set of circumstances. A state's regime of utilization that is equitable vis-à-vis its co-riparians today may not be so next year. As McCaffrey noted, a 'new use in one state may change the equitable calculus as among all riparians and therefore should be the subject of notification, consultation, and if necessary, negotiation. And this is true whether the new use is made by an upstream or downstream state… .' [81]

4.2 Variants of Equitable Utilisation: Towards Application

Conceptually it is important to distinguish between two variants or modes of application of the principle of equitable utilization. The *shared uses* variant refers to the classical apportionment method, and it is usually achieved through a treaty among the basin states that allocates the dependable flow of *wet water* of a river among the riparian states, where right to 'water qua water' is created.[82] But each state enjoys complete freedom of action with respect to the choice of the manner of utilization of its quota,[83] presumably, with the major caveat that no state can have the right to cause a significant harm to its neighbors through its usage of the common waters.

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[79] Quoted in Robert O Collins. 'The Inscrutable Nile at the Beginning of the New Millennium' available at < http://www.history.ucsb.edu/faculty /Inscrutable %20 Nile1.pdf.>, accessed 16 December 2007(emphasis added.).

[80] Ibid.

[81] McCaffrey, note 40 above, 345.

[82] Wolf Quoted in A Dan Tarlock , and Patricia Wouters, 'Are Shared Benefits of International Waters an Equitable Appor-

The second variant of equitable utilization, called *shared benefits* principle, springs from welfare economics, and its gist is that water is a scarce resource that can be put to alternative uses but that in water sharing processes among the riparians of a given water states must ensure that water is put to a use that is most valuable as compared to the other uses.[84] The implication in many cases would lead to a situation where 'some nations forgo the actual use of wet water but are entitled to monetary compensation for allowing other states to put the water to its most efficient use.'[85]

In the NBI discussions, references have been made to the principle of equitable utilization but it yet to be seen if the states are ready to commit themselves to the shared benefits variant of the principle. Indeed, the NBI itself started off with a participatory process of dialogue among the Nile riparian states that resulted in their agreeing on a shared vision—to 'achieve sustainable socioeconomic development through the equitable utilization of, and benefit from, the common Nile Basin water resources.'[86]

Due to the usage of the word 'benefits' in the NBI processes, it is instructive to make an overview of the advantages and demerits of the two variants. At one level, the difference between the two variants appears to be little more than semantics. It could be argued that the object of any equitable distribution of an international river being to ensure that all riparian states receive 'water justice', and since 'water justice' can be obtained equally by sharing the use of wet water or by monetary compensation, the dichotomy is a distinction without a difference.[87]

Yet, such a line of argument comes out of a lack of deeper insight into problems associated with the practical application of the two variants of the principle. It may be pointed out that at least three concerns are associated with the 'shared benefits' variant of the principle.[88] Firstly, upstream headwater states are usually less fortunate than the usually wealthier downstream states, and such is the case in the Nile Basin. As a result, they may be tempted into accepting short-term benefits at the expense of forgoing their future uses.[89] Secondly, shared benefits may not directly address problems of poverty alleviation, and they usually fail to benefit those in the watershed of origin.[90]

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tionment?' (2007) 18(3) *Colorado Journal of International Environmental Law and Policy* 526.

[83] Ibid, 526-527

[84] Ibid, 527.

[85] Ibid, 527

[86] See 'NBI Background', < http://www.nilebasin.org/index.php?option=com_ content &task =view &id=13&Itemid=42>, last accessed 05 April 2008. (Emphasis added.).

[87] Tralock and Wouters, note 82, above, 527.

[88] See Ibid, 528

[89] Ibid.

[90] Ibid.

Thirdly, benefit sharing runs the risk that aquatic ecosystem integrity may not be adequately addressed, and the bio-system of the basin may be negatively affected.[91] The problems, as they are, may not be insurmountable but they must be carefully addressed. It can only be hoped that the ongoing negotiation over the cooperative utilization of the Nile waters will carefully address these and other related concerns.

4.3 Equitable Utilisation vis-à-vis No-significant Harm Rule

The principle of equitable utilisation and the 'no-significant harm' rule have been vying for recognition for a long time. Normally, the interplay of the doctrines of equitable utilisation and that of preventing 'significant harm' in the utilization of common waters are presented as a warring company. Historically, the no significant harm rule emerged before the principle of equitable utilisation. It regulated a whole range of neighbourly relations, especially transboundary harms attributable to the commission or omission of a neighbouring state.

The origin of the '*no harm rule'* may be traced to the Roman law maxim: *sic tuo utere ut alienum non laedas* (use your property in such a way as not to harm others).[92] It was originally based on the concept of restrictive enjoyment of one's own property, or limited and regulated proprietary rights subject to the prevention of harm to one's neighbours.[93] Put in the context of inter-state relations, it implied that neghibouring states 'are not allowed to use or to tolerate the use of their territory for causing damage to their neighbours.'[94]

Contrary to the rule of 'no-significant harm' which aspires to regulate the overall relations of neighbouring states, the principle of equitable utilisation is limited in scope to the regulation of inter-states' non-navigational activities on international watercourses.[95] Indeed, its emergence was prompted by the limitations of the 'no-significant harm' rule in relation to allocation of international watercourses. The 'no-significant harm' fails to provide adequate rules for the resolutions of controversies over 'allocation issues on fully-used or over-used international watercourses, or would have done so in an [un] equitable way…by giving complete priority to existing activities and by prohibiting the development of new or the extension of existing uses.'[96]

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[91] Ibid.

[92] Sompong Sucharitkul, 'State Responsibility and International Liability in Transnational Relations' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 289.

[93] Ibid.

[94] Caflisch, note 13 above, 12.

[95] Ibid,13.

[96] Ibid.

According to Caflisch, the no-significant harm rule has strived to play two related roles pertaining to the law of international rivers.[97] First, it seeks to provide guidelines in the allocation of the rights of shared water basins, and, second, it is also of crucial relevance in the area of environmental protection. While it has continued to hold sway in relation to environmental considerations, its water allocation utility has waned in recent years.[98] This is because most international water basins are fully used or overused today and an attempt at a new use by a riparian state would result in causing harm to the existing uses. The effective result of this no-significant harm rule is to maintain the status quo. Considered in the context of the Nile basin, where the water is already fully used and new upper riparian attempt to put the waters to imminent new uses,[99] the application of the 'no-significant harm' rule would deny the upper riparians any possibility of developing or expanding their use of the Nile waters.[100]

It was such a shortcoming associated with the no-significant harm rule that has brought into focus the need for clarification of the interplay of this doctrine with the principle of equitable utilisation. It is sterile to state that the prevention of any harm in a basin such as the Nile where ten states share the common waters is a matter of impossibility. The question that poses itself is as to which one of the two – the principle of equitable and reasonable utilisation or of no significant harm rule-takes precedence in the event that the two happen to contradict each other.

In situations where an upstream state commences a new project that would otherwise be a reasonable and equitable use of a common international river, the new use upstream would almost inevitably result in the reduction of the quantity or quality of the water that flows downstream. Such a reduction would inevitably cause harm to the pre-existing uses of the downstream state by diminishing the quantity or quality of the water owing to the new upstream use.

Under the doctrine of equitable and reasonable utilisation, the fact that there had been prior uses made of the common waters by some of the riparian would be one of the considerations in arriving at the equitable and reasonable allocation of the common waters. A use by a riparian may cause harm to the pre-exiting uses by another riparian. A choice must be made between the applications of the two competing principles.

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[97] Ibid, 12.

[98] Ibid.

[99] Ashok Swain, 'Managing the Nile River: The Role of Sub-Basin Co-Operation' in Manas Chatterji, Saul Arlosoroff, and Gauri Guha (ed), *Conflict Management of Water Resources* (2002) 145146-152.

[100] Caflisch, note 13 above, 13.

Historically, the need for clarification of the interplay of the two principles arose much earlier in the context of the 1966 Helsinki Rules. Thus the International Law Association considered that 'the principle of equitable and reasonable utilization should be the guiding principle… [wherein the no-significant harm] rule was one among the series of elements to be considered for determining whether a given use was "equitable and reasonable".'[101]

It has been observed that there exists unanimity of opinion among scholars that, in the event of conflicts among principles, 'the most fundamental principle of international water law is that of equitable utilisation.'[102] In short, the *principle of equitable utilisation* takes precedence over the *no significant harm* rule. If it were otherwise, the resultant situation would be to freeze the development of many upper riparian states to international basins, and this is perhaps more so in the Nile Basin than anywhere else. An immediate result of the precedence of equitable and reasonable utilisation over the no-significant harm would be to lay to rest the 'prior appropriation' doctrine that has been overly emphasised by the lower riparians of the Nile basin. Thus, the rules of international water law do not approve of downstream states' foreclosure of upstream new projects by demonstrating that the later development would cause it harm.[103]

During the preparation of the draft of what was to later become the Watercourse Convention, the International Law Commission commented that:

> *[prima facie*], utilisation of an international water course is not equitable if it causes other watercourse states appreciable harm. … The Commission recognizes, however, that in some instances the achievement of equitable and reasonable utilisation will depend upon the toleration by one or more watercourse states of a measure of harm.[104]

Applied alongside with the principle of equitable and reasonable utilisation, thus, the no significant harm rule imposes the *duty of due diligence* on the riparian states that start to put the common waters to a new or more use than had been the case. The due diligence duty goes beyond requiring a state to abstain from causing a harm to the other riparians and includes a positive duty to 'take all appropriate measures to prevent the causing of significant harm to other watercourse States.'[105] It has been observed that events that should be prevented in a state's territory could be lawful activities in the par-

[101] Caflisch, note 13 above, 13.

[102] Stephen C McCaffrey, 'The Law of International Watercourses: Some Recent Developments and Unanswered Questions' (1989) 17(3) *Denver Journal of International Law and Policy* 509.

[103] Ibid.

[104] See *Report of the International Law Commission on the Work of its Fortieth Session*, 43 U.N. GAOR Supp. (No. 10), U.N. Doc. A/43/10 (1988), pare 84.

ticular state's territory, but suffice for it to cause the state's international liability so long as they entail a significant harm in a neighbouring state. In the end, everything boils down to the requirements of mutual empathy among the riparian and the search for 'glasses half-full'.[106] There is a compelling need to maintain a delicate balance, and departure to either end from such an equilibrium is equally prejudicial.

5. Back to Point of Departure: The Water Convention and Basin-Specific Arrangements

The analysis of the interplay of the principle of equitable and reasonable utilisation and the no-significant harm rule would take us back to our initial observation that much has to be achieved via basin-specific arrangements such as the NBI. The rules of general international law provide general framework within which basin-specific rules can be made. But, given the adherence of the states to polarised positions, and the concern for sovereignty being still at play, it would take a long time for general international law, not least the Watercourse Convention, to play a major part in the resolution of water allocation in the Nile Basin. Indeed, some have doubted whether the Watercourse Convention would ever become truly operational.[107]

The adoption of the Watercourse Convention has seen an expressed suspicion, and even rejection, from the Nile riparians. Ethiopia complained of the lack of balance between the rights of downstream states and those of upstream states, and retorted that the Working Group that drafted the Watercourse Convention had made 'no serious desire to accommodate' the interests of the upstream states, 'particularly [those of] …a developing country such as Ethiopia.'[108] Rwanda pointed out that the Watercourse Convention lacked regard for sovereignty which it considered a 'sacrosanct principle' in treaty making processes.[109] Burundi outrightly rejected the Watercourse Convention and voted against it alongside China and Turkey. Egypt, Ethiopia, Rwanda and Tanzania have abstained in the voting process and have not signed it to date.[110] The Democratic Republic of Congo, Eritrea, and Uganda were absent and did not vote, and have not acceded to the Watercourse Convention subse-

[105] Art 7 (1), Watercourse Convention. See also Sucharitkul, note 92 above, 289.

[106] I borrow this phrase from Elias N Stebek, 'Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus' (2007) 1(1) *Mizan Law Review* 58.

[107] Caflisch, note 13 above, 16.

[108] Aaron Schwabach, 'The United Nations Convention on the Law of Non-navigational Uses of International watercourses, Customary International Law, and the Interests of Developing Upper Riparians' (1998) 33 *Texas International Law Journal* 275-276.

[109] Ibid, 276-277.

quently. The only two Nile basin states that voted in favour of the Watercourse Convention were Kenya and Sudan, and their ratification is yet to come. That leaves the Nile basin in a desperate situation where any inter-state regulatory framework is utterly absent.

Consequently, the hope of establishing a legal and institutional mechanism of inter-state cooperation over the management, utilisation and development of the Nile waters almost entirely depends on the success of the NBI processes. A regulatory framework that is specific to the basin states should soon be put in place and an effort to that end must tackle a huge task of balancing differing conceptions of sovereignty, the competition between equitable and reasonable utilisation and the no-significant harm rule and the apportionment of common waters for current and future uses of the riparians which in turn demands the accommodation of competing priorities of the Nile Basin states. Achieving such an objective is a task of monumental proportions but much depends upon the level of political will to avoid mutual suicide.

6. Towards an Attitudinal Change: The Duty to Negotiate in Good Faith

The attitudes of the Nile riparian states depict unique features that are contributing to the anarchic state of affairs in the Basin. The White Nile riparian states are known for their reticence and ambivalence in the move towards a negotiated agreement over Nile waters utilization. Until recently, their participation in the negotiations has been minimal .

This attitude is attributable to a variety of factors. The upstream states of the White Nile contribute just a modest share to the Nile, and the consequent gains from the agreed legal frameworks that may come about may seem of minimal significance to them than to the lower riparian and upstream states of the Blue Nile. Thus they may not have much incentive to spend much resource in the search for a negotiated agreement. Their relatively lesser dependence on the waters of the White Nile basin might lie behind such states' behaviour as well. Located as they are in the humid equatorial zone with a relatively reliable rainfall and water sources outside the Nile basin, the equatorial riparians have, to date, a minimal dependence on the waters of the Nile.[111] Besides, the gains that would accrue to them (from a basin-wide agreement) are so uncertain that they were not hitherto willing to risk their relationships with Egypt.[112]

[110] See The African Water Page < http://www.africanwater.org/UNPressWater.htm>, last accessed 08 April 2008.
[111] Tesfaye, note 31 above, 99.

Eritrea, a late comer as the newest state in the Basin, maintains an observer status to date, and is not actively committed to the NBI process. The major Blue Nile upper riparian and major contributor of the waters of the Nile, Ethiopia, has for a long time been a partner without a voice. It maintained an observer status both in *Undugu* and *TeccoNile.* To use comments from one of the external assessors of this article "UNDUGU was an informal forum spurred by Egypt which sometimes raised issues (regarding the Nile at the foreign ministers meeting of the OAU" while Hydromet and TECCONILE were the formal cooperative forerunners to the NBI.

Egypt has always sought to 'dominate rather than coexist with the Nile Valley.'[113] It almost invariably has always preferred the 'do-it-alone' avenue than concerted efforts to develop the basin waters. The construction of the Aswan High Dam, completed in collaboration with Sudan, seems to present an exception, but even that was a project constructed to serve more of Egyptian interests than those of the Sudanese. Egypt saw the importance of using Sudanese land along the common border to build the dam close enough to be monitored and controlled from the Egyptian side. As is well known, the catastrophic human cost of the dam in the form of forced evictions of indigenous populations from their ancestral land on which the Aswan High Dam was built was borne almost solely by Sudan. And in part, it was partly a project they imposed on the only other partner (Sudan) that was in a weaker bargaining position then as it is now.

To date, Egypt is known for its propensity to resort to armed responses to perceived or real hydraulic works on the Nile that would in the slightest way reduce the amount of waters reaching the Aswan. Thus the internal attitude of the countries of the basin is marked either by one of indifference, mutual insecurity or silence and this variation in the levels of enthusiasm for basin wide framework encourages the maintenance of the *status quo* and unilateralism.

It must be stressed that there are rules of international law that require a state to negotiate in good faith with the aim of reaching an agreement.[114.] In the negotiations of water basin agreements, failure to negotiate in good faith, or, alternatively, obstructing the move towards the negotiated legal and institu-

[112] Ibid..

[113] Elhance, note 19 above, 75.

[114] See Watercourse Convention, Arts 3(5), 4 (2), 8 (1), 17 (1) and (2); See also Stephen E. Draper, 'International Duties and Obligations for Transboundary water Sharing' (1997) 123(6) *Journal of Water Resources Planning and Management* 348; Mohamed Sameh Amr, 'Diversion of International Water Courses under International Law' (2003) 10 *African Yearbook of International Law*150-159.

tional framework is in itself a culpable conduct. More importantly, such an obstructive conduct of a state would almost inevitably cause significant harm to other basin states. Moreover, it may lend a hand to unilateral actions of the common river and continue to breed mutual mistrust among the basin states. On all of these counts, all of the Nile Basin states can be considered suspects, and a change of such an attitude and the need for complete good faith in intra -basin negotiations is long overdue. It would not be to assume too much to state that the current intransigence of the downstream riparians in the NBI process is a continuation of the same attitude.

Conclusions

As the old adage has it, *when the elephants fight, the grass gets trampled.* While states of the Nile basin have engaged in legal and doctrinal wrangling on the way to basin wide agreement, each day that passes before the treaty is ratified imposes a heavy but avertable cost on the lives, economic, security and environmental wellbeing of a tenth of the African population that inhabits the Nile Basin. This paper presents a humble effort to identify the causes that hinder or slow down the process of treaty formation over the allocation of the Nile waters among the riparians. Obviously, misconception of these causes leads to misdiagnosis of the nature of the problem, which in turn leads to the mismatch of response that perpetuates conflict and suffering in the Basin. Such a situation is akin to picking ants from one's body while standing on an anthill.

This study has identified triple blockades that hamper the path to the basin wide agreement in the Nile Basin that the NBI has to deal with. The basin suffers from a legal ambiguity, doctrinal controversies and problems of good faith on the part of the states. It is with the removal of these obstacles that the NBI efforts would come to fruition in the establishment of legal and institutional mechanisms and the eventual allocation of the Nile waters in an equitable and reasonable manner.

The impending treaty must be able to establish the substantive and procedural safeguards of the rights and duties of the states vis-à-vis other riparians of the basin. Sufficient and clear mandate must be entrusted to the Nile Basin Commission that would eventually replace the NBI. Success or failure of the impending treaty regime depends on the degree to which it incorporates clear guidelines and institutional arrangement for the resolution of disputes that may ensue from time to time. The impending treaty would do well, therefore, by making provisions that take into account, *inter alia*, the needs of each riparian country, the yield of the river, current uses and new projects. Much of the prospect of success of the NBI ultimately depends upon the political will

and good faith put in the transition through the temporary NBI mechanism to the permanent Nile Basin Commission. It must be acknowledged that the Nile riparians do not have viable alternatives to the joint management and equitable utilisation of the Nile waters, and the choice is one of sailing together or sinking together. Time is running out, and so is water. ■

DWINDLING ETHIOPIAN FORESTS:
THE 'CARROT' AND 'STICK' DILEMMA

Elias N. Stebek *

Introduction

'C*learing*' forests for agriculture, cattle grazing or establishment of villages was regarded as '*maknat*' in Ethiopia until awareness towards the adverse effects of deforestation gradually developed during recent decades. '*Maknat*' is an Amharic term which literally means '*straightening up*'; and in the context of forest clearing, it means '*preparing land for use'*. Such a mindset is contrary to the belief of many communities which give reverence to nature including trees. Traditional beliefs such as '*adbar*'[1] in many parts of Ethiopia, the practice of '*Irecha*'[2] in Oromo tradition and "*guido*"[3] (i.e. cultural forests which serve as places of worship in Sheka, Kafa) are typical concepts of reverence to nature.

The 2005 Report of the UN Commission for Africa states that "More that 70 percent of sub-Saharan Africa's population depends in large measure upon forests and woodlands for livelihoods and 60 percent of Africa's energy demand is met by forests."[4] In light of such dependence of sub-Saharan Africa on forests, the impact of deforestation is indeed severe. "Deforestation removes key sources of food, fuel and medicines for rural poor people as well as degrading biodiversity and wildlife – part of Africa's comparative advantage for tourism and pharmaceuticals."[5]

Although about 35 % of the land cover of Ethiopia was covered with high forests (during the early 1900's), it was reduced to 16% and 3.6 % of the total land area of the country in early 1950s and early 1980s respectively.[6] At pre-

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[1] Large tree under which ceremonies and community assemblies are made. In Shaka Zone (Kafa) , "Deddo" has a similar concept. See *infra*, Tadesse & Masresha note 9, pp. 12, 13

[2] Celebration in October which has elements of reverence to nature

[3] "Cultural Forests, wetlands, riverine forest and waterfalls are traditional religious sites and hence protected by imposing resource and habitat taboos through *guido*." (Tadesse Woldemariam and Masresha Fetene, *Forests of Sheka, Infra*, note 9 p. 12*)*

[4] *Our Common Interes*t, Supra note 42

[5] Ibid

sent the forest cover of the country is estimated to be 2.3% of the total land-mass of the country.[7] The first section of this article highlights the problem of Ethiopia's dwindling forests at accelerated rate. And sections 2, 3 and 4 forward a brief discussion on the legal regime and the factors behind continued deforestation despite the laws enacted towards forest conservation and development.

1. The magnitude, reasons and effects of deforestation

1.1- Magnitude of the problem

Depletion of forests and their degradation "are a threat to ecosystem diversity and a fundamental influence on the declining standard of living of many households."[8] The steadily declining forest cover of South West Ethiopia, for example, which was in a relatively better state illustrates the magnitude of the problem of deforestation:

> The change in forest cover during the last 30 years is the most severe anthropogenic catastrophe that the country has seen. Reusing (1998) estimated that the closed high forest of South West Ethiopia dropped from a 40% cover between 1971 to 1975 to only (around) 18% by 1997, which is a loss of about 60% (Tadesse *et al.* 2002). Conversion of forestland to other land use types is the major cause of deforestation. Around 235,000 hectares of closed and slightly disturbed forest areas were deforested between 1971 and 1997, a loss of about 10,000 hectares of forest every year (Reusing 1998).[9]

Tadesse and Masresha state that in the woredas of Sheka Zone (in SW Ethiopia) "dense closed forest decreased from about 55,304 hectares in 1987 to 43,424 by 2001. On the other hand, open forest decreased from 46,494 to 35,077 hectares during the same period. Their study in four *kebeles* namely (Uwa, Keja-Chewaka, Welo and Beto which border a tea plantation) indicated that dense cover which was 60% in 1973 declined to 50%, 32% and 20% respectively in the years 1987, 2001 and 2005.[10] The decrease in dense

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[6] EPA (1997) & EFAP (1994) Ethiopia Forest Action Program. Final Report. MoNRDEP. EFAP

[7] Demel Teketay, *Status of Forestry Development, Conservation and Utilization in Ethiopia*, 2000. pp. 37-53, In: Proceedings of the First Meeting of Eastern and North Eastern Node of the African Forestry Research Network (AFORNET) in Kenya 24th -26th May 1999.

[8] Kaba Urgessa, Perceptions of forest cover and tree planting and ownership in Jimma Zone, Ethiopia, http://www.fao.org/docrep/005/y9882e/y9882e04.htm (Accessed: February 22, 2008)

[9] Tadesse Woldemariam and Masresha Fetene, *Forests of Sheka: Ecological, social, legal and economic dimension of recent land use/ land cover changes* --- Overview and Synthesis, (Melca: 2007), pp. 4,5

forest cover was even worse (about 12.2 % per year) in Gemado kebele mainly owing to expanding coffee plantations. The dense forest cover which was 78% in 1973 has steeply fallen to 43% and 16% respectively in the years 1987 and 2005.[11]

1.2 Major reasons of deforestation in Ethiopia

Ethiopia's '*Policy and Strategy for the Development, Conservation and Utilization of Forests*' states that the increasing demand for farmland, fuel wood, construction, unlawful settlement in forests and unlawful logging which are caused by population growth are grounds for deforestation. The adverse effects stated in the document include depletion of biodiversity, soil erosion, runoffs, land degradation, desertification, droughts and recurrent famine.[12] Kaba Urgessa also attributes the severe deforestation and degradation of Ethiopia's forest cover to "heavy exploitation resulting from an escalating demand for fuelwood and land for cropping and grazing.[13]

Dr. Taddesse and Professor Masresha express their concern regarding "recent changes in institutions, forest cover and religion" that have caused "a significant change in people's perception towards forest resources and resource management."[14] According to Tadesse and Masresha, clan leaders who had traditional roles in the management of forests "had the right to enforce compliance to taboos and restrictions related to the cultural forest. Clan leaders also imposed punishment on people involved in cutting trees." Based on their study on Forests of Sheka Zone, they have criticized the post-1997 transfer of cultural forests into state forests and the allocation of "large forest areas (*Kobo* land), cultural forests (*guido*), burial places, wetlands and riverine forests along the Baro River" to tea plantations."[15] This has allowed the bulldozing of tabooed and respected sites thereby degrading local values, belief systems and feelings of responsibility.[16]

1.3 The need for forest conservation and reforestation

Professor Sebsebe Demissew states the need for conservation of forests on the following grounds:

- *Timber:* "If properly managed, some of the forests could be used

[10] Ibid, p. 9

[11] Ibid, p.10

[12] Policy and Strategy for the Development, Conservation and Utilization of Forests (Ministry of Agriculture and Rural Development, April 2007) N.B- Translated from the Amharic version.

[13] Lisanework, N. & Mesfin, T. 1989. "An ecological study of the vegetation of the Harena forest, Bale." *Sinet: Ethiopian Journal of Science*, 12(1): 63-63. (in kaba Urgessa, *Infra, note 226*)

[14] Tadesse and Masresha, *supra* note 9, pp. 12, 13

[15] Ibid

[16] Ibid

as a source of timber" through staggering timescale of production so that it can be matched with reforestation.

- *Regulation of water*: "Catchment areas well covered by natural forest provide maximum infiltration of water and a continuous stream flow. Once the forest cover is removed, the natural infiltration capacity of the soil will be impaired, and rain-water will flow on the surface, leading to a higher rate of erosion and the consequent drying up of streams and rivers." Projects associated with rivers, such as, irrigation, hydroelectric projects, etc. "depend on continuous flow of streams and rivers which ultimately depend on the forest cover of the mountains.
- *Conservation of soil fertility*: Soil is intact in forests, and erosion is minimal.
- *Shelter for animals*: Forests are natural "habitats for many wild animals." Deforestation means depriving animals of shelter and in effect cause and accelerate their extinction.
- *Source of economic plants (and biodiversity)*: "Most modern medicines are of plant origin, and a large proportion of the Ethiopian population uses the services of traditional healers who depend entirely on herbal medicine." …
- *Education and recreation*: Present and future generations have the right to learn and discover the species found in forests, (and their aesthetic utility and their significance as centers of recreation and tourism is apparent). [17]

The *first* measure suggested by Sebsebe is the participation of local farmers in forest conservation by involving them in the decision making process when forest areas are made subject to protection. Meanwhile, he notes the need to educate farmers and raise their standard of living in addition to availing them with alternatives such as allowing farmers to plant fast growing trees in the area. *Secondly*, Sebsebe underlines the need to make *inventory* of forests so that sites of timber, firewood, reforestation, etc. can be conducted through appropriate forest management. And *thirdly* he recommends an integrated approach towards forest conservation and reforestation because it is the shared concern of farmers, foresters, agronomists, the public at large and governmental and non-governmental institutions concerned with the conservation of natural resources.[18]

[17] Sebsebe Demissew, "The Floristic Composition of the Menagesha State Forest and the Need to Conserve Such Forests in Ethiopia", *Mountain Research and Development*, Vol. 8 No. 2/3, African Mountains and Highlands (May- Aug., 1988) p. 246

[18] Ibid, p. 147

2- Waves of deforestation, adverse impacts and the Legal Regime: An Overview

2.1 Waves of deforestation

There has been enhanced awareness about the necessity of effective legal regime since the mid-1960s. Series of Proclamations and Regulations were enacted in 1965 and 1968 that dealt with the conservation, protection and exploitation of state forests,[19] management of protective forests,[20] conservation and utilization of private forests [21] and Regulations which determine power of rangers and forest guards.[22] Before 1974/75, about half of the forestland in Ethiopia was privately owned or claimed, and about half was held by the government. [23] The legal regime until 1974 aimed at the protection of state forests and protected forests (i.e. forests that are protected from human and animal interference for the purpose of protection and development). Moreover, the exploitation of private forests were regulated with a view to balancing utilization with forest protection and development.

There was a wave of deforestation after the 1975 Rural Land Proclamation [24] because it took some years to offer effective protection to forests, and secondly the protection of forests which were previously made through guards of private owners, forest rangers and guards of state forests was considerably loose for some years after nationalization of rural land. "The 1975 land reform nationalized forestland and sawmills which existed mostly in the south (and southwest). The government controlled harvesting of forestland, and in some cases individuals had to secure permits from local peasant associations to cut trees. But this system accelerated the destruction of … forests." [25]

[19] State Forest Proclamation No.225/1965; Protection of State Forests Regulations No. 344/1968 and Exploitation of State Forests Regulations 345/1968

[20] Protective Forest Proclamation No. .227/ 1965; Management of Protective Forests Regulations No. 347/1967

[21] Private Forest Conservation Proclamation (Proc. No. 226/1965); Protection of Private Forests Regulations No. 343/1968; Exploitation of Private Forests Regulations No. 346/1968; Establishment of Community Forests Regulations No.348/1968

[21] Private Forest Conservation Proclamation (Proc. No. 226/1965); Protection of Private Forests Regulations No. 343/1968; Exploitation of Private Forests Regulations No. 346/1968; Establishment of Community Forests Regulations No.348/1968

[22] Power of Rangers Regulations No. 349/1968; Power of Forest Guards Regulations 350/1968

[23] *Infra, note 25*.

[24] Proclamation to Provide for the Public Ownership of Rural Lands (Proclamation No. 31/ 1975)

[25] The Library of Congress Country Studies; CIA World Fact book http://www.photius.com/countries/ethiopia/economy/ethiopia_economy_forestry.html (Accessed: February 15, 2008)

It was in the midst of such accelerated deforestation that the Forest and Wildlife Conservation and Development Proclamation No. 192/1980 was enacted in 1980. The Proclamation was indeed a significant step towards forest conservation and development. The famine which occurred few years after the Proclamation, was a wake up call to the level of awareness regarding the significance of forest conservation and development in Ethiopia's combat against poverty, recurrent droughts and famine.

During the late 1980's there were efforts to formulate the Conservation Strategy of Ethiopia (CSE). It took "a holistic view of the natural and man-made and cultural resources, and their use and abuse" and it sought "to integrate into a coherent framework of plans, policies and investment related to environmental sustainability."[26] The first phase (1989-1990) involved the drafting of Conceptual Framework of Conservation Strategy of Ethiopia (CSE).[27] The second phase of Conservation Strategy of Ethiopia (CSE, 1990-1995) dealt with policy and institutional framework and action plan. And the third phase (1995-1998) was the "implementation phase to finalize the development of regional state action plans and development programs"[28] mainly aiming at capacity building.

The latter phases of Conservation Strategy of Ethiopia and a stronger legal regime for forest protection and development were necessitated by a wave of illegal logging which (analogous to post 1974/75 events) occurred post 1991/92 during which change of government had created power vacuum in various rural areas until administrative entities and farmers' associations were capable of conducting some control against the wave of deforestation.

The following study by Terefe *et al* indicates the steady decline of forest cover in Western Shewa:

> The highlands of Western Shewa, in the Upper Awash Basin, were … covered with dense forest. The dominant tree species were *Tid* and *Zigba*. Nowadays, however, it has been difficult to find any dense forest in the area at all. Today, there are scattered individual trees of *Tid* and *Zigba* in remote and inaccessible places only.
>
> (According to the study conducted through focus group discussions and interviews) population pressure and the prevailing land use are the major factors. Particularly elders said that during the reign of Haile Selassie, large proportion of the plateau in Western Shoa (Ginchi, Holetta and Addis Alem areas) were covered with dense natural forests. According to elders, it was

[26] FDRE Environmental Policy, Environmental Protection Authority (in collaboration with Ministry of Economic Development and Cooperation (Foreword, 1997)
[27] Ibid
[28] Ibid

> after 1974 that the area witnessed severe depletion of forest resources. … [T]here was stiff competition among peasants for the purpose of securing agriculture land, and wood for construction and fuel. [29]

The author of this article believes that what the researchers stated as "*stiff competition among peasants*" to secure farmland was aggravated by the widespread practice of availing more land to families with bigger numbers indirectly rewarding households for every child they bring into the family. Moreover, newly wed couples were given land by farmers associations, which indirectly became an incentive towards early marriage and a drive towards bigger families thereby accelerating the momentum of Ethiopia's population growth in a pace unheard of during the preceding decades.

Terefe *et al* stated that there were various efforts during the 1980's "through reforestation programs which (the elders) described as successful" until "another round of destruction was experienced in the area" during the political transition of the early 1990's.[30] In a similar study conducted in the Ghibe-Omo Basin, Mekonnen and Biruk stated that large forestland of the upland area in the Omo-Ghibe Basin was converted into farmland between 1973 to 1994 (MoWR 1996).[31] Based on information from Natural Resource Conservation Office of the Woredas of Bako and Sokuru and Jima Zone, the study noted that the forest in the area was in a very good condition before 25 years and stated that the alarming rate of forest degradation is attributable to primarily agricultural land expansion including sloppy lands and secondly to "the (1994) Forest Proclamation that abolished check points, (which encouraged) cutting of prohibited species for timber production (such as) *Cordia Africana* and *Hagenia abyssinica*."[32]

Mekonnen & Biruk's study revealed that "the forest resources of the *Hammer, Benna* and *Dasenech* Weredas have been reduced significantly since the last ten years."[33] It further indicated that overgrazing, newly introduced crop farming, rapid population growth, absence of an alternative livelihood … are the major causes for deforestation. [34]

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[29] Terefe Abebe, Tsige Gebru, Wondafrash Genet and Yonas Tadesse, "Causes, Consequences and Management Aspects of the 2006 Flooding Hazards in Awash River Basin," in *Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation* (Forum for Environment, December 2006) pages 41, 42.

[30] Ibid, p.42

[31] Mekonnen Adinew and Biruk Asfaw, "Food Hazard Assessment in the Ghibe-Omo Basin: The Case of 2006," in "*Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation"* (Forum for Environment, December 2006) p. 23

[32] Ibid, p. 24

[33] Ibid

[34] Ibid

The study conducted by Yonas and Sinework came up with similar findings about the waves of deforestation in eastern Hararge.

> The highlands of eastern Hararge were once covered with dense forests. However, due to the rapid increase in population pressure and the subsequent demand for agricultural land, firewood and wood, forests and woodlands were cleared indiscriminately. … [D]uring the reign of Emperor Haile Selassie I (1930 -1974), the forest cover of the highland part was very dense.
>
> Since forests were owned by landlords, no one was allowed to enter the forest zone let alone cause damage. In fact, the collapse of the imperial rule gave way to massive forest destruction. … . Consequently, the mountain remained devoid of vegetation and this in turn aggravated soil erosion. [35]

Yonas and Sinework stated that "the large-scale mass campaign of undertaking soil conservation and reforestation works supported by food-for-work in *Dengego* highland" conducted in the 1980's "had brought significant improvement n maintaining the soil and forest status of the upland." However, during the late 1980's "settlers turned the forests into farmlands" and "large-scale deforestation and human settlement took place in the forest" especially in 1991 to 1995. And "consequently, the area is devoid of forests."[36] The study shows that these waves of deforestation were mainly attributable to lack of awareness and lack of sense of ownership on the development process, and the transitional periods during changes of government gave impetus for deforestation and the degradation of the environment.[37]

2.2- Deforestation, droughts, flooding and soil erosion

In spite of the meager forest cover in Ethiopia, there is still an imprudent enthusiasm to avail land (with forest and open forest covers) to 'investors.' In terms of short-term benefit, allocation of forest land to cash crop investors might generate public revenue from land lease, production of cash crops and employment opportunities. In many instances, however, such lands slip into the hands of land speculators who seek easy money thereby rendering the *prima facie* advantages imaginary than real. And in terms of long-term benefits, such conversion of forests to modern agriculture, resettlement, etc … clearly brings about further deforestation and environmental degradation which are very closely related with droughts and flooding.

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[35] Yonas Tadesse and Sinework Dagnachew, "Flooding at Dire Dawa: A Case Study of the 2006 Flash Flood," in "*Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation"* (Forum for Environment, December 2006) p. 55

[36] Ibid, pp. 55, 56

[37] Ibid, p. 56

The impact of deforestation has been common knowledge and most of its adverse effects do not seem to need discussion. However, there seems to be the need for further awareness (in Ethiopia) about the relationship between deforestation and flooding.

> Different studies reveal that land use changes can increase or decrease the volume of runoff and the rate and timing of flooding. Viessman and Lewis (2003) pointed out that afforestation, owing to its effects on infiltration, increases interception. As a result, forests increase dry season transpiration and reduce dry flow. Deforestation, on the other hand, has the converse effect. It increases quick overland flow and delay in subsurface flow (De Moraes et al, 2006). Due to the latter case, base flow is reduced. Thus, deforestation creates high flood peaks and increases soil erosion. [38]

Such soil erosion obviously creates gullies which grow deeper and wider to the extent that streams which flow into rivers and lakes steadily decrease. Water flow from ever-branching gullies enhance the sedimentation of rivers and land degradation in the lower plains because the water flows initially transport the fertile topsoil of sloppy lands and then carry sand and gravel which will ultimately cover the fertile topsoil of farmlands and shrubs in the lower areas. The 2006 flooding in Fogera Plain is a case in point:

> … A continued sedimentation of the lower *Gumara* and *Ribb* rivers is the result of the rapid erosion that is taking place in upper sites. In those upland sites that have been assessed there are so many gullies … (which) are widening in dimension. ... [R]ainfall of a mild intensity is taking away their soils in a greater proportion than heavier rainfalls used to do when the areas were under vegetation cover. On the other hand, in the down stream areas huge sediment is brought with the flood. It was also confirmed that along the vast plain in *Fogera* and *Libo Kemkem Weredas*, there existed huge fresh deposit of sediments. … [I]n just one rainy season (in 2006), sediment of more than half-meter depth was deposited over an area in *Shaga Mariam* Peasant Association of *Fogera* Woreda. [39]

Wondafrash and Shiferaw noted that "deforestation is the single most responsible factor for the continued soil erosion" in the area.[40] With regard to the progressive worsening of sedimentation, the study indicated that sediments of a bigger size were being deposited on the farmlands during 2006 flooding season. During focus group discussion "it was discovered that, usually over the previous *kiremt* (rainy seasons), only fertile sediments used to be depos-

[38] Wondafrash Genet & Shiferaw Alem, "*The 2006 Flood in Fogera Plain: Causes, Effects and Issues for Effective Management*," in "Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation" (Forum for Environment, December 2006) p. 2

[39] Ibid, p. 7

[40] Ibid

ited when the *Ribb* and *Gumara* rivers inundated their farmlands. … But (in 2006) the rivers brought gravels and sand in huge amount." [41]

The study showed that deforestation leads to rainfall droplets which fall free on land surface with a kinetic energy which causes soil erosion and loss of soil organic matter. Decrease in infiltration of water into the soil would then lead to increase in runoff and flooding.[42] The study further revealed that soil erosion *primarily* creates gullies which affect flow of rivers by increasing or decreasing the gradient of rivers, and which *secondly* cause sedimentation that leads to decrease in the cross sectional area of rivers and the resultant decrease in the discharge of water into the outlet of rivers thereby ending up in flooding.[43]

In the night of August 6th 2006, surge of flooding in Dire Dawa claimed the lives of 256 people and damaged about 5000 houses. [44] Floods chased nearly 36,000 people from the Fogera plains which flooded more that 6,000 hectares of cropland; and "irrigated farms and fertile lands along the Middle Awash river were also hit hard, with some 15,000 people displaced."[45] From August 6th to 13th 2006 "floods in Dasenech and Ngangatorn in South Omo caused more devastation, cutting off 14 villages and destroying whole settlements" during which 364 people died and 3,000 people drowned although the military managed to airlift about 1,300 [46] people out of the flooded villages.

And, in October 2006, at the middle of the night "another flood hit Kelafo, Mustahil and other low-lying villages in Somali region after traveling up to 1,100 kilometers from downpours in the Bale Mountains." This flooding killed "80 people and affected 362,000, including displacing 122,500."[47] These tragic events are indeed nature's wake up calls which are bound to stay looming at the shoulders of our barren mountains and plains while Ethiopia equally remains vulnerable to the opposite catastrophes of periodic droughts.

2.3 The legal regime: 1994 onwards

The preamble of Proclamation 94/1994 [48] (which has now been repealed by Proclamation No. 542/2007) *inter alia*, stated the grave and alarming situation of soil erosion and the need to arrest the expansion of desertification and ecological imbalances as its rationale. The Preamble further related forest development and conservation with the enhancement of sustainable develop-

[41] Ibid, p. 8
[42] Ibid, Figure 6, p. 12
[43] Ibid, Figure 7, p. 13
[44] *Annual Report 2006 Ethiopia*, UN World Food Programme (WFP Ethiopia, Addis Ababa), p 11
[45] Ibid, pp. 11,12
[46] Ibid, p. 12
[47] Ibid
[48] Proclamation to Provide for the Conservation, Development and Utilization of Forests (Proclamation No. 94/1994)

ment "through the participation of the people and benefit sharing by concerned communities" and by making forest policies to be in harmony with agricultural development and other economic sectors.

Article 3 of Proclamation No.94/1994 enumerates three modalities of ownership (namely: state forest, regional forest and private forest) although state forest could have meant forests under the Federal Government and Regional States. However, Article 3 of the Proclamation currently in force, i.e. Proclamation No. 542/2007 [49] recognizes private forest and state forest as two modes of ownership. According to Article 2/6 of the latter Proclamation state forest is defined as "any protected forest, which is under the ownership of the Federal Government or a Regional State."

Proclamation No. 94/1994 addressed conservation and development of Forests (Part II) and Utilization of Forests (Part III) in addition to which there were miscellaneous issues. The recent Proclamation No. 542/2007 has devoted Part II to the promotion of private forest development (Art. 4) technology (Article 5) and markets (Article 6) along with corresponding stipulations (under Article 7) with regard to obligations of private forest developers. It also devotes Part III (Articles 8 to 11) to the conservation, development and administration of state forests. The legal regimes which regulate private and state forest utilization, development and administration have thus been distinctly formulated.

2.4 Private and state forest

'Private forest' refers to "a forest other than state forest developed by any private person and includes a forest developed by members of a peasant association or by an association organized by private individuals, investors and governmental and non-governmental organizations."[50] The phrase 'by an association organized by private individuals' raises the issue whether forest may be owned by a farmer's association, and if so, whether such ownership can be classified into private ownership.

We can take the issue further, and inquire into whether communities can own forests, because Article 4/3 of Proclamation No. 542/ 2007 provides that:

> "Management plan shall be developed, with the participation of the local community, for forests that have not been designated as protected or productive forests, and such forests shall be given to the community, associations or investors so that they conserve and utilize them in accordance with directives to be issued by the appropriate body."

[49] A Proclamation to Provide for the Development, Conservation and Utilization of Forests (Proclamation No. 542/2007)

[50] Article 2/9 of Proclamation No. 542/ 2007

The rights embodied in Article 4 Sub-article 3 relate to 'conservation' and 'utilization' of forests that are not designated as protected [51] or productive [52] under the conditions stated in the provision. The interpretation of Article 4 Sub-article 3 in relation with Article 3 (which recognizes state and private forests) suggests two inferences. First, communities will bear the duty to conserve the forest which they can be entitled to utilize. And secondly, such rights do not constitute ownership because community ownership of forest has not been recognized under Article 3 of the Proclamation.

2.5 Promotion of private forest development, conservation and utilization

The former Proclamation (No. 94/1994) had merely embodied a single provision (Article 6) which dealt with conservation and development of private forests, while there was no provision that addressed the issue of utilization. The absence of a provision that dealt with utilization of private forests was apparent because the provision under Part III titled 'Utilization of Forest' had only envisaged utilization of state forests, regional forests and protected forests.

The repealed proclamation did not thus provide incentive to private foresters because Article 6 does not show the benefits gained by private foresters. There can of course, be private foresters, such as NGO's which might develop forests for purely environmental objectives. However, forestation by investors usually has profit motive subject to the environmental consideration of replacement of trees commensurate with periodic harvest of forest products.

Proclamation No. 542 / 2007 has indeed rectified this shortcoming and provides for various benefits which include the following:

- Promotion of forest development by providing private individuals, associations, government organizations, NGO's, and business organizations with rural land in areas designated for forest development if they want to develop forest (Article 4/1);
- Providing support with sufficient seeds and seedlings of the tree species that could have economic benefits (Article 4/4);

[51] "*Protected fores*t means a forest designated … to be conserved and developed free from human or animal interference for the purpose of water shade management and the conservation of genetic resources, biodiversity and the environment in general as well as for the purpose of training and research." (Article 2/7 of Proclamation 542/2007)

[52] Forest designated for the production of industrial, construction and other forest products (Art. 2/8 of Proclamation 542/ 2007)

- Assurance of private ownership of the forest given to private foresters on concession (Article 4/5);
- The right to use and transfer holding rights of forestland (Article 4/6);
- Entitlement to forestry capacity building schemes stipulated under Article 5; and
- Support in the enhancement of marketing skills and opportunities of forest products (Article 6).

The corresponding duties of private foresters are embodied under Article 7 which, *inter alia*, requires them to replace trees when harvested and to protect forests from pest, fire and other hazards.

2.6 The issue of community land-holding in the Ethiopian context

The concept of '*res nullius*' (things never owned) implies a master-owner relationship between humans and the environment. The concept regards natural resources not hitherto 'owned' susceptible to acquisition of ownership. Needless-to-say, there is the instinct of territoriality in all animals and birds. However, the modern concept of ownership requires title deeds as proof of ownership or possession (in the Ethiopian context), and an entire community technically does not have title over lands and forests as long as it does not possess the title deed to that effect. The question thus becomes whether indigenous communities who have lived in a certain area from time immemorial and who consider themselves not only as possessors and owners, but also as integral members of that particular ecosystem do not have ownership and possessory rights over the resources.

According to Article 3 of Proclamation No. 31/1975,[53] all lands are "the collective property of the Ethiopian People." In technical terms, every Ethiopian has around eighty millionth ownership right over every inch of Ethiopian land. This explains why land could only be possessed (*usus* and *fructus*) and not be sold, i.e. disposal (*abusus*) through sale. The Proclamation had recognized four forms of possession: individual farms, co-operative farms, state farms and lands possessed by pastoralist communities. In other words, land was publicly owned while the right to use it and exploit it was allocated under various modalities of possession.

Article 40 Sub-article 3 of the Constitution of the Federal Democratic Republic of Ethiopia provides that "The right of ownership of rural and urban land, as well as all natural resources, is exclusively vested in the *State and in the peoples of Ethiopia.*" The second sentence of the provision reads "Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and

[53] Proclamation to Provide for the Public Ownership of Rural Lands

shall not be subject to sale or other means of exchange." In effect, the Constitution recognizes co-ownership of land by the state and the people which may lead towards a plausible argument that the word '*people*' seems to apply to local and tribal communities as well.

2.7 Community land holding rights under Proclamation No. 456/2005

The Preamble of Proclamation No. 456/2005 [54] states the need "to sustainably conserve and develop natural resources and pass them over to the coming generation through the development and implementation of a sustainable rural land use …" The Preamble also expresses the necessity of putting "in place legal conditions which are conducive to enhance and strengthen the land use right of farmers to take the necessary conservation measures in areas where mixed farming of crop and animal production is prevalent and where there is a threat of soil erosion and forest degradation."[55] It is to be noted that the Proclamation's Preamble recognizes the existence of tribe based communal land holding system[56] which impliedly seems to envisage the existence of community land holding systems.

The term 'holding' in the Proclamation refers to private holding (Article 2/11), communal holding (Article 2/12), and state holding (Article 2/13) which are proved by 'holding certificate' (Article 2/14) issued by a competent authority as proof of rural land use right. Competent authority as defined under Article 2/17 "means a body established in accordance with the constitution of a region to ensure that a system of rural land administration and utilization is realized in the region."

With regard to ownership, Article 5/3 provides that "Government being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary." This clearly indicates that the Proclamation considers only one form of ownership of rural land: i.e. *government ownership*, whereas the Constitution under Article 40/3 bestows ownership of land on the state as a *political-administrative entity* and peoples as a social *collective* which may take the form of nations, nationalities and the Ethiopian people in general. It is to be noted that Article 89/6 of The Constitution provides that "Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." In other words, the Constitution doesn't entrust ownership to the Government.

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[54] Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation No. 456/ 2005, Preamble: paragraph 2

[55] Ibid, paragraph 5

[56] Ibid, paragraph 6

Article 5/3 of Proclamation No. 456/2005 is thus clearly unconstitutional because it considers the government (not the state) as the owner of rural land and disregards the status of peoples (which by extension seems to include communities) as co-owners of rural land. It is to be noted that the term 'government' has a narrower scope than 'state', and thus Article 5/3 of the Proclamation ought to have been in conformity with Article 40/3 of the FDRE Constitution which recognizes public ownership by the '*state and people*' which is clearly different from mere 'government ownership'.

Moreover, Article 5/3 of Proclamation No. 456/2005 contravenes Articles 13 to 17 of the ILO Convention No. 169 of June 1989.[57] The Convention requires governments to "respect the special importance for the cultures and spiritual values of the peoples concerned" and "their relationship with the lands or territories".[58] It also recognizes "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy" and safeguards their rights "to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities"[59] such as nomadic peoples and shifting cultivators (Article 14/1). The exercise of these rights over traditional lands (for generations) in effect gives them a territorial status to the community.

Although Ethiopia has not yet ratified the Convention, this right of indigenous peoples is currently in the process of acquiring the status of customary international law. Where the embodiment of a provision in a convention is meant to crystallize principle/s of customary international law, it is binding irrespective of the ratification status of (or being a state party to) the convention. The scope of this article does not, however, allow further discussion over this issue.

Mellese Damtie and Mohammed Abdullahi have discussed the shortcomings of the Proclamation No. 456/2005 in view of its discrepancy with the FDRE Constitution and the ILO Convention of 1989. As they correctly remarked, the Proclamation needs revision in conformity with the FDRE Constitution and international developments.[60]

[57] Convention (No. 169) concerning Indigenous and Tribal Peoples in independent countries (Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session; *Entry into force* 5 Sept. 1991) http://www.unhchr.ch/html/menu3/b/62.htm Accessed: March 20, 2008

[58] Article 13/1

[59] Article 14/1

[60] Mellese Damtie & Mohammed Abdullahi (Forests of Sheka, 2007) *Legal and Institutional Analysis for Sustainable Use of Forest Resources*: The Case of Sheka Forest in South West Ethiopia, Published by Melca , p. 135

3-Community land holding: An overview of opportunities and challenges

The Colombian experience of community lands can be stated as good practice:

> "According to official estimates, 81.65% of Colombian indigenous peoples have their territorial occupancy legalized. Recognition by the state adopts the form of the *resguardos*, a legal concept which, to the indigenous peoples, has the meaning of full ownership of land. A total of 469 *resguardos* have been created. … These lands, granted to the indigenous peoples as freeholds, add up to a present day total of approximately 27,954,896 hectares, which is 24.48% of the country's area.[61]

Another good practice as regards legal recognition to community land holding is the Mozambique Land Law No. 19/97 enacted on 1st October 1997. Article 1 defines local community as "a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests through the protection of areas of habitation or agriculture, whether cultivated or lying fallow, forests, places of cultural importance, pastures, water sources and areas for expansion." Land is the property of the State [62] and the right of title holders is the right of land use (*usus*) and benefit (*fructus)* under authorization or through occupancy [63] along with rights to transfer these rights for heirs and upon lease in accordance with the law.

Mozambique's Land Law does not recognize communities as co-owners of land in par with the State. However, it recognizes the right of communities as title holders through occupation of community lands. According to Article 1/7 of Mozambique's Land Law, *occupancy* is a "form of acquisition of the rights of use and benefit of land by national individual persons who have been using the land in good faith for at least ten years or by local communities."

The insecurity of communities in the continuity of using a certain land and its resources brings about neglect to its preservation and protection. Moreover, such insecurity causes conflict between neighbouring communities with competing claims. The situation in Afghanistan illustrates this point. "Various terms regarding the loci of rural community life exist in Afghanistan, such as

[61] Roque Roldán Ortega (2000) *Indigenous Peoples of Columbia and the Law*: A Critical Approach to the Study of Past and Present Situations, Translated into English by Efraín Sánchez, ILO supported publication, p. 42

[62] Article 3 of Mozambique's Land Law No. 19/97 of 1st October 1997

[63] Ibid, Article 1/17

qarya (often translated as 'village'), *quishlaq* (usually meaning settlement) and *montequa* (meaning something like area)."[64] Dr. Stanfield discusses the rangeland tenure of communities in rural Afghanistan. "Rangeland is a public land which cannot be privately (held). Families, clans and tribes, as well as nomadic groups use rangeland for feeding livestock, for gathering fuel, as a source of herbs for medicinal or cooking purposes, and a passage of ways for moving livestock from one place to another."[65]

Such rangelands may eventually become wastelands if communities indiscriminately change them to lands of rain-fed agriculture. A major phenomenon which accompanies such degradation of rangelands "is the increase in conflicts among farming and livestock dependent families for a decreasing supply of adequate rangeland" and decline in the supply of rangeland accompanied by "constant or increasing demand for areas to pasture livestock" inevitably leads to "competition for this increasingly scarce resource."[66]

Stanfield noted that the "main cause of rangeland degradation and resulting social conflicts is the insecurity with which rural people hold and use rangelands."[67] He has identified the following three dimensions of the tenure insecurity:

> "[F]irst, a longstanding history of conflict over rights to rangelands among groups of village residents and nomadic groups; second, differences of opinion about the preservation of rangeland between farming families with access to agricultural land and families without access to agricultural land but with a dependence on livestock; and third, contradictions between governmental agencies (empowered formal law establishing Sate ownership of pasture land) and local communities which , by custom and necessity, use the rangelands.
>
> The turmoil in Afghanistan during the last twenty five years has deepened the gap between formal laws and the facts on the ground. As a result, the Ministry of Agriculture, Irrigation and Livestock (MoAIL) has a new scheme which enables "the transfer of effective management responsibilities for forestry and range resources within defined community geographical areas to communities." The objective of such community based management is to create "value for community members (both in the form of productive resources –timber, firewood, better pasture), and as means of protecting natural resources …"[68]

[64] J. David Stanfield, *Community Land Administration: Focus on Afghanistan*, Terra Institute (October 28, 2007), p. 10

[65] Ibid, p. 13

[66] Ibid

[67] Ibid

[68] Ibid, pp. 13,14

4- Remarks on problems of forest protection and development

4.1- Some observations on Proclamation No. 542/ 2007: Strengths and Pitfalls

The Ethiopian legal regime indeed gives due focus to forest protection and development although it lacks adequately detailed and easily enforceable Regulations and the requisite institutional framework towards effective and efficient implementation of the legal regime. According to Article 7 of Proclamation No. 542/2007, a private forest owner is required to obtain a prior forest products movement permit before harvesting and transporting forest products.[69] Article 7/2 further imposes duties regarding the replacement of harvested trees, the protection of forest from pest, disease, fire and other hazards, and requires compliance with pertinent directives issued to protect the environment.

Article 9 deals with the conservation, development and administration of state forests with areas of focus such as:

- allocation of the necessary budget, manpower and materials and putting in place administration and management compatible to a given forest's level of development;
- allowing community participation in the development, conservation and benefit sharing;
- preventive and curative measures against pests, disease, disasters (natural or man-made);
- protection from unauthorized acts of settlement, deforestation, mining;
- protection from forest fire; and
- evacuation from forest areas (and settlement in other areas suitable for living) where habitation within a state forest obstructs forest development.

Article 11 of the Proclamation has embodied the modalities of administration of protected forests.[70] And finally, Part IV of the Proclamation titled "Miscellaneous Provisions" deals with prevention of forest fire (Article 12), production and movement of forest products (Article 13), and the prohibitions embodied under Article 14. According to the latter provision, no person can (*inter alia*) do the following acts in state forests (unless he/she obtains written permit from the Ministry of Agriculture and Rural Development or from the appropriate regional body):

- cutting or using endangered indigenous natural trees,
- cutting tree, settlement (temporary or permanent), grazing, hunting, car-

[69] Article 7/1

[70] See definition of 'protected forest' in *Supra* note 51

rying saws or other tools used for cutting trees,
- keeping bee-hives or extract honey.

Article 14/5 requires prior permit to undertake large-scale farming, mining operations, construction of roads, water drilling, irrigation, dam construction and other similar investment activities. The Proclamation further embodies a penalty clause against violation of the prohibitions highlighted above. According to Article 3 of the Criminal Code of 2004, special laws (of a criminal nature) are regarded as part of Ethiopian criminal law. Thus the penalties stated in Article 20 of Proclamation No. 542/2007 have the same effect as the penalties embodied in the Criminal Code.

According to Article 20, rigorous imprisonment (or imprisonment) [71] which ranges from 1 year to 15 years (and a varying range of fine) may be imposed upon violation of the various prohibitions stated in the Proclamation. For example, the offence of cutting trees or removal or processing or using forest products except pursuant to the Proclamation is punishable with rigorous imprisonment of one to five years and with a fine of Birr 10,000.[72] It is, however, surprising to see that the punishment imposed on the accomplice [73] is more severe than that of the principal offender[74] because Article 20 sub-Article 5 of the Proclamation states that providing "assistance in any form to those who illegally cut forest trees or transport forest products to hide or take away the forest products" is punishable with *5 years imprisonment* (and a fine of Birr 5,000). The basic penalty for the principal offender is one year, while that of the accomplice is five years.

The gravest penalty of ten to fifteen years of rigorous imprisonment is imposed on offenders who cause damage to a forest by setting fire or in any other manner.[75] Moreover, settlement or expansion of farmland in a forest area without permit or any act of construction of any infrastructure in a for-

[71] The words 'rigorous imprisonment' and 'imprisonment' have been used in the various penalty provisions. Whether the drafters have inadvertently used imprisonment to denote 'simple imprisonment' as defined in Article 106 of the 2006 Criminal Code is not clear. The drafters seem to use the words interchangeably without difference in meaning. The issue is briefly discussed below.

[72] Article 20/1 of Proclamation 542/2007

[73] According to Article 37 of the 2004 Criminal Code, an accomplice is a person who intentionally assists a principal offender either before or during the design or the commission of the offence. The assistance may be "by information, advice, supply of means or material aid of any kind."

[74] Article 32 of the 2004 Criminal Code states the types of principal offenders among which the principal material offender is the person who actually commits the offence either directly or through non-human agent (i.e. an animal or natural forces (Art. 32/1/a).

[75] Ibid, Article 20/3

[76] Ibid, Article 20/4

estland without having the necessary permit is punishable with not less than two years of imprisonment and with fine of Birr 20,000.[76] And , Article 20/6 of the Proclamation provides that 'faults' which do not fall under those stated in Articles 20/1 to 20/5 shall be punishable with six months to five years of imprisonment and with a fine of Birr 30,000. The term '*fault*' seems to mean '*offence*' because 'fault' is a term used in the context of civil wrongs.

The penalty clauses seem to be inconsistent with the 2004 Criminal Code in the use of terminology. The provisions use imprisonment (sub-Articles 1, 4, 5 and 6 of Article 20) while the words 'rigorous imprisonment' are used under sub-Articles 2 and 3. This doesn't seem to be an intentional distinction meant to classify the penalties into 'simple imprisonment' (as defined in Article 106 of the 2004 Criminal Code) and 'rigorous imprisonment' (defined under Article 107).

If the term 'imprisonment' in Articles 20/1, 20/4, 20/5 and 20/6 are interpreted as 'simple imprisonment', the maximum term of imprisonment that can be imposed is 3 years (according to Article 106 of the 2004 Criminal Code) while the ceiling might go up to 25 years if the term 'imprisonment' is interpreted as 'rigorous imprisonment.' In case, on the other hand, the drafters of Article 20 of the Proclamation had thought of the permissibility and non-permissibility of parole (**አመክሮ**) while they used the words '*imprisonment*' and '*rigorous imprisonment*', both forms of imprisonment are entitled to parole under the 2004 Criminal Code.[77]

In spite of such deficiencies, the penalty clauses of the Proclamation clearly show the focus given to forest protection. The gravity of penalties stipulated in Proclamation No. 542/2007 is indeed greater than the ones embodied in the 2004 Criminal Code for comparable offences. For example, Articles 353 (1/b), 516, 685, 689 [78] of the 2004 Criminal Code impose punishments of *simple imprisonment* (at times as alternative to fine) while Articles 849-852 merely entail *arrest* [79] or fine. Moreover, the Proclamation embodies provi-

[77] See Article 108 (1) third *alinea* of the 2004 Criminal Code.

[78] Intentional violation of provisions concerning exploitation of … forests (Article 353/1/b), propagation of agricultural or forest parasite (Article 516); intentional and unlawful damage in forests by bringing in herds or flocks to pasture (685), intentional damage to forest products (689)

[79] According to Article 106 of the Criminal Code, the range of *simple imprisonment* is ten days to three years (sub-Article 1, *second alinea*) subject to extension of the ceiling to a maximum of five years (sub-Article 1, *third alinea*) where the law so prescribes owing to the gravity of the offence. And Article 747(1) of the Criminal Code provides that the duration of *arrest* shall be from one day to three months.

sions which enable speedy trial in case of flagrant offences (Article 21/1) in addition to which illegally obtained forest products shall be taken and registered as exhibit until judicial decision (Articles 21/2 and 21/3).

4.2- Objective factors involved in the application of Ethiopian forest legal regime

Professors Ann and Robert Seidman noted that "a statute or other rule does not, by itself, constitute an independent, '*efficient*' cause of changed behavior" because "Law or no law, behavioral change, being ubiquitous, will undoubtedly occur." [80] The three crucial questions that can be raised in relation to the critical state of deforestation in Ethiopia are:

- "*why people behave the way they do*" with regard to deforestation,
- whether there are *alternatives for people to act otherwise*, and
- the extent to which *the law can be used* as one of the instruments for *behavioral change* towards reforestation.

Individuals and group of persons "act by making choices within a range of constraints and resources thrown by their social, political, economic and physical environments."[81] And the challenge of every law is the extent to which it can induce behaviors which will positively contribute towards forest conservation, development, reforestation and prudent utilization. "The rule, the implementing agency's expected behavior, and the 'non-legal' factors in the addressee's arena of choice, determined by the constraints and resources in their place-specific, non-legal environment … interact to influence a person's behavior in the face of the law."[82]

The reason why persons involved in deforestation act the way they do is their desire to benefit from forest clearing. Where, for example, a forest is privately owned and effectively guarded, the arena of choice does not allow people to be involved in acts of deforestation. Even under periods of weak law enforcement such as periods of political turmoil, the communities in *Sheka* Zone [83] acted differently than communities in Eastern *Hararge*, Ghibe-Omo Basin, uplands of *Fogera* and Western Shoa [84] because Sheka forest (see note 3, above) has greater significance to the communities in the area while the latter communities related forest clearing with the immediate 'benefits' of additional farmland, *fuelwood*, income from sale of wood, and other material returns.

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[80] Ann Seidman, Robert B. Seidman and Nalin Abeyesekere (2001) *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (London: Kluwer Law International) p. 14

[81] Ibid, p.15

[82] Ibid, p. 17

[83] See Section 5.1, paragraph 3

[84] See Section 5.2 above

However, during times of political transition such as the mid 1970's and the early 1990's the arena of choice of behavior included cutting trees and getting away with it. In places where the community guards against such acts owing to spiritual values or sense of ownership, however, change of governments and periods of weak law enforcement in rural areas would not induce rural dwellers to clear forests for various material benefits.

The question as to whether there are *alternatives* for people to act otherwise raises the issue of the availability of alternative opportunities so that farmers can restrain themselves from clearing land for farming owing to population growth and scarcity of farmlands and grazing grounds. Equally important is the question of whether there is an increasingly growing availability of alternatives to fuelwood.

Legal constraints obviously influence human behavior, but they become effective only where the mechanisms of implementation (by whom, how, etc) are pragmatically and prudently articulated and put in place. Even more so, the addressee of the legislation, as stated earlier, ought to have arenas of alternative/s so that the law can induce *behavioral changes* towards forest protection and development.

Certain behaviors occur irrespective of legal constraints. "Drivers usually stop at ... the intersection between a street and a busy highway, not (only) because the law requires them to do so, but because, if they do not, they may be involved in an accident."[85] On the other hand, "for some behaviors, the law constitutes something close to an 'efficient' cause. In no country do people pay their income taxes solely because a law requires them to do so; nevertheless, without an income tax law, nobody would pay the tax."[86]

In the Ethiopian context, laws on the utilization, protection and development of forests are not, unfortunately, analogues to traffic lights where the impact of violation is apparent and immediate. This is so, because persons responsible for deforestation and environment degradation do not, in most cases, become the immediate victims of their own acts of forest clearing. At times, the persons responsible and the victims may be generations apart. However, involving communities as active participants and beneficiaries of forest protection and development, enhancing popular awareness, and getting local elders, spiritual leaders, etc on board will gradually create a stronger foundation towards the culture of forest preservation and development.

The most crucial factor in this regard is the task of providing alternatives for fuel wood and facilitating alternatives of subsistence which can serve as

[85] Seidman *et a*l, *supra* note 89, p. 15 | [86] Ibid

means of earning a living in lieu of the scramble for more and more farmlands to the detriment of forest cover. This seems possible only if Ethiopia manages to leapfrog towards modern agriculture which can relieve its mountains from farming and grazing, and if sustained development in ICT, tourism, industrial production and services are realized thereby gradually reversing the ratio of Ethiopia's rural and urban dwellers.

Meanwhile, legal prohibitions against deforestation might not be as effective as they ought to be because "conflicts between human needs and wilderness preservation are not inconceivable."[87] As Janna Thomson remarked, human beings "are endowed by nature with certain inalienable needs – like the need for food and shelter – and if the population is big enough, these elementary needs are bound to come into conflict with the goal of preservation, however respectful people are towards nature."[88]

4.3-Institutional issues in the implementation of the Ethiopian forest legal regime

Ann Seidman is of the opinion that laws which are in the passive form and which lack details as to who does what in the implementation process are difficult to apply. [89] Although this statement was made on laws in general, it throws some light with regard to the major problems of ambiguities and overlapping functions in the implementation of the legal regime on forest protection in Ethiopia. Proclamation No. 542/ 2007 clearly lacks details of implementation and its enforcement remains to be difficult until it is reinforced by regulations.

The need to distinctly define the role of federal and regional institutions in the preservation and development of forests is a major area of concern. Mellese and Mohammed noted that "the Federal Government seems to have withdrawn from affairs of forests, except for providing technical and financial assistance, giving technological packages and making policies, laws and guidelines to the Regional states."[90] Based on interviews conducted with experts, they suggest that "the Federal Government should not withdraw … from administering forests, especially those (that are) critical and strategic for maintaining the ecological balance."[91] They support the suggestion of experts that forests which link two or more regional states and those which

[87] Janna L. Thompson *"Preservation and Wilderness and the Good Life"*, in *Environmental Philosophy* (Edited by Robert Eliot and Arran Gare) Open University Press: 1983, p. 102

[88] Ibid

[89] Discussion with Professor Ann W. Seidman, March 24th 2008

[90] Mellese Damtie and Mohammed Abdullahi, *Supra* note 60, p. 160

[91] Ibid

cross boundaries of regional states must be administered by the Federal Government.[92]

In principle, forest protection is most effective at the grassroots. Accordingly decentralization of forest protection and development is obviously preferable than over-centralization. However, "reports of field studies indicate (that) the rate of deforestation has increased especially in the years after 2001."[93] Mellese and Mohammed state that the decentralization has not effectively devolved to the grassroots with tailoring according to local contexts.[94]

> Decentralization might not be effective if it is made abruptly since it is a complex and dynamic process that includes constant learning and experimentation.
>
> Decentralization needs to be phased in gradually and involves: building consensus through an open, transparent and inclusive process; participatory decision making, institutional, technical and human capacity building; provision of adequate financial resources and incentives … ; tailoring objectives to local contexts and developing the flexibility to adapt to different situations and changing circumstances. [95]

The issue of decentralization cannot be considered to have been addressed until the protection, prudent utilization and development of forests devolves to the grassroots through the crucial task of their active involvement according to local contexts. In due course of awareness enhancement at the grassroots, communities can ultimately realize the adverse effects of deforestation so that they can be involved in the process of reversing the trend of accelerated environmental degradation and desertification.

4.4- Observations on the legal regime of Regional States

Although the Federal laws on Rural Land Use (Proclamation 256/2005) and on Forest Development, Conservation and Utilization (i.e- Proclamation 252/2007) do not recognize community land-holding, Article 3 of Forest Proclamation of Oromia [96] lists three forms of forest resource ownership, namely: state forest, private forest and community forest. Article 6 (sub-Article 1) of the Proclamation provides that "state owned forest (or) patches of forests outside the boundary of state forest may be handed over to organ-

[92] Ibid

[93] Ibid

[94] Ibid, 162

[95] SZA (2004) Decentralization, Federal Systems in Forestry and National Forest Programs: Report of a workshop co-organized by the Governments of Indonesia and Switzerland "The Interlaken Workshop", April 2004, p. 1 (in Mellese Damtie and Mohammed Abdulahi, *Supra* note 60, at161

[96] Proclamation No. 72/2003 (*Megeleta Oromia*, 15/1993)

ized local community" subject to the conditions stated in the provision. The provision recognizes the right of communities to use forest products sustainably (Art. 6/2/a) and meanwhile requires the community to protect the forest from human encroachment (Art. 6/2/b). Moreover, Oromia Rural Land Use and Administration Proclamation [97] recognizes community rights of access to land under Article 5, Sub-article 4 and defines communal holding under Article 2, Sub-article 5 of Proclamation No. 130/2007.

Tigray National State Rural Land Use Proclamation No. 23/1989 (Eth. Cal) [98] recognizes the right of farmers to own trees which they have planted on the plots that are under their possession (Art. 10/1), and meanwhile Article 10/2 of the Proclamation prohibits plantation of trees such as eucalyptus trees (apparently owing to their adverse effects on soil fertility and underground waters). The possessor of land is required to care for the trees on the land (Article 10/5) and is prohibited from cutting the types of trees stated under Article 10 sub-Article 3.

Article 4 of the SNNPR Forest Proclamation[99] resembles the Federal proclamations in having failed to recognize community holding of forests. It is to be noted that Article 9 of the Proclamation does not maintain balance between the utilization of forest products with the corresponding duty of preservation and development. The provision embodies stipulations as to how state forests can be put into use, and it does not give due focus to their conservation and development.

The positive aspects of the SNNPR Rural Land Use Proclamation [100] include the recognition of community possession (under Article 16) and reserved and protected lands (Article 19). However, Article 21 of the Proclamation evokes concern. The provision is titled 'Improving the impact of population pressure on the land' but rather allows "settlement on unoccupied lands of the region based on the study and will of the community." Resettlement programs are indeed extremely rare measures of emergency which should not be positively articulated in laws in the name of improving impact of population pressure. In fact, resettlements (which are options of a lesser evil under extreme situations of necessity) cause (rather than alleviate) pressure on forests and wild life as has been clearly observed through experience.

[97] Proclamation No. 56/2002 has been amended by Proclamation No. 130/2007

[98] *Negarit Gazet*a (Proclamation N0. 23/ 1989 Eth.; 6th Year No. 23, Mekele)

[99] Southern Nations, Nationalities and Peoples' Regional Government Proclamation Issued to Determine Forest Management, Development and Utilization (Proclamation No. 77/ 2004) *Debub Negarit Gazeta*, 9th Year No. 10

[100] SNNP Regional State Rural Land Administration and Utilization Proclamation (Proclamation No. 53/2003) Debub Negarit Gazeta, 8th Year No. 2

Community responsibilities which solely focus on protection and development of forests do not usually serve their purpose. This is so, because such legal regimes and policies fail to motivate communities and are unable to create a sense of ownership. Nor does community forest-land holding, by its own, become fruitful if the rights of utilization are not accompanied by restrictions against sale of community forest-lands, and unless conservation and development schemes for sustainable use are put in place.

4.4– Lessons from the legal regime of the 1960's

The State Forest Proclamation (Proclamation No. 225 of 1965), Private Forest Conservation Proclamation (Proclamation No. 226 of 1965) and Protective Forests Proclamation (Proclamation No. 227 of 1965)[101] were enacted on the same date, i.e. 27th of August 1965. This explains the basic factor behind the harmony and consistency in the proclamations and the holistic approach which was taken in the research, policy formulation, drafting, deliberations and promulgation process.

The Preambles of the Proclamations 225/1965 and Proclamation 226/1975 expressed the need to protect, conserve, develop and utilize "in accordance with modern scientific principles so as to promote the economic development of (Ethiopia) and to ensure a continuous supply of forest produces *for the benefit of the present and succeeding generations* …" Moreover, the Preambles of these two proclamations and Proclamation No. 226/1965 stated that conservation of forests is necessary for soil protection against erosion, deflation and desiccation. The Preambles further stated the role of forests in balancing the water regime and preserving the beauty and fertility of Ethiopia.

To this end, Article 6 of Proclamation No. 225/1965 unequivocally stipulated that "*No state forest shall be alienated, either in whole or in part*." This seemed to prohibit the alienation of state forests to agriculture, investment and other endeavours through various forms of allocation. It is indeed a principle that can *á fortiori* (for a stronger reason) be used at present because our forests need even greater protection that they did in the mid-1960s.

There is a similar lesson we can learn from Article 5 of the Private Forest Conservation Proclamation (Proclamation No. 226/1965) because it clearly prohibited the removal, utilization, processing or destruction of any forest product from private forests for commercial purposes unless the private forest owner obtains a permit from the authority stated in the Proclamation. The grounds that justify the denial of forest exploitation permit were clearly listed under Article 5 (e) thereby delimiting the discretionary power of the regulat-

[101] *Supra*, notes 19 to 22

ing authority. The reasons for the denial of forest exploitation permit were required to be stated in writing and no such denial could be made "except in cases where maintenance of the forest in question (was) necessary for:

i. conservation of the soil and its protection from erosion, deflation and desiccation;
ii. the protection and continued existence of springs and water-courses;
iii. protection of sand-hills and sea-shores from sea erosion or the spreading of sand;
iv. purposes of national defence; or
v. purposes of public health.

In contrast, Article 7 of Proclamation No. 542/ 2007 merely requires private forest owners to "notify the body found around the forest and obtain forest products movement permit prior to harvesting and transporting the product from place to place." While Proclamation 226/1965 had required prior *permit by an authority* before exploitation, the current Proclamation only requires *notification by the forest owner* thereby giving more power to forest owners in harvesting private forest products. Nor does the current Proclamation distinguish between privately owned natural forests and planted forests while Article 5 (a) of Proclamation 226/1965 was clearly stringent in the exploitation of privately owned natural forests.

Another important lesson which we can learn from the legal regime of the 1960s is the issuance of nine Regulations in 1968 which were meant to facilitate the effective enforcement of the three Proclamations enacted in 1965. Analogous to the proclamations, these Regulations were issued on the same date (30th September 1968), and this signals their horizontal synchrony and harmony. The Regulations were the following:

a) Regulations issued pursuant to the Private Forest Conservation and Protective Forests Proclamations of 1965 (Legal Notice No. 343/1968);
b) Regulations issued pursuant to the State Forest and Protective Forests Proclamations of 1965 (Legal Notice No. 344/1968);
c) Regulations issued pursuant to the State Forest Proclamation No. 225 of 1965 (Legal Notice No. 345/1968);
d) Regulations issued pursuant to the Private Forests Conservation Proclamation No. 226 of 1965 (Legal Notice No. 346/1968);
e) Regulations issued pursuant to the Protective Forests Proclamation No. 227 of 1965 (Legal Notice No. 347/1968);
f) Regulations issued pursuant to the Private Forests Conservation Proclamation No. 226 of 1965 (Legal Notice No. 348/1968 which regulated *community forests*);

g) Regulations issued pursuant to the State Forests Proclamation No. 225 of 1965 (Legal Notice No. 349/1968) which established Forest Ranger Service and defined the powers and duties of Forest Rangers;
h) Regulations issued pursuant to the State Forests Proclamation No. 225 of 1965 (Legal Notice No. 350/1968) which established Forest Guard Service and defined duties of Forest Guards; and
i) Regulations issued pursuant to the State Forest and Private Forests Conservation Proclamation of 1965 (Legal Notice No. 351/1968) which required commercial end-users of forest products to submit annual reports regarding the particulars stated in Article 4 of the Regulations.

Legal Notices 343/1968 and 344/1968 dealt with protection of forests against fire, forest insects, and other threatening damages including grazing. Issues related with utilization of forests and marketing were addressed in Legal Notices 345/1968 and 346/1968. It is indeed surprising that Legal Notice No. 348/1968 unequivocally recognized community forests while our current legal regime is reluctant (or at least ambiguous) in this regard.

Article 4 of Legal Notice 348/1968 had enabled the establishment of *Community Forest Commission* which included the "Woreda governor, head of the Agricultural Section in the area, local school director, local elders, the forest commissioner of the respective province and the representative of the Ministry of National Community Development." Although this seems more of a bureaucratic apparatus than a community-based structure, it is exemplary with regard to its objective and basic theme. Moreover, the Regulations had the pitfalls of less focus on the utilization side of community forests. Yet, the fact that the Regulations came under the Private Forests Conservation Proclamation clearly implies the right of communities to exploit such forests subject to the conditions attached thereof.

Legal Notice 349/1968 dealt with the establishment of "a forest ranger service for the protection of forests and the implementation of forestry laws and regulations."[102] According to Article 5 of the Regulations, Forest Rangers were entrusted with the duties and powers to, *inter alia*, "mark forest trees suitable for exploitation," ensure the observance of laws regarding cutting permits, "issue *certificate of origin for forest products* being utilized, removed or possessed,... supervise the execution of afforestation and reforestation schemes, … report general forest conditions …", and take over possession of illegally possessed forest products as well as the vehicle or animals on which they are loaded. Although '*certificate of origin*' has been mentioned in Article 15 (2/b) of Proclamation No. 542/2007, it clearly deserves more

[102] Legal Notice 349/ 1968, Article 4

emphasis in upcoming Directives to be issued by the Ministry of Agriculture and Rural Development. Article 15 (2) of the Proclamation fails to state the party who issues *certificate of origin,* and this is a vital point that ought to be addressed in the Directives to be issued by the Ministry.

The scheme of forest protection was reinforced by Legal Notice 350/1968 which brought about the establishment of Forest Guard Service which had the duty of guarding and protecting state forests and ensuring "that the removal, utilization, processing and possession of forest products, whether from a State forest or a private forest is carried out in accordance with forestry laws and regulations."[103] Article 15/1 of Proclamation No. 542/2007 also embodies stipulations regarding Forest Guards, and the issue here becomes putting the law into practice through human and budgetary resources.

Furthermore, there is a major good practice we can learn from the Forestry Regulations issued in 1968 with regard to the reporting obligations of commercial end-users of forest products. Article 4 of Legal Notice 351/1968 (that was known as Trade of Saw Logs and Veneer Logs Regulations) provided that:

> Every person operating a sawmill, veneer mill, plywood factory, or any plant processing forest products, whether from a state forest or private forest shall annually but not later than thirty (30) days after the 30th of Sene of each year, submit to the Ministry a report which shall include all information as to:
> 1) the ownership of the plant;
> 2) location, capacity and mechanical description of the plant; and
> 3) The volume of production per year.

The Annex to Legal Notice 351/1968 embodied a schedule of data that was required to be reported by traders and businesses engaged in saw logs, veneer logs, plywood factories and other plants processing forest products. Such data could apparently be tallied with transactions (including purchases of forest products) submitted for tax purposes thereby enabling the effective regulation of forest utilization, protection and development.

Daily observation clearly shows a very wide gap between Ethiopia's forestry laws and the day-to-day reality. Only few cases are brought to courts although the magnitude of deforestation in nearly all parts of Ethiopia is very high. A major factor in this regard seems to be focus of the legal framework on post-offence legal measures rather than preventive schemes that target at rendering the commission of such offences difficult, if not impossible. For example, a case in *Wolmera Woreda, Suba kebele* indicates that the suspect

[103] Legal Notice 350/1968, Article 5

was arrested while trimming logs after having cut *Tid* tree from *Menagesha Suba* state forest on Nehassie 6th 1997 (Eth. Cal) after midnight (1:30 am.).[104] The accused was released because two prosecution witnesses stated different places as the venue for the commission of the offence.

Illegal cutting of trees can hardly be verified by witnesses thereby rendering sole reliance on legal sanctions largely ineffective. Moreover, potential witnesses are usually neighbours or relatives of the suspect thereby rendering it difficult to obtain evidence. The legal regime is thus required to incorporate mechanisms such as *inventory* of forests (as suggested by Professor Sebsibe, *supra* note 18), empowerment of rural elders and local representatives in forests protection and development and putting in place effective guarding and inspection institutional framework. In other words, Ethiopia's forestry laws should go beyond dealing with the effects, and institutionalize a wider framework of systematic prevention and cure which can be simultaneously undertaken along with the efforts toward deterrence.

Concluding remarks

The *Statement of Forest Principles* adopted at the 1992 United Nations Conference on Environment and Development (UNCED), Brazil, (Rio de Janeiro)[105] and the current global concern regarding climate change offer a conducive setting to Ethiopia's efforts toward forest protection and development. Unfortunately, however, there is a very wide gap between what Ethiopian laws on forest protection require and the facts on the ground. This gap is not only attributable to the gaps in the law, absence of effective regulations and an efficient institutional framework but also to the highly formalistic aspects of law enforcement mechanisms.

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[104] Appendix 1 (File No. 0-02917), in Worku Endale's LL.B Thesis: " *The Practice and Oromia's Proclamation No. 72/2003: The Case of Forest Protection in Wolmera Woreda*" (SMUC Faculty of Law, July 2008) Unpublished

[105] The UNCED collection is a set of documents produced by the United Nations Conference on Environment and Development, also known as the Earth Summit, and various preparatory activities that led to the conference. UNCED took place from 3-14 June 1992 in Rio de Janeiro, Brazil. Delegations from 178 countries, heads of state of more than 100 countries, and representatives of more than 1,000 non-governmental organizations or NGOs attended the meetings. Four preparatory committees or "prepcoms" met in the two years prior to UNCED to produce the texts of major UNCED agreements. (One of the five major agreements associated with UNCED was…) The Statement of Forest Principles - a non-binding agreement on development, preservation, and management of the Earth's remaining forests;(http://www.ciesin.org/datasets/unced/unced.html, Accessed: February 8, 2008)

There is thus much to be done towards the effective implementation of the laws and empowerment of local communities in forest utilization, preservation and development. Community participation in forest utilization, conservation and development, and secondly, reversal of the rural-urban dweller ratio in Ethiopia through economic development (far beyond oxen-driven plough and rain-fed agriculture) seem to determine the fate of our forests which have dwindled from 35 (or 40)% to 2.3% of Ethiopia's land cover.

Poverty, according to Sengupta, has at least two dimensions. "The first is income poverty, which relates to what percentage of a country's population subsists below a minimum level of income or consumption. The second is the capability of the poor to come out of poverty in a sustainable manner by having increased access to facilities like health, education, housing and nutrition."[106] As long as the predominantly one-way traffic in global trade, imprudent government policies, weak work ethic, low productivity, etc. make it difficult for least developed countries to come out of poverty, the problems of deforestation and desertification are bound to continue. Moreover, incidences of imprudent allocation of forest lands to 'investors' who clear (already depleted) forests will indeed accelerate the process.

Many Sub-Saharan African countries (including Ethiopia) are tied in the chicken-egg cycle of poverty, wars, population growth, instability and marginalized roles in a steadily globalizing economy. In addition to the imminent need to address the normative, institutional and implementation gaps that are attributable to the legal regime, Ethiopia's combat against deforestation can hardly be effective if it fails to simultaneously address the corresponding problems of poverty and population growth (unmatched by enhanced development). As population increases, more and more land is deforested and over-farmed. … The vicious cycle exacerbates the effects of Ethiopia's droughts, leading to severe and ever more frequent crisis."[107]

Demographic factors "such as rapid population growth … exacerbate the severe state of underdevelopment."[108] Ethiopia's population "increased fourfold between 1900 and 1988. At the beginning of the present century the crude rate of natural increase was estimated at 0.3% per annum" and the total population of Ethiopia "was estimated at 11.8 million. It took 60 years for this to double to 23.6 million in 1960" while it took only 28 years for the

[106] Arjun Sengupta, "On the Theory and Practice of the Right to Development" in *Reflections on the Right to Development*, Sage Publications: New Delhi, 2005, p.98

[107] Sahlu Wolde & Charles Teller (April 2005) *Population, Development, and Environment in Ethiopia*, Woodrow Wilson International Center for Scholars

[108] *National Population Policy of Ethiopia* (Addis Ababa, April 1993), p. 23

1960 population figure "to double to 47.3 million in 1988."[109] And within twenty years from 1988, Ethiopia's population has now gone beyond 80 million.

Apparently, mountainous and substantially sloppy parts of Ethiopia are not conducive to modern agriculture. With modern agriculture, our mountains can be relieved from parceled settlements and overgrazing. Moreover, some of the villages in many *woredas* can develop into towns thereby leading to a gradual reversal of the rural-urban population. Modern agriculture can, for example, be accompanied by the unconditional prohibition of allocating land which is covered by forests. Current rural land holders can meanwhile be encouraged to form share companies by contributing their land holding rights and teaming up with investors towards modernizing agriculture.

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Needless-to-say, *sticks* scare while '*carrots*' motivate. In spite of legal sanctions against deforestation, every extra Birr obtained through illegal cutting of trees for market or the increasingly growing need for fuel-wood, farmland and grazing lands are steadily accelerating the pace of deforestation in Ethiopia. Pursuits of many 'investors' for (speculative as opposed to entrepreneurial) profit are further exacerbating the pace of deforestation. Moreover, there is another 'carrot' on the horizon, i.e. the potential for plantation of agro-fuels (or bio-fuels) which, if imprudently overdone, can lead to barren monocultures thereby adversely affecting biodiversity in addition to pushing up food prices because agricultural products will be used not only for food, but also as raw materials for fuel-producing ethanol factories.

With all these 'carrots' in the field, the effective implementation of the legal regime on forest protection and development is bound to stay largely weak unless focus is given to the *roots* and the *stem* of the *problem tree* (such as population growth and pre-industrial agriculture) while simultaneously using *legal sanctions* and proactive prevention through *community empowerment* as complementary means of combating the problem. To date, the 'carrots' seemed to have pushed behaviour towards steadily increasing deforestation. On the contrary, the recent shortage of power supply was *Nature's* 'stick' attributable mainly to watershed deforestation and the resultant siltation of our dams, shortage of *Belg rains* and enhanced evaporation due to global warming. The longer we fail to take note of *Mother Nature's wake up calls*, not only would series of nature's upcoming '*sticks*' hit us hard, but would also deny us the 'carrots' which are bound to dwindle directly proportional to the slow pace in forest protection and development. ■

[109] Ibid, p. 1

THE TRADE AND ENVIRONMENT DEBATE:

THE NORMATIVE AND INSTITUTIONAL INCONGRUITY

Simeneh Kiros Assefa *

Introduction

Although human activities are in general said to be responsible for environmental problems, trade takes the lion's share. The ever growing production and consumption of goods and services, the major inputs of which are natural resources, discharge of wastes and dangerous chemicals into the environment, etc. have always been major concerns. The reality has thus provoked the discussion over global concerns regarding trade related environmental issues within the UN as well as in the GATT/WTO regimes.

Although national economic self-interest and international relations dominate the trade and environment debate, there are three important convoluted factors that need to be dispelled. First, the GATT/WTO is an exclusively trade organisation that is not necessarily competent to address environmental concerns except that the GATT Art XX addresses the General Exception on human, animal and plant life and health. Second, although trade is the major category of human activity as a source of environmental problems, there are wide range of *Multilateral Environmental Agreements* ("MEAs") negotiated and agreed upon outside the purview of trade institutions. And third, many of those MEAs are administered by various secretariats other than the United Nations Environmental Program ("UNEP") or the GATT/WTO.

Many of the environment-related trade disputes are, however, raised under GATT XX and entertained by the dispute settlement bodies of the GATT/ WTO with significant ramifications for concerns of the environment and the normative and institutional frameworks of the UNEP and others in this realm. This shows institutional gaps regarding the issue of trade and environment, and in effect, nations are dealing with the problem by local legislation with extra-jurisdictional trade ramifications.

This article examines the convergence of trade and environmental issues and the divergence of their enforcement because of the institutional competition

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between GATT/WTO and UN and the normative incongruity between the GATT and MEAs. In so doing, emphasis is placed on the various environment related trade disputes, environment related provisions of the WTO and the various Dispute Settlement Bodies, with a view to assessing the effectiveness of the existing environmental protection approach. Section 1 discusses the trade-environment debate (both institutionally and normatively) through time and gives background of the problem; Section 2 deals with the various environment related provisions of the WTO; and Section 3 highlights the various GATT Article XX disputes. Interpretation of the provision of GATT Article XX and its relation with MEAs are briefly discussed under Section 4 which is followed by concluding remarks.

1. Background to the Trade-Environment Debate

The issue of environment was a major concern in Europe since early 1950s.[1] Europe was dealing with the environment within the Economic Commission for Europe (ECE) system but, as the problem had already got out of hand, it was tabled before the UN by Sweden in 1968.[2] Although there was a debate whether the UN is a proper forum for environmental issues, the first world conference on Human Environment was held in 1972 in Stockholm.[3]

In preparation for the conference, UN was gathering public opinion in different countries and international and regional institutions; one of such institutions was the GATT.[4] This was the apparent impetus for the environmental issues to be formally raised in the GATT Council of Representatives ("the Council"), the highest decision making body of the GATT. In the same session, in 1971, the Council established the Group on Environmental Measures in International Trade (EMIT) which is to be convened only at the request of Contracting Parties.[5] The following year, the first conference on the environ-

[1] A. Bishop and R. Munro, "The UN Regional Economic Commission and Environmental Problems" in *26 International Organization No 2* (1972) p 359

[2] R. Gardner "The Role of the UN in Environmental Problems" in *26 International Organization No 2* (1972) p 237

[3] See *infra* note 31 for the impropriety of the UN for environmental issues.

[4] We need to appreciate the positive contributions of the GATT. While the UN was in preparation of the world conference on human environment, the GATT was requested to make a contribution as a consequence of which the Secretariat made a research on "Industrial Pollution Control and International Trade" *Early Years: emerging environment debate in GATT/ WTO* <www.wto.org> (last accessed on December 2, 2007). Information from states and international organizations were gathered through, for instance, the specialized agencies of the UN in the regional offices. See generally Bishop and Munro *Supra* note 1 as they discuss the role of regional economic commissions (ECAFA, ECA, CWLA and ECE) in the dialogue on environmental issues.

ment under the auspices of the UN was held in Stockholm. With respect to the EMIT, on the other hand, there was a long period of silence in the trading world until 1991. The first meeting of the EMIT, the *long-dormant Group* as referred to by the Group itself, was convened in 1991.[6] In the same year, a dispute arose between Mexico and the United States when the latter banned imports of tuna from Mexico on the ground of environmental protection.[7]

In 1992 the *United Nations Conference on Environment and Development*, usually known as the *Earth Summit*, was held in Rio de Janeiro. The Program of Action which was adopted at the Rio Conference is referred to as Agenda 21 which meant the Agenda for the 21st Century. It focused on the link between sustainable development and environmental protection.[8] One can easily sense that the Rio Earth Summit has significantly impacted the Uruguay round of GATT negotiations.

A paragraph is thus included on environment and sustainable development in the Preamble of the WTO [9] contrary to what was the case in the GATT '47

[5] Trade and Environment Division – World Trade Organization, *Trade and Environment at the WTO* p 2. <http:/ www.wto.org/english/tratop_e/envir_e/ envir_wto2004_e.pdf> (last accessed on December 2, 2007).

[6] *Id*. p 4; also see the "REPORT OF THE MEETING OF THE GROUP ON ENVIRONMENTAL MEASURES AND INTERNATIONAL TRADE " (27 November 1991), para 2. The EMIT has never been convened between 1971 and 1991 while there were two rounds of trade negotiations during this period. The Tokyo round was held between 1973 and 1979 and the major part of the Uruguay round had been undertaken during this period.

[7] This case is discussed in greater detail later in this essay

[8] Trade & Environment Division *Supra* note 5 at 4

[9] *Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development…* WTO Charter Preamble, paragraph 1.

[10] *Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods. ,Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce…*

Preamble.[10] Later, the Committee on Trade and Environment ("CTE") was also established within the GATT/WTO system in 1994 replacing the EMIT.[11]

The longstanding question is whether (the GATT [12] and now) the WTO, having seen its responsibilities as are provided for in the establishing Charter [13] and its commitment as tested though time, is the right forum in addressing the issue. Some of the complaints are based on the presumption that the WTO is not environment friendly.[14] It is true that the GATT was negotiated at the time where economic development and full employment were the sole concerns while the environment was not quite so.[15] This can be gathered both

[11] *Ministerial Decision on Trade and Environment*, 14 April 1944, 33 ILM 1267 (1994)

[12] World War II is said to be the result of the serious global economic recession preceding it by the race to bottom depreciation of currencies with a view to sell one's commodities. It is true that the war itself resulted in serious destruction that has never been seen. The creation of the GATT as part of the *Bretton Woods* institutions, (the International Monetary Fund (IMF) and World Bank for Reconstruction and Development (IBRD), is thus to address such global economic crisis by elimination of border restrictions be it tariff or quantitative, and other domestic restriction on foreign commodities.

[13] Art III - Functions of the WTO

1. The WTO shall facilitate the implementation, administration, operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to this Agreement.
4. The WTO shall administer the Trade Policy Review Mechanism provided for in Annex 3 to this Agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

[14] Particularly with respect to the interpretations of the provisions of GATT Art XX it is contended that members of the Panel and the AB do not have environmental and other (background) social issues coming up with *trade-biased interpretation* those provisions which are already restricted in *wording*. F. Macmillan *WTO and the Environment* (Sweet and Maxwell, 2001) pp 8, 9.

from the Preamble of GATT 1947 and the then existing circumstances.[16] It is understandable for government representatives of the day to focus on the calling of the time. It is not, however, the sole reason for the GATT/WTO to deal less with the environment than it should, at least by way of reconsideration as in the case of other issues.

These developed nations were said to be not committed to addressing environmental issues for there has been, as always, national economic self-interest.[17] Thus, environmental issues were only addressed on *ad hoc* basis such as by the creation of Committee on Challenges to Modern Society (CCMS) under the NATO,[18] or by establishing a body called Senior Advisors to the ECE.[19]

In subsequent efforts for the establishment of a permanent body on the issue of environment, there is a serious *competition of institutions* apparently between the UN and other institutions.[20] Appended to it is the issue whether developing nations should participate in the discussion either because it does not concern them [21] or the process delays immediate and technical measures needed immediately.[22] Further study indicated that, environmental problems are concerns of the poor in as much as they are of the affluent.[23]

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[15] This Agreement is the result of discussion between the US and the UK; Western Europe had not recovered from the ravages of the war and common market was not established; Japan was essentially outside of the international economy; and most African and Asian countries were under colony. A. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2002) pp 23, 45; the developing countries expressed this in the UN Declaration on *New International Economic Order*, para 1.

[16] *Supra* note 10

[17] It is indicated that there was even less positive attitude on the part of governments, the public and corporations, as well as less commitment on the part of environmental scientists. B. Johnson "The United Nation's Institutional Response to Stockholm: A Case Study in the International Politics of Institutional Change" in *26 International Organization* No 2 (1972) p 264

[18] *Id.* p 262

[19] Bishop and Munro *Supra* note 1 at 366

[20] Those other competing institutions where the developed countries have influence on the outcome of the case either by virtue of weighted vote, restrictive membership or otherwise, , depending on the nature of the issue, could be such as GATT, OECD and NATO.

[21] G. Kennan for instance, opined that "the United Nations is not the proper forum for dealing with the environmental problems because these problems were mainly caused by ten of the world's more industrialized countries" *To Prevent a World Wasteland: A proposal, 48 Foreign Affairs No 3* (1970) pp 410-11. Also, L. Engfeldt, "The United Nations and the Human Environment – Some Experiences" in *27 International Organization No 3* (1973) p 396; Gardner *Supra* note 2.

It is always the case in international relations that states disagree on institutions where a particular issue is to be disposed of based on where they think they have influence on the outcome of the case. In the early days of the cold war, this was strengthened not only by the already formed bloc, the east and west divide, but it was also affected by the growing north and south divide.[24] The UN General Assembly was perceived to be more of an organization of the weak conglomerate. This is particularly so when the *newly* independent African and Asian countries became members of the UN thereby forming a significant number. [25]

Many developed countries were not willing to address issues within the UN system, where, with equality of votes, they could not have control over the outcome of cases.[26] Matters of trade and development could be good examples. When issues of trade and development could not be addressed within the GATT system,[27] a group of developing countries tabled them before the UN, while developed countries proposed that such matters could be addressed within the GATT, IMF/WB regimes.[28] Yet, the UN formed UNCTAD and declared the 1960s as the first *development decade*, among others,

[22] Many wrongly blamed the developing countries for being *ignorant* and for their *lack of will* to participate in the negotiation, Engfeldt *Supra* note 21 p 394. Their participation is said to have been obtained with a cost "…first it did require an immense amount of the time of the secretariat…Second, the secretariat has encouraged the developing states to believe that concern with development will not reduce the funds available for development but rather will increase them". D. Kay and E. Skolnikoff "*International Institutions and the Environmental Crisis: A Look Ahead*" in *26 International Organization* No 2 (1972) p 475. Some call the conference *the environmental bandwagon as a vehicle for more financial assistance from the industrialized countries.* Engfeldt *Supra* note 21 at 396

[23] M. Strong "The United Nations and the Environment" in *26 International Organization* No 2 (172) p 169; Engfeldt *Supra* note 21 at 402. See also Schultz, *Infra* note 49.

[24] See generally Kay and Skolnikoff *Supra* note *22*; S. Weintraub "How the UN Votes on Economic Issues" in *53 International Affairs No 2* (1977); S. Zamora "Voting in International Organizations" in *74 American Journal of International Law No 3* (1980)

[25] *Id.*

[26] *Id*. Also see, for instance, B. Gossovic and J. Ruggie, "On the Creation of a New International Economic Order: Issue Linkage and the Seventh Special Session on the UN General Assembly" in *30 International Organization No 2* (1976); H. W. Singer "The New International Economic Order: An Overview" in *16 The Journal of Modern African Studies No 4* (1978). The US, in fact, made the UN particularly some of its organs wherein it does not have much control, made irrelevant focusing its effort in the IMF, IBRD, GATT, OECD and NATO. See S. Finger "United States Policy toward International Institutions" in 30 *International Organizations No 2* (1976); S. Weintraub "What do We Want from the United Nations" in *30 International Organization No 4* (1976).

despite the disagreement of the developed countries.[29] In response to these activities, developed countries conceded to include Part IV of the GATT relating to trade and development to indicate that the subject can better be addressed within the GATT system than through the UN. As it stands now, UNCTAD seems to have been made a powerless organization to address trade issues of the developing countries.[30]

The fate of the issue of environment and trade appears to be similar. When the issue of environment was tabled before the UN, there was a debate whether the UN is the right organ to deal with the matter.[31] In fact, when such social issues such as trade, development and environment are raised, it was considered as the political issue of the *communist* against free trade.[32] It is easily discernible that there was an effort to move the issue out of the UN to other organs such as the GATT where the developed countries have control of the outcome.

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[27] Even though a few developing countries participated in the making of the GATT it is believed to be the club of the rich. At least at the initial stage there were only 13 developing countries represented and two of those from Africa were not represented by a representative of their government. Both South Africa and Rhodesia (currently referred to as Zimbabwe) were represented by a colonialist rule which owns the industries in those countries. Also see note 15 above.

[28] Within the GATT system always, the West has the upper hand because as the two institutions both the IMF and WB have weighted voting procedure, it is very unlikely that the agenda of the developing countries could be promoted. See for example S. Zamora "Voting in Economic Institutions" *74 American Journal of International Law No* 3 (1980)

[29] R. Gardner "The United Nations Conference on Trade and Development" in *22 International Organizations* No 1 (1968) p 106

[30] UNCTAD was created in order to maintain the net flow of long term capital to developing countries and to improve its terms and conditions as a reaction to the drop of prices of primary commodities and worsening in the terms of trade. S. Metsger "Development in the Law and Institutions of International Economic Relations: UNCTAD" in *61 American Journal of International Law* No 3 (1986) p 758; after many decades of development, those developing countries could not record any significant development. Some are even under a new classification called *Least Developed* being worse off than they were by the time UNCTAD was initiated and created. See generally R. Green "UNCTAD and After: The Anatomy of a Failure" in *5 Journal of Modern African Studies No 2* (1967)

[31] Some considered the UN structure and procedure itself to be an *impediment* because it is *obsolete* (Engfeldt *Supra* note 21 at 394, 395) for such technical issues where swift and efficient action is needed on such issues like the environment; still others consider taking an issue before the UN is *doomed to futility* (Johnson *Supra* note 17 at 262).

This can be gathered from the patterns of certain measures within the GATT . The inclusion of Part IV in the GATT was used not to complement and reinforce, but rather to weaken the efforts of UNCTAD in addressing trade and development issues of the developing countries. When the preparation for the first conference on the Human Environment was in progress, the GATT Council was convened. While the preparation for *the Rio Earth Summit* was underway, the EMIT convened for the first time in 1991 in preparation for the same.[33] In response to the Rio Summit, the Preamble of the WTO Charter contains a statement on sustainable development.[34] However, there does not seem to be consistent actions on the part of GATT/WTO because some of them are positive reactions while others are not.

On the other hand, the UNEP is established as a weaker environmental arm of the UN,[35] with jurisdictional[36] and budgetary limitations.[37] Moreover, a

[32] This is particularly so seen in the overreactions to the negotiation on the law of the sea and environmental conferences because previously those matters of the environment which were outside national territories and jurisdictions were declared to be *common heritage of mankind* in the UN Charter of Economic Rights and Duties of States Resolution during the establishment of the New International Economic Order. G. Melloan "Global View: Flying Down to Rio, for Fun and Profit" *Wall Street Journal* (Monday, May 11, 1992) D. Bandow "Deep-Six the Law of the Sea" *Wall Street Journal* (Thursday, July 28, 1998).

[33] Trade and Environment Division – WTO *Supra* note *5* at 4

[34] *Supra* note 9

[35] *Institutional and financial arrangement for international environmental cooperation* UN General Assembly Resolution 2997 (XXVIII); The organizational structure of the UNEP is that, there is the Governing Council, as the highest decision making body, is composed of 58 countries (*Id*. Section II Para 3); the work is to be undertaken by the Environmental Coordination Board which meets periodically under the chairmanship of the Executive Director who is also the head of the *small secretariat.* The Environment Coordination Board reports to the Governing Council. The latter reports to the ECOSOC which in turn reports to the General Assembly (*Id.* Section IV Para 2, and Section I Para 3)

[36] The readings of the powers and functions of the Governing Council (*Id*. Section I Para 2), or the Executive Director (*Id*. Section II, Para 2) or that of the Environment Coordination Board (*Id*. Section IV Para 2) do not indicate any substantive power to the UNEP. The tasks of UNEP to design environmental programs and assess their implementation and effectiveness ought to be accompanied by organizational strength and resources.

[37] Funding has been a point of debate before the establishment of the Program; (Engfeldt *Supra* note 21 at 396). Section II Para 3 of the Establishment Resolution provides that the expenses of the Governance Council and a small secretariat are to be covered from the regular budget of the UN. Such programs that are of "general interest as regional and global monitoring, assessment and data-collecting systems, including, as appropriate costs for national counterparts; environmental research; information exchange and dissemination; public edu- ☞

number of Multilateral Environmental Agreements (MEAs) have been negotiated and entered into force between the first conference on the human environment in 1972 and the Rio conference in 1992.[38] At the Rio Conference various agreements were reached with respect to the normative and institutional framework of environmental issues.[39] Subsequently, the Kyoto Protocol was adopted and signed by many major industrial and developing countries except the US.[40] However, they are not under the administration of the UNEP. Nor is there any other single organization that has clear responsibility

cation and training; assistance for national, regional and global environmental institutions; the promotion of environmental research and studies for the development of industrial and other technologies best suited to policy of economic growth compatible with adequate environmental safeguards; and such other programs as the Governing Council may decide upon, and that in the implementation of such programs due account should be taken of the special needs of the developing countries" are to be financed from the environmental fund established by voluntary contribution of members (*Id*. Section III para 3).

[38] Although the agreements are based on diverse issues, UNEP maintains a list of 98 MEAs and 117 regional environmental agreements negotiated since 1946, such as, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter* (1972), *Convention on International Trade in Endangered Species (International Convention for the Prevention of Pollution by Ships, 1973, as modified by the Protocol of 1978 relating thereto, Convention on the Conservation of Migratory Species of Wild Animals* (1979), *United Nations Convention on the Law of the Sea* (1982, it is not entirely an environmental agreement, but Part XII addresses the preservation of the marine environment), *Convention on the Protection of the Ozone Layer* (1985), *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987), *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (1989) *Multilateral Environmental Agreement Negotiator's Handbook 2nd Ed*. (University of Joensuu, 2007) p 1-3 & 1-4. Out of these agreements 20 of them include provisions that can affect trade ("Relationship between WTO and MEA Rules" <www.wto.org> (last accessed on December 6, 2007)

[39] The adoption of the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity, the decision to negotiate the Convention to Combat Desertification, an Action Plan called "Agenda 21 " the decision to establish the Commission on Sustainable Development, The Rio Declaration composed of 27 Principles are the essential ones. "*Multilateral Environmental Agreements Negotiator's Handbook*", 2nd Ed (University of Joensuu, 2007) pp. 1-5

[40] While the US has been the force behind the global economic growth after WWII, with respect to the issues of global environment it is shying away from ratifying various environmental treaties such as the Basel Convention and the Convention on Climate Change and on Biodiversity. The US, in fact, signed and unsigned (whatever the meaning of the word in international law) the Kyoto Protocol contending that it is *fatally deficient in fundamental ways* "Hot Politics" <www.pbs.org> (last accessed on November 6, 2007). It is thus on the defence seat without a clear direction while the ☞

for those environmental treaties. They are rather administered through secretariats scattered around the world.[41] Unlike the WTO agreement where the obligation is a single undertaking, the MEAs could be signed *a la carte*; countries are free to sign some and ignore others. Unsurprisingly therefore, both the UNEP and the MEAs are ineffective. Moreover, it is made clear that the GATT is not *an institution with the competence to set environmental standards* nor can it review environmental priorities chosen by each country.[42] Yet, the relationship between the MEAs and the GATT does not seem to be clear.[43]

2 Environment-related Provisions Under GATT

The historical development of GATT/WTO is a trade liberalization effort to the benefit of developed countries. Originally the GATT 1947 and later the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) made very little concession allowing member states to take domestic measures with a view to protect human, animal and plant life and health and environment. The

Europeans are shaping the agenda and imposing their regulatory style on new agreements, determined to move more firmly on restraining greenhouse gas emissions - complicating the U.S. ability to join particularly with limited domestic political interest or support. M. Kimble "Multilateral Environmental Agreements - Regulating Global Goods" in *Trade and Environment, the WTO, and MEAs* <www.boell.org> (last accessed December 6, 2007)

[41] Most of the MEAs, especially the big ones negotiated in the last three decades, operate through secretariats scattered around the world rather than by UNEP. The agreement on desertification is headquartered in Germany, on Persistent Organic Pollutants (meant to control chemicals such as dioxins, PCBs, and DDT) is in Stockholm; the Convention on Trade in Endangered Species is in Geneva, on chlorofluorocarbon control is in Quebec, Antarctic protection in Tasmania, tropical-timber control in Yokohama, and so on. Each is responsible for monitoring its' members compliance and each has its own enforcement policy.

[42] Group on Environmental Measures and International Trade, "THE GATT AND THE TRADE PROVISIONS OF MULTILATERAL ENVIRONMENTAL AGREEMENTS" Submission from The European Community (17 November 1992) para 1.2

[43] In its first meeting, the Group adopted as one of its three agenda items the "trade provisions contained in existing multilateral environmental agreements (e.g. the Montreal Protocol on Substances that Deplete the Ozone Layer, the Washington Convention on International Trade in Endangered Species and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal) vis-à-vis GATT principles and provisions." Group on Environmental Measures and International Trade, '*Trade Provisions Contained in Multilateral Environmental Agreements'* Note by the Secretariat (Revised, 11 October 1993, hereinafter, GATT Secretariat Note I) p 2

content of those provisions were not understood for a long time.[44] Currently, there are various provisions found in five different WTO agreements: the GATT, GATS, TRIPs, TBT and SPS.

It is obvious that, because of the influence of the Rio Earth Summit, the WTO Charter recognizes the relations between trade and the environment and requires (member states) that while endeavouring "to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services," they need to allow "for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[45]

This is a vague guiding principle, in the interpretation and application of member states' rights and obligations in the GATT/WTO system. The various specific provisions found in the other agreements are thus equally important. It is necessary to begin with the provisions of the GATT for two reasons: first the GATT is the first and the original agreement in operation since 1948; second, all respondent states in those environment related trade disputes invoked the provisions of GATT Article XX as a defence. The relevant part of GATT Article XX, General Exceptions, provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

[44] In fact, while for instance, the provisions of GATT Art XX were there since 1948, they are invoked only in early 1990s. The EMIT, for instance, was aware neither of the scope of its obligations nor of the provisions. "One delegation stated that it did not view this Group as a negotiating forum but as a body in which to examine the interface of GATT rules and environmental concerns; this would involve technical work to which experts from capitals could provide input. Another delegation believed that the work of the Group should be conveyed to the UNCED. Another believed that there was a close link between the work of this Group and that of the Working Group on Domestically Prohibited Goods, to which this delegation attached a great deal of importance. It hoped that this Group could give new vigour to the work in the latter Working Group as it was in need of revival. Another delegation stated that the Group would enter into an entirely new area of work and therefore must proceed in a highly prudent manner. It believed that the role of the Group should be to send a positive message of the role of trade policy in environmental matters." Group on Environmental Measures and International Trade, "REPORT OF THE MEETING OF THE GROUP ON ENVIRONMENTAL MEASURES ANDINTERNATIONAL TRADE" (27 November 1991) para 6

[45] *Supra* note 9

> between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption…

The General Agreement on Trade in Services (GATS) contains almost identical provision under Article XIV (b) as its own general exceptions that member states may take measures "*necessary to protect human, animal or plant life or health…"* This provision is subject to the same restriction as in GATT Article XX because the measure is legitimate in so far as "it is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."[46]

The Agreement on Sanitary and Phytosanitary Measures (SPS) has by far extensive provisions accommodating human, animal and plant life and health protection with apparent significant restrictions on free trade. Thus, member states have the right to take sanitary and phytosanitary measures *necessary for the protection of human, animal or plant life or health.* However, such measures are subject to two requirements; first, that they are not inconsistent with the provisions of the Agreement; second, such measure is applied "only to the extent necessary to protect human, animal or plant life or health, based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."[47]

The Agreement further provides that any sanitary or phytosanitary measures establishing international standard (guideline to which member states are free to demand compliance) should be in compliance with all WTO Agreements.[48] If a member state, however, sets a standard beyond the international standard,

[46] The chapeau of Art XIV of GATS

[47] Art 2 (1) & (2); a more or less similar provision is contained in the Preamble (paras 1, 2); Paragraph 7 provides that "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time."

it must show a scientific justification and that a risk assessment ought to be carried out.[49]

With respect to patentable subject matters, the agreement on Trade Related aspects of Intellectual Property Rights (TRIPS) recognizes the right of member states to exclude an invention from patentability and commercial exploitation within its territory with a view to "protect '*ordre public'* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law." [50]

Finally, the Agreement on Technical Barriers to Trade (TBT) also recognizes the right of member states to take measures or set requirements necessary to "ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment… at the levels it considers appropriate." [51] The agreement subjects this right, as in the chapeau of both GATT Article XX and GATS XIV, to similar restrictions that those requirements may "not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement."[52] The Agreement further provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create." [53]

These are the major provisions, if not all,[54] on trade and environment within the GATT/WTO system. These provisions are basically general exceptions, deviations from the basic principles of international trade such as the Most Favoured Nation ("MFN") and National Treatment principles, as well as a restriction to liberalized trade. As exceptions, their interpretation and applica-

[48] Art 3(2)

[49] J. Schultz "The GATT/WTO Committee on Trade and the Environment - Toward Environmental Reform" in *89 The American Journal of International Law* No 2 (1995) p 428

[50] Art 27 (2)

[51] Art 2.2 and para 6 of the Preamble

[52] *Id.*

[53] Art 2.2. Those legitimate objectives, as provided for in the same provision and the provisions of Art 5.4 are, *inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.* Such state has various other obligations when it sets such technical requirements. See the provisions of Art 2.9, 2.10, 5.4 of GATS.

[54] Other provisions are not that important because they are either included only in the preamble or are mere statements in a weak agreement such as the Agreement on Agriculture.

tion is inherently restricted both in terms of wording and interpretation apart from the inherent restriction that emanates from within.

In recent years, there were many unilateral measures that are said to be taken either as justified under Article XX of the GATT or as an enforcement of an MEA. In the normal course of events, those measures negatively affect goods and services originating in another member state and in some instances provoking disputes.

3 The Major Cases Involving the GATT Article XX Exceptions

There are various issues appearing before dispute settlement bodies.[55] The basic features of the disputes are that state members to the GATT/WTO introduce or adopt a measure or policy meant for the protection of human, animal and plant life and health, and the environment. Other (victim) states complain that the policy/measure is contrary to the principles of GATT/WTO, those basic principles being the principle of Most-Favoured-Nation (MFN) treatment, national treatment, restriction to liberal trade or an introduction of quantitative restriction, or illegal measures and procedures. The state complained against usually attempts to justify its measures under GATT Article XX, the General Exception, and the provisions of the Agreement on TBT as in *EC-Asbestos* case. The following is a summary of major cases in this regard.

3.1- The United States – Prohibition of Tuna and Tuna Products from Canada [56]

This is the first case that appeared before a dispute settlement body on the basis of the general exceptions of the GATT Article XX, although Article XX is raised as *a post facto* justification. On 31 August 1979, the US prohib-

[55] The phrase the *dispute settlement bodies* in this case refers to the different institutions including both before and after the establishment of the WTO Dispute Settlement Body (DSB) in 1995. For instance, the first dispute that arose between the US and Canada on the former's prohibition of tuna and tuna products from Canada was initiated in 1981 and was submitted to conciliation.

[56] In the discussion of trade and environment, particularly within the DSB, the US prohibition of tuna and tuna products imposed in 1979 is not mentioned perhaps because it is not primarily focused on the environment. Thus, it is the tuna case that was initiated by Mexico as discussed later that is referred to as Tuna I and the one initiated by the EEC and the Netherlands is referred to as Tuna II. Without breaching the custom of referring to the following two cases as Tuna I and Tuna II respectively, however, I find it necessary to include this case against the US prohibition of tuna and tuna products from Canada in my discussion as the first landmark in the trade-environment dispute.

ited imports of tuna and tuna products from Canada. This action followed the seizure of 19 fishing vessels and the arrest by Canadian authorities of a number of United States fishermen, engaged in fishing for *albacore tuna* within 200 miles of the West Coast of Canada without authorization by the Canadian government, in waters regarded by Canada as being under its fisheries jurisdiction and regarded by the United States as being outside any state's tuna fisheries jurisdiction.[57]

The United States' prohibition was imposed pursuant to Section 205 (Import Prohibition) of the Fisheries Conservation and Management Act of 1976, which provide *inter alia*, that:

> [I]f the Secretary of State determines that any fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea was recognized by the United States, being seized by a foreign nation as a consequence of a claim of jurisdiction which was not recognized by the United States, the Secretary of Treasury should immediately take such action as may be necessary and appropriate to prohibit the importation of fish and fish products from the foreign fishery involved.[58]

Thus, since the United States does not recognize the Canadian claim to jurisdiction over tuna in waters where the vessels were seized, it took the action in accordance with the provisions of Section 205.[59] It is both Section 205 and its consequential measures that are the subject of the dispute.

Canada submitted that the action taken by the US is discriminatory contrary to the principles of the GATT and impaired the benefits accruing to it under the GATT.[60] It further contended that the measure is based on a domestic legislation in order to conform to the commercial interests of the powerful West Coast tuna fishery lobby [61] while the United States maintained that it is fully justified under Article XX(g) of the GATT which provided an exemption from other GATT obligations for measures relating to conservation of exhaustible natural resources. [62]

3.2- United States – Restriction on Imports of Tuna from Mexico (Tuna I)

Tuna are commonly caught in commercial fisheries using large "purse seine" nets.[63] In the eastern tropical Pacific Ocean, but not in other waters, schools

[57] *United States – Prohibition of Tuna and Tuna Products from Canada* (Tuna I), Report of the Panel (L/5198 – 29S/91) adopted on 22 February 1982, para 2.1

[58] *Id.* para 2.2

[59] *Id.* para 2.3

[60] *Id.* para 3.1

[61] *Id.* para 3.4

[62] *Id.* para 3.5

of tuna often swim below herds of dolphin that are visible swimming at or near the surface. Tuna fishermen in the eastern tropical Pacific therefore commonly use dolphins to locate schools of tuna, and encircle them intentionally with purse seine nets on the expectation that tuna will be found below the dolphins.[64] The US Marine Mammals Protection Act of 1972 (MMPA) as amended,[65] thus prohibits "taking" of and importation to the United States marine mammals save where an exception is explicitly authorized with a view to reducing incidental injury and killing to marine mammals in the course of commercial fishing:[66]

> The Secretary of Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.

This prohibition is mandatory.[67] The relevant provision, Section 101(a) (2) (B) bans the importation of yellowfin tuna harvested with purse-seine nets in the ETP and products therefrom unless the Secretary of Commerce finds that the government of the harvesting country demonstrated that it has "(1) implemented a dolphin protection program 'comparable' to that of the US fleet," and "(2) achieved an incidental dolphin kill rate *comparable* [68] to the US fleet."[69] In 1990 (and more stringently in 1991) the US banned import of tuna and tuna products from Mexico directly and later, also import through intermediary nations.[70] It is both these rules and the measure that are the subject of the dispute. Mexico contended that section 101(a) (2) is inconsistent with GATT Article XI and section 101(a) (2) (B) is contrary to GATT Art. XIII.[71]

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[63] In this process of catching tuna fish, a fishing vessel using this method sends a small boat carrying one end of the net around a school of tuna. The other end of the net remains attached to the fishing vessel. Once the boat has encircled the school of tuna and returned its end of the net to the vessel, the vessel winches in cables at the bottom and the top of the net, thus "pursing" it and gathering its contents. Tuna II *infra* para 2.1

[64] Tuna I, para 2.2

[65] The amendment is with a view to give more competitive disadvantage to the US fleet, thus to address the practice of other nations *more effectively*.

[66] Tuna II, para 2.3

[66] Tuna II, para 2.3

[67] *Id.* para 2.5

[68] After the 1991 amendment, in order for an average incidental dolphin mortality rate to be considered "comparable" it may not exceed 1.25 times the average US vessels for the same period. In addition, the share of eastern spinner dolphin and coastal spotted dolphins may not exceed fifteen percent and two percent respectively, of the total number of dolphins taken. *Id*. para 2.4

[69] *Id.* para 2.5; it is also provided that the burden of proof is on the country who introduced the measure. *Id.*

[70] *Id*. para 5.5

[71] *Id.* para 3.1

The US, on the other hand, maintained that it is a domestic measure consistent with Article III, and should the Panel fail to accept this argument, it is justified under GATT Article XX.[72]

3.3– USA: Restrictions on Imports of Tuna (Tuna II)

The facts of this case are identical to Tuna I that the EC and the Netherlands challenged the measures taken by the US ban of importation of tuna produced by a method that resulted in the incidental kill or serious injury of marine mammals in excess of the United States standard.[73] The subject of the dispute was whether the MMPA and the consequent measure by the US government is quantitative restriction within the meaning of Articles XI and III.[74]

The EEC and the Netherlands challenged the measure on the ground that:

> Article XX(g) or (b) could not be invoked in this case to conserve natural resources or to protect the life or health of living things located outside the jurisdiction of the party taking the measure. Although the text of these paragraphs did not explicitly restrict the location of the resource or living thing to be protected, this did not mean that such a limitation was not contained in the provision.

The EC also objected to the measure on the ground that it focuses on the *production technique,*[75] and this position was supported by third parties.[76]

3.4- The U.S. - Gasoline Case

The US Congress enacted the Clean Air Act in 1963 intended to prevent and control air pollution in the United States.[77] By an amendment in 1990, the US

[72] This is a landmark case on environmental disputes in the GATT system and its significance lies in that it raised the issue of Production Process Method (PPM) and made a distinction between the product and the production process which is also supported by third parties. Mexico touched upon it not incidentally, while Australia and Canada made it their principal argument *Id.* paras 4.2 and 4.8 respectively. For detailed discussion see R. Hudec "GATT/WTO Constraints on National Regulations: Requirements for an *Aim and Effects* Test".

[73] Report of the Panel, *United States – Restriction of Imports of Tuna* (Tuna II) (16 June 1994) para 2.9; with respect to the imported yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific, however, the government of the harvesting nation must meet a number of specific conditions. The requirements of those conditions are discussed in Tuna I.

[74] *Id.* para 3.93

[75] *Id.* para 3.59

[76] Both Australia and Venezuela made this argument *Id.* paras 4.4, 4.6 and 4.44. Australia, in another submission to the EMIT on the topic GATT and the International Environmental Agreements (10 October 1993) objected to the extra-jurisdictional arguments when such measure is taken based on multilateral environmental agreement para 31.

[77] The Clean Air Act of 1990

Environmental Protection Agency (EPA) is authorized to issue *Regulations* to implement the Clean Air Act, applied to the US refiners, blender and importers of gasoline[78] based on the composition and emission effects of gasoline. [79]

Accordingly, the EPA issued Regulations that provide for compositional and performance specifications for both types of gasoline set in comparison to certain baseline figures which is called *Gasoline Rule*. The Rule certainly makes distinction between importers and domestic refiners [80] in establishing quality baseline and is thus the subject of this dispute.[81]

3.5- The U.S.- Shrimp/Turtle Case

Currently, there are seven types of sea turtles recognized. These sea turtles are affected by activities of man either directly (for their meat, shell and eggs) or indirectly (by incidental capture, destruction of their habitat or pollution of the ocean).[82] All sea turtles are considered to be endangered and thus found listed in Appendix I of the 1973 Convention on International Trade in Endangered Species ("CITES").[83] Thus, the US Congress passed Section 609

[78] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* (29 January 1996) para 2.1

[79] Section 211 (k) of the Act divided the market for sale of gasoline into two: areas of the United States experiencing the worst ozone pollution where only *reformulated gasoline* could be sold to consumers and the rest of the United States where *conventional gasoline* may be sold. *Id.* para 2.2

[80] According to the US, by August 1995 only 100 US refiners representing 98.5% of the gasoline produced in 1990 had received EPA approval of their individual baseline and only 3 of those refiners met the statutory baseline for all parameters. Importers, on the other hand, were generally required to met the higher statutory baseline.

[81] The rule sets both historical and statutory baselines. Thus, with respect to determining a domestic refiner's individual historic baseline, the Rule established three methods: "Under Method 1, the refiner had to use the quality data and volume records of its 1990 gasoline. If Method 1 type data were not available, a domestic refiner had to use its 1990 gasoline blendstock quality data and 1990 blendstock production records, Method 2. In the event that neither of these two methods was available, a domestic refiner had to turn to Method 3 type data, which consisted of its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show 1990 gasoline composition.

On the other hand, certain entities were automatically assigned the statutory baseline. First, refineries which began operation after 1990 or were in operation for less than 6 months in 1990 were required to use the statutory baseline. Second, importers and blenders were assigned the statutory baseline unless they could establish their individual baseline following Method 1. Moreover, if actual 1990 data were not available, importers and blenders were assigned to the statutory baseline."

[82] Report of The Panel *U.S. —Import Prohibition of Certain Shrimp and Shrimp Products* (15 May 1998) para 2.3

of Public Law 101 – 162 enacted in 1989 ("Section 609") on the basis of which US Government introduced a Guidelines requiring the use of Turtle Excluder Devise ("TED") developed by the US National Marine Fisheries Services, in fishing shrimp.[84]

Section 609 provides,[85] among others, that shrimp harvested with technology that may adversely affect certain sea turtles protected under US law may not be imported into the United States, unless the importing nation is certified that its fishing environment does not pose a threat of incidental taking of sea turtles in the course of commercial fishing [86] or that it has a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States, that the average rate of that incidental taking by the vessels of the harvesting country is comparable to the average rate of incidental taking of sea turtles by United States

[83] "According to the US Endangered Species Act, 1973, all sea turtles are endangered or threatened species. Also research programs undertaken in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States led to the conclusion that incidental capture and drowning of sea turtles by shrimp trawlers was the most significant source of mortality for sea turtles." National Research Council, National Academy of Sciences, (1990), Decline of the Sea Turtles: Causes and Prevention, Washington D.C., as cited in Shrimp/Turtle case paras 2.1-2.3

[84] *Id*. para 2.5. A TED is grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

[85] The section has three elements: first, it requires the US State Department to commence negotiations for bilateral and multilateral agreements to protect sea turtles; second, it requires the State Department to report to Congress within a year on the practice of other countries affecting the mortality of sea turtles; and third, it prohibited the importation of any shrimp harvested using commercial fishing technologies that might harm sea turtles, unless exporting countries are certified by the US administration as having a regulatory program to prevent incidental turtle deaths comparable to that of the United States or is certified as having a fishing environment that does not pose risks to sea turtles from shrimping. R. Howse "The Appellate Body Ruling in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate" in *27 Colum. J. Envtl. L. (2002)* p 3

[86] The 1996 Guidelines define shrimp or shrimp products harvested in conditions that does not affect sea turtles to include: "(a) Shrimp harvested in an aquaculture facility ...; (b) Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States; (c) Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the US programme ... would not require TEDs; (d) Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur." *Id*. paras 2.12, 2.13. The standard is identical to that of Section 609 (b) (2) (C).

vessels in the course of such harvesting.[87] The certification is to be made annually thereafter. [88]

Both the 1991 and the 1993 Guidelines (the original and the revised Guidelines, respectively) were meant to apply to certain Caribbean/western Atlantic countries.[89] But later, the Court of International Trade, on an action brought by Non-Governmental Organizations (NGOs), ruled that Section 609 is applicable to any country where shrimp harvesting may adversely affect those species of sea turtles [90] which resulted in the Guidelines 1996.[91]

The subjects of the dispute are both Section 609 and the 1996 Guidelines. The complaints were that the US measure constitutes a prohibition or restriction on the importation of shrimp or shrimp products in violation of GATT Article XI.[92]

3.6- The Brazil – Retreated Tyre Case

The dispute was between Brazil and the EC concerning various measures taken by Brazil relating to importation of retreated tyres.[93] The complaint was basically (a) on the prohibition of import license for retreated tyres; (b) banning the importation of used tyres; (c) imposition of fine on the importation of retreated tyres as well as on the marketing, transportation, storage, ...or warehouses of imported, but not domestic, retreated tyres; (d) in some states of Brazil, restricting sale of imported retreated tyres and sale of retreated tyres made in Brazil from imported castings; (e) exemption from import ban for retreated tyres imported from MERCOSUR countries based on ruling of MERCOSUR tribunal and the Brazilian court suspending the ban and held that they are not *capricious and unpredictable*.[94]

The EC claimed violation of the GATT Articles I:1, III:4, XI:1 and XIII:1 while Brazil argues such measures were justified under GATT Articles XX (b) and XX(d), and that the exemption for MERCOSUR countries was justified under GATT Article XXIV. It was each measure that became the subject of the dispute in this case.

[87] *Id.* para 2.14
[88] *Id.* para 2.14
[89] *Id.* para 2.9
[90] *Id.* para 2.15
[91] *Id.* paras 2.10 - 2.11
[92] *Id.* para 7.11; GATT Art XI:1 (General Elimination of Quantitative Restrictions) provides that "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."
[93] Panel Report *Brazil – Measures Affecting Imports of Retreated Tyres* (12 June 2007) paras 2.1 – 2.4
[94] *Id.* paras 2.7 – 2.16

4. Interpretation of GATT Article XX and its Relations with MEAs

As it has been alluded earlier, measures relating to the protection of human, animal and plant life and health and exhaustible natural resources are trade related and, thus, they seem to be deviations from the basic obligations envisaged during the creation of the GATT. In addressing such measures within the context of trade, there are three outstanding issues that have evolved through time - the sequence of interpretation of the provisions of Article XX, its scope and its relation with MEAs.

4.1- Sequence of interpretation

It is indicated in the summary of the cases that the measures that are taken by a state are challenged on the ground that they are contrary to the principles of the GATT, i.e. non-discrimination contrary to the principles of MFN and National Treatment, as well as restriction to international trade. Those states (complained against) on their part are raising the defence that the measures are not contrary to the GATT principles, and should they be found to be contrary to the GATT principles, they are justified under GATT Article XX, and that the measures are taken with a view to protecting human, animal and plant life and health, the environment or with a view to protecting an exhaustible natural resource.[95]

In these disputes, a pattern of interpretation of the content of GATT Article XX has evolved. In the US-Canada tuna case, the US representative discussed the provisions of Article XX in his argument. However, as the measure is found to be contrary to other GATT principles, the Panel did not rule on Article XX. The important case in this regard is the Tuna I, where an elaborate argument was made on the content of Article XX, the Panel held that the US measure is not justified under both paragraphs (b) and (g) of Article XX by analyzing the contents of both the chapeau and the paragraphs together.[96]

The analysis of trade – environment issues is properly addressed in Tuna II for the first time. The Panel followed three – step analysis for both paragraphs: first, whether the policy invoked falls within the range of policy sought under Article XX; second, whether the measure is taken within the

[95] In the Canada Tuna case, there was no disagreement that dolphins are exhaustible natural resources, but later it is adopted that they are actually natural resources. In the US-Gasoline case, air held to be exhaustible natural resource; generally the meaning of exhaustible natural resource has been modified significantly in the course of those cases.

[96] Paras 5.29 & 5.34, respectively

context of the challenged policy along with other similar domestic measures (on production/consumption of the said good) to address the issue; and third, whether the measure complies with the requirements of the chapeau of Article XX.[97]

In the first case, the Panel addressed the sequence of examination of the order of the requirements under GATT Article XX. In Tuna II, the Panel, in its three-step analysis rationally followed a certain order as indicated above. The order of examination of the requirements of Article XX is made clear in the US-Gasoline case for the first time. In that case, the Panel decided that the measures are contrary to the principles stated in the chapeau. This made the determination whether it falls under any of the exceptions listed under paragraphs (a) to (j) unnecessary.[98] On appeal, the Appellate Body ("the AB") reviewed first whether the measure falls under any of the listed exceptions and it held that it falls under Article XX(g). The AB further examined whether the measure fulfils the requirements of the chapeau. The AB thereby reversed the sequence of examination of the provisions of Article XX.[99]

Although the Appellate Body (AB) had already delivered its decision on the Gasoline case, the Panel in the US-Shrimp/Turtle case, failed to comply with the order of interpretation of the provisions of Article XX. In subsequent cases, the Panel first addressed the issue whether the measure taken by the US fulfils the requirements of the chapeau, which it found in the negative,[100] after which it stated that it is unnecessary to examine whether such measure falls under any of the listed exceptions.[101] In this case, the AB held that the Panel erred in the interpretation of the provision by failing to properly follow the *sequence of steps*, as are followed in the US - Gasoline case.[102] In subsequent cases where there is a dispute whether a given measure is taken with a view to exercising the power under Article XX, the Panel first determined whether the said measure falls under any of the listed categories in paragraphs (a) to (j) before it examined whether it fulfils the requirements of chapeau of Article XX. That was the case both in the EC – Asbestos and the Brazil – Retreated tyre cases.

4.2- Scope of Article XX

As the provisions of GATT Article XX do not contain the word *environment*, the scope of Article has been a matter of dispute between member states and a matter of concern for environmentalists. Thus, parallel to the determination

[97] Tuna II pp 49, 53

[98] See paras 6.33, 6.34 and paras 6.40, 6.41 for paragraph (d) and (g) of Art XX, respectively.

[99] P 23

[100] Paras 7.48 and 7.49

[101] Para 7.63

[102] Para 122

of the sequence of steps in the interpretation of Article XX in the course of those disputes, the scope of Article XX is also determined. It is evident that a member state can adopt its own policy for the purpose of the protection of human, animal and plant life and health, and for conservation of exhaustible natural resources.[103] A birds-eye-view of the cases indicates that the determination of whether a given measure falls under paragraph (a) to (j) is not as difficult as determining whether it fulfils the requirements of the chapeau of Article XX which are discussed at three levels:

i. The GATT is a trade agreement; but the purpose of Article XX is to ensure that GATT does not impede states to take such necessary measures to pursue their own public policy not necessarily in conformity with other GATT obligations.[104] It has been observed by the Panel and the AB in the cases discussed above that there has to be a *policy* [105] *principally aimed*[106] at the protection of human, animal or plant life or health, or the protection of exhaustible natural resources on the basis of which the measure is taken.
ii. As a deviation from the basic principles of the GATT such measure might be found contrary to the principles of national treatment.[107] However, the chapeau prohibits that the measure cannot be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevailed." Such discrimination is not an ordinary discrimination which is prohibited under Article III, but one which is *necessary* to be justifiable under Article XX.[108] Such measure should not be more restrictive than it is necessary to achieve a public policy goal as encompassed in Article XX.[109] The inter-

[103] Although it has not been directly addressed by the Panels for example in the case of Tuna I, it has been raised by both complaining states and third parties that the measure can be applied only within the national territory of that state (paras 4.1, 4.5, 5.27). It is also addressed by the EC in its submission to the GATT that such national measure is extra - jurisdictional in application EMIT *The GATT and the Trade Provisions of the Multilateral Environmental Agreements* Submissions by the European Community (17 November 1992) para 2.4

[104] *Id*. para 2.4

[105] Tuna II, para 5.12; US-Gasoline AB page 15

[106] Tuna II, para 5.31; US – Gasoline pp 18, 19

[107] It has been indicated by Schultz (*Supra* note 49 at 427) that there is no deviation from MFN. That is what is affirmed by the Panel in the Brazil - Tyre case.

[108] What appears from the reading of those cases is that the nature of discrimination under Art XX is different from other discriminations that, Art III is on explicit discrimination to foreign goods and services, while that of Art XX is *origin neutral* nevertheless discriminate against foreign goods and services. This is also enunciated in Hudec *Supra* note 72 at 3

[109] Submission form the European Community, *Supra* note 42, para 2.5

national standards as included in TBT and SPS Agreements, for example, are deemed to fulfil the *necessity* test.[110]

iii. The measure should not be used as a *disguised restriction to international trade*. There is little guidance in the GATT as well as in the cases regarding what constitutes "*disguised restriction on international trade"*. The ordinary reading indicates that the objective or effect of the measure is to afford protection to domestic producers in circumstances where such protection is not *necessary* to achieve other legitimate objectives under Article XX.

4.3- The relation between Article XX of GATT and MEA rules

It is stating the obvious that the GATT and MEA rules are separate regimes. Some describe them as *neither friends nor foes, but neighbours*.[111] The GATT Secretariat in early days stated that while "many environmental measures are likely to have no significant effects on trade, those that do can have complex trade effects."[112] It also stated that in the absences of relevant information, "few generalizations can be made about the likelihood of any particular measure creating, diverting, or restricting trade."[113]

Environmental measures are applied in the form of *pure border restrictions* that would clearly restrict trade. However, most of the measures are internal measures, "such as taxes and charges or technical regulations and standards, which affect market access and the conditions of competition for all producers, both domestic and overseas."[114] The trade effects of such measures are

[110] What are those products that are subject to restriction? Austria suggested that these are products which are not only *themselves, or through the substances physically incorporated, environmentally damaging* but also *products on the basis that their production is damaging to the environment under certain circumstances.* Group on Environmental Measures and International Trade Submission by Austria GATT AND INTERNATONAL EVVIRONMETAL AGREEMENTS (IEAs) (1 October 1993) para 2.5

[111] B. Krist "Nether friends Nor foes, But Neighbours: An Introduction to the Relationship between the WTO and MEAs" in *Trade and Environment, the WTO, and MEAs* <www.boell.org> (last accessed December 6, 2007) p 1

[112] Measures affecting trade based on MEAs are placed under three categories by the GATT Secretariat which are referred to as *Models*. The first model is based on export certificate and/or import permit; the second model is introducing local exceptions; and the third model is regulation of local production and consumption of goods, Secretariat Note 1 *Supra* n. 43, paras 5, 6, 17 & 24

[113] Group on Environmental Measures and International Trade: THE TRADE EFFECTS OF ENVIRONMENTAL MEASURES" Note by the Secretariat (29 June 1993, hereinafter, GATT Secretariat Note II) para 4,

hard to predict.[115] That aside, there is still unsettled view regarding how far those measures taken based on the provisions of MEAs are accommodated under GATT Article XX.

Some governments made it clear that the two are so distinctive that the insertion of the word *environment* in Article XX does not remedy the ill because the focus on Article XX does not imply measures impacting on trade for environmental reason. This includes measures taken pursuant to a MEA, which necessarily constitute exceptions to GATT obligations.[116] However, it is believed that the public policy objective sought under paragraphs (b) and (g) are broad enough to encompass environmental protection objectives.[117] Others argue that if TBT and SPS allow member states to adopt international standard (that is not considered to be a disguised restriction to international trade). And the requirements should comply with MEAs as they are meant for establishing international standard.[118] This argument doesn't seem to be convincing at least under circumstances where both state parties to a dispute are parties to the GATT and the complaining state is not a party to the MEA. That in turn begs the question whether those MEAs could modify the obligations under the GATT.

For all what it is worth, some individuals argue that based on the rules of treaty interpretation, the MEAs trump the GATT in so far as they came later, which unfortunately is not the case for many of them.[119] That raises the question whether the DSB has jurisdiction. Equally, the power of dispute settle-

[114] Para 5

[115] Many factors can affect the outcome. Those that would appear to warrant particular attention, according to the Secretariat are: "(i) policy-induced discrimination against overseas suppliers; (ii) lack of full and timely transparency for overseas suppliers. This is of particular importance in the case of voluntary measures, such as eco-labelling; (iii) market characteristics, such as size and openness to trade (a small market may dissuade overseas suppliers from undertaking product changes to maintain market share, a large market may encourage them to make the effort, and a market of global importance may cause changes in standards in other markets), proximity to overseas suppliers (long-distance suppliers may be particularly vulnerable to restrictions on product packaging), industry concentration, product substitutability and consumer preferences; (iv) which specific products the measures apply to; (v) environmental resource endowments and constraints among domestic and overseas suppliers; and (vi) the availability of technology needed to meet new product standards."

[116] EC Submission *Supra* note 42, para 2.4

[117] *Id.*

[118] In Austria's Submission (*Supra* note 110) it is referred to as *The primary purpose test* para 44 Esq.

[119] Austria in its submission to the GATT suggested to include a trumping clause to Art XX for future MEAs *Ibid,* paras 85 - 87 a view supported by Schultz *Supra* note 49 at 343.

ment bodies is restricted and perhaps the only function of the WTO DSB is serving in preserving "the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements."[120]

The EC rather suggested a clarification and a set of standard of application of MEAs for a non-party state that:

a) a number of substantive criteria, based on the interpretation of Article XX, which ensure that trade measures applied to non-participants do not go beyond what is necessary to achieve the environmental goals of the agreements;
b) certain formal criteria related to the concept of a multilateral environmental agreement, so as to ensure that the exception for the application of trade measures to non-participants is limited to cases in which environmental protection commitments have been established through a genuine multilateral process.[121]

[120] The phrase covered agreements include (a) Agreement Establishing the World Trade Organization (b) Multilateral Trade Agreements: the Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Understanding on Rules and Procedures Governing the Settlement of Disputes; (c) Plurilateral Trade Agreements: Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement and International Bovine Meat Agreement (Appendix 1, DSU) which does not cover MEAs. It is further provided that in the discharge of its responsibilities, the Panel is instructed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, an obligation by which the AB is bound by. It is further provided that the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Art 3 (2) DSU; Art 11, Functions of the Panel (DSU)

[121] Group on Environmental Measures and International Trade THE GATT AND THE TRADE PROVISIONS OF MULTILATERAL ENVIRONMENTAL AGREEMENTS: Submission from The European Community 17 November 1992, Para 2.4. Austria on its part submitted that what is relevant, from the GATT perspective, is whether there is actual difference between the environmental protection commitments applied by parties and non-parties. This GATT requirement is indeed fully recognized under CITES, Basel and the Montreal Protocol which allow for trade with non-members to be carried out on the same basis as with members provided non-members apply equivalent environmental guarantees. It can be expected that any future Multilateral Environmental Agreement which envisages the application of trade measures to non-members would include similar provisions so as to avoid GATT inconsistencies. Moreover, clarifying the interpretation of this requirement would also provide an insurance against any possible abuse by the signatory of the MEA when implementing the Convention.

[122] Austria's submission, *Supra* note 110

Some governments even reject objections based on the extra-territorial application of domestic environmental measures in so far are they are based on MEAs.[122]

Concluding Observations

It stands to reason that addressing environmental problems affect trade competitiveness; whether it is limiting emission of greenhouse gasses, transportation of hazardous waste, or preservation of biodiversity. The GATT Article XX is far too insufficient to properly address the issues of environment and WTO is not sufficiently competent to promote and enforce those issues in the world trading system.

Unfortunately, the efforts within the international community and the UN system are not promising in comparison to the magnitude of the problem. No state can point its finger on another because all states have environmental problems and each has its own share in taking the blame. There are environmental problems of the affluent and environmental problems of the poor. Needless-to-say, the earth is the common heritage of mankind and there has to be a systemic and concerted effort to address the problem at the national, regional and global levels with a view to mitigating further assaults against nature.

The majority of environmental problems occur within the national territories and can better be dealt with nationally as in the area of household energy consumption, combating deforestation or the use of efficient technology. It has been seen that GATT Article XX is not a barrier to the adoption of national policies and measures that are meant for the protection of human, animal and plant life and health, provided that it is not applied in a manner that amounts to be arbitrary or unjustified discrimination among states (where the same circumstance prevails), or if such measure is not implemented in a manner that restricts international trade. It is also observed that *international standards* as used in the TBT fall under this exception. Thus, it is possible to address environmental issues within the GATT system. The fact that the term *environment* is not included in this provision cannot be a restriction to the application of environmental measures in so far as they are meant for the protection of human, animal and plant life and health.

These policies and measures, however, need to focus exclusively on domestic matters, and should not be used as legal justifications for the restriction of international trade. In this regard, some recommend that the restriction of such measure to national territory is not justified and that *like products* [123]

[123] The word like products as was interpreted in the Japan's Liquor Tax Law case.

need to be re-interpreted to accommodate product-process manufacture [124] with a view to avoiding free-riding.[125] That might be considered an intellectual support to withdrawal from global free-trade in the guise of the basic principle called *sovereign power of states*.

Environmental problems beyond national territories can be addressed both at a regional and global level. It is true that environmental concerns of a given region are different from other regions. Regional environmental problems can be better addressed in regional systems. Thus, the immediate causes and effect of international environmental problems could be identified and analyzed more readily at the regional level [126] based on the specific needs and conditions of the region.

As it stands now, the global framework seems to have pitfalls. The only unifying provision is GATT Article XX. Some states are parties to one MEA while some are parties to another. Certain MEAs are administered by UNEP, and many are not. GATT Article XX cannot replace MEAs nor is the relation between the two defined. In as much as it is expected to contribute its share in the protection of the environment, WTO is not thus the appropriate forum for the negotiation and enforcement of Multilateral Environmental Agreements (MEAs).

It is stating the obvious that, MEAs need to be administered under a unified relevant organ such as UNEP, and such organ need to have the power of enforcement and the resources at its disposal. ■

[124] See Austria's Submission, *Supra* n.110; Schultz, *Supra* note 49 at 433; also WTO Public Forum 2007: "How can the WTO Harness Globalisation?" <www.wto.org> (last accessed October 19, 2007)

[125] Can we then consider those who have been assaulting nature for the last more than a century were free-riders?

[126] Bishop and Munro, *Supra* note 1, p 349

SHARING THOUGHTS

Three Eye-opening Events

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Mizan Law Review has invited me to discuss the *eye-opening events* that I mentioned during a speech I made to law teachers at AAU Akaki Campus on 15th July 2008. The written medium of communication of course enables a person to convey thoughts, memories and reflections to a wider public including future readers. However, writing does not have the flexibility, flavor and the wider landscape which constitute the positive features of speech. It is with such modesty that I started writing the following thoughts and reflections.

The events which I am now sharing with Mizan's readers are occasions which helped me to open my eyes in my march from rigid legalistic formalism toward a wider conception of the law as a system, a process, and a social institution. The march began in 1965 at a Woreda Court in Addis Ababa, located on Russia Road near Menelek Hospital. The 'march' continued in 1967 near a rural village named Sululta, 22 kms north of Addis Ababa but 15 km across the countryside, off the Dessie Road. And, the third part of this 'march' involved an analytic, critical and reflective reading of a book after I joined the University Faculty (UA, School of Law) in the 1970s.

The First Event

I was a new graduate from a US law school when I took a law teaching job at Addis Ababa (then Haile Selassie I) University in 1964. Like most newly-graduated young lawyers, I felt that I was at a height of professional competence, equipped with all the tools and kits for finding, interpreting, analyzing and applying legal rules, principles and procedures. And like most young lawyers of my age, I was very comfortable with the entrenched conceit of 'thinking like a lawyer' until a certain case decision in the Woreda Court convinced me that there is much more in law than only the façade of formal rules and procedures.

The case I watched in the courtroom involved a boundary dispute between two neighbors. Surprisingly, both parties were unhappy about the court decision. The person who lost the case was sad because the decision involved a fine of 35 Birr. The woman who obtained a favorable decision was also unhappy because the penalty of fine (payable to the state) did not resolve her problem. She had come to the wrong (criminal) court in the first instance, because when she filed a complaint at a Police Station she thought that the proceedings which ensued would solve her problem. And now she had to go again to a civil court regarding her border demarcation complaint.

I gained a big lesson from watching this court case, and it was indeed a wake-up call to engage in deeper critical reflection regarding the rigid formalistic conception of the law. Even though the woman 'won' the case, it meant nearly nothing to her. I thus learned that law is not only about formal rules, but needs to be understood properly, and I started to expand my thinking.

This event marked the beginning of my 'overall focus on "legal systems". The woman who had lodged complaint in this case had focused on the law as she understood it from the perspective of the traditions that she and most people like her understood. To her, there should be no difference between a civil or a criminal case. The law represented a series of rules in society that were either followed or violated. In this case, her neighbor had violated a rule by moving the boundary of his land onto hers. She felt justified in going court to correct the wrong. She had not considered whether the remedy she was pursuing was a criminal or a civil one.

It would not have mattered in the traditional system. She would have simply petitioned because of the violation of the rule. If she was proven to be right, she would have gotten her land back and her neighbor would have been shamed because he acted inappropriately. She chose to go to the official government court (presumably through the Public Prosecutor's Office), because

she was living in the city and, apparently, assumed that it was more appropriate to do it in this way.[1] Since she did not really appreciate the full implication of going to the government court, things got confused. I was a witness to this confusion and tried to sort it out, which led me to begin to understand the implications of having a full system of traditional law available. Of course, the basic question I had to ask was why were we just teaching our students the formal government law which, it turned out, was only being used by a very small minority of people who had legal cases.

As a parallel matter, I started to believe that the real task of a lawyer is his/her capability to avail peace, harmony and equitable remedies by keeping people (as much as possible) out of expensive and time-consuming litigations. I concluded this because of the special nature of the traditional system which I would spend a great deal of time trying to understand. Traditional courts tried try to resolve the disputes between the parties and reach an actual resolution of the differences with a formal reconciliation process at the end of the process when the parties acknowledged the violation of the rules or the mistakes that were made.

The traditional system did not make a declaration of right and wrong or impose punishment. Instead its goal was to make peace in the community. There are of course matters which inevitably go to courts. Nevertheless, my first-hand observation taught me the limitations of certain court litigations even where a party might have 'technically won.'

'Spirit-possession' sessions and dispute resolution

The second eye-opening event involved 'spirit possession' sessions which are part of the dispute resolution process of the traditional legal system. I visited a number of them in 1966. First, I visited one of the leading figures who had a very large following. Although I did not proceed with a full analysis of this spirit institution, it was clear that throughout Ethiopia there were many persons who claimed to have spirits. A hierarchy of persons with spirits clearly existed with the *Ye-Arussiwa Emebet* at the pinnacle. *Ye-Arussiwa Emebet*

[1] I later learned that there were, in fact, rules in the traditional sector that it was considered inappropriate to bring a case to the government court when a local court institution was available. Later on, I witnessed a rather lengthy and powerful petition that was brought against a villager who had inappropriately brought a case in the government Woreda court. In the end, the person who had brought the complaint to the official court was made to pay, both financial terms and with his reputation for the violation of the rather rigid rule that villagers are not permitted to petition to the official government court when traditional institutions are available.

who was the first spirit-possessed person whom I visited on a whim. I was curious about her and the phenomenon of spirit possession which I was told involved both healing and conflict resolution.

I made a second visit to her headquarters, *Ferekessa*, on Mohammed's birthday which was the day of a giant celebration with individuals present from all over Ethiopia. Many people believed that her spirits were very powerful and socially positive. As I said just above, I attended the annual celebration for Mohammed's birthday, which was held at Ferakessa in Arussi province. I estimate that there were between 80 and 100,000 people present to be near her, which was certainly indicative of her presumed power.

While present, I saw the holder of the spirit [2] both resolve disputes and perform what some people felt was miracle health cures of blindness and deafness At this time, I was teaching Conflicts of Law (Private International Law) which generally was comprised of cross-border legal disputes which were normally international in nature. I decided also to incorporate into my Conflicts of Law course "internal" conflicts, that is, conflicts between systems within the same geographical borders. In Ethiopia it meant looking at the conflicts between the formal governmental system and the more informal, and unrecognized traditional system.

My reading led me to believe that the "law" in the traditional system was as much a legal system as the formal law promulgated by the Parliament. I was convinced that the traditional legal structure should be incorporated into the overall legal system, but, of course, I realized that it was a political decision that would have to be made by the government. I had been evolving a sense of law which could incorporate the traditional law into the overall system with no definitional problem. I felt it was important to deal with tradition as a real part of the legal system and perhaps someday there would be a realization that it should be recognized, as I was convinced that it was going to remain a strong force within the overall dispute-settlement regime in Ethiopia.

This in turn led me to consider incorporating into my classes some of the relevant activities of traditional law. Part of this construct included what I had witnessed on my visits to Ferakessa, that similar people possessed by spirits offered the public. I learned about a person named Basha Reta who lived nearer Addis Ababa, and was believed to have a spirit called "Adal

[2] At this time it was a man named Lij Taye Gessesse, who was a lineal descendant of the original spirit holder who held the power of the spirits. The original spirit holder had migrated from Wollo Province in central northern Ethiopia to Arussi. Lij Taye passed away during the period of the Derg and I am not certain now who holds the power of the spirits of *Yearusiwa Emebet*.

Moti", among others. I learned that Adal Moti was considered a very powerful spirit.

Although I have never believed in spirit possession systems, the psychiatric functions of Basha Reta (similar to those of Lij Taye Gessesse, the Arussi Imebet) were fascinating because there were a great many people who were being healed from ailments that seemed to have psychological factors or that were nerve-related. As a lawyer, what fascinated me most were the hundreds of disputes that were being resolved by Basha Reta at his sessions on Sundays and Wednesdays.[3] My students and I started to attend the Sunday sessions[4] and learned many lessons on how disputes were being resolved so that both parties were happy and reconciled.

The visits to Basha Reta's sessions taught me that such traditional institutions can have a positive contribution towards peace, order, harmony and development (as long as certain aspects of exploitative 'witch-crafting' are prohibited) if the reverence which is accorded to such persons by communities can be constructively used for the purposes of dispute resolution, environmental protection, and other endeavors of community development. These are indeed among the core objectives of every legal system.

My students and I thus learned that law is not only about formal legal provisions. We started to expand our understanding of law beyond the formal. Such occasions nurtured my curiosity about the relationship between law and society. Until the mid 1960s the young lawyer's soul in me had a passionate belief in the "magic" available in formal legal rules to regulate society. Gradually, however, I learned to be more modest, and to recognize that laws should be understood in a far wider context.

Courtroom settings and litigations represent the conflict (as opposed to the love and mutual respect) aspect of laws. Litigations can be dramatic, and tend to capture our attention. However, contractual obligations performed according to the law, peace, and harmony in social relations and the entire spectrum of tranquil human relations constitute over 99% of our daily behavior. Normal human interactions, including disputes, do not usually go to court. And all these ordinary interactions involve norms of conduct of which formal laws

[3] There was a certain irony in Basha Reta's activities. He lived in an area that had large numbers of Amhara and Oromo people. Fortunately, he was powerful enough to have acquired an Amhara styled spirit which appeared on Sundays and an Oromo styled spirit which appeared on Wednesdays. For purposes of convenience our visits to Basha Reta were virtually all on Sunday.

[4] I took no more than three students with me on each visit, as I was driving and there were only four seats in my Volkswagen Beetle.

are only one piece. Again, I have come to believe that the best lawyers are those who can settle disputes without going to court, unless it becomes absolutely necessary.

Edgerton's book

The third event which enabled me to open up my eyes further was a book entitled *Rules, Exceptions and the Social Order*, by Robert Edgerton, which I read when I was pursuing graduate courses in Social Anthropology. The definition of law as a set of rules enacted by a legislature (or as a case precedent) might help a student to pass exams. But such a conception cannot withstand various debates related to the essence of law, the origin of laws and the future of laws.

Edgerton's book examines the issue of where legal rules come from as a matter of social development and a consideration of social structural reality. It explores how rules come into existence from the point of view of the members of societies and the manner in which societies continuously change. The book then indicates that in due course of change in social order, many legal rules that were *principles* become *exceptions* . The book further shows that the exceptions might eventually become irrelevant and disappear as a result of obsolescence owing to social change and progress.

In other words, laws are generated by societies as rules of expected social behavior and they serve as the normative framework toward the attainment of order, peace, harmony, and development. In its narrower formalistic conception, we talk about rules that are being violated. Such is the mindset of conflict-oriented lawyering. In due course, however, we can grow toward having a wider conception of legal rules as set of norms and processes that enable a society to function properly, effectively, and harmoniously.

Concluding reflections

No legislature can pass laws that change people, although in the 1960s there were theories that took the position that law indeed could radically change human behavior. Instead, too-rigid and heavily formalistic legal rules will tend to make people circumvent such laws. To a certain extent, laws can be instrumental to change, whenever societies become ripe to make an evolution of a qualitative transformation. Otherwise, the faster laws change in haste (unmatched by their natural rhythmic clock) the more they become superficial and unenforceable.

A valuable example to refer to, which is in many ways the forerunner of the Ethiopian attempt to change its law, is the modernization of law in Turkey.

Attaturk attempted to engineer radical change in the legal system starting in the 1920s, by sending a group of students to study law in Switzerland and then adopting many of the Swiss Codes. This was an attempt to secularize and modernize the law of Turkey. Attaturk's attempt has been studied to evaluate the impact of reception of laws and legal systems in a form that is incompatible to the already existing indigenous law.[5]

Indeed, Ethiopia has a treasure of profound traditions which have been nurtured and reinforced by many generations. Law abiding citizenry in Ethiopia can be illustrated by an example recently raised by one of my friends: you can see beggars in front of jewelry shops in Piazza with a fragile glass window separating them from unguarded sets of jewelry that are worth hundreds of thousands of Birr. Yet the beggars respect this barrier and do not smash the windows to rob instead of begging.

There may of course be many ups and downs in the march towards the imported definition of 'development', *inter alia*, owing to a global setting which seems to be unfavorable to less-developed countries like Ethiopia. There may thus be 'bumps' on the rough road ahead. Such setbacks may unfortunately erode some elements of Ethiopia's legal traditions. Eventually, however, I am optimistic that every positive aspect of a tradition lives, and that is why it deserves the name 'tradition.' ■

NOTES CORNER

- **Notes on Jurisprudence**
- **Notes on Western European Legal Traditions**

NOTES ON JURISPRUDENCE

Positivism Continued: Kelsen's Pure Theory of Law

*Elise G. Nalbandian**

Arguably, the most influential legal theory of the 20th Century in Continental Europe seems to be Hans Kelsen's "*pure theory of law*." It is solidly in the line of the positivist tradition running from Hume, through Bentham and Austin to establish a 20th century ultimate positivism developed from before 1918 up to and beyond 1970's. This theory's literature began to develop before 1918, when Kelsen was examining the Austrian Constitution (which he would later be involved in rewriting) and it continued until the 1990's. However, the 1967 text of "*The Pure Theory of Law*" is the text that the following notes rely on for the purposes of studying this theory.

Kelsen's theory of law is referred to as "*Pure Theory of law*" because he believed that any explanation of the nature of law had to exclude all other elements such as sociology, politics and other disciplines. Kelsen also excluded any possibility of morality being involved in the question of legal validity. It is this dual exclusion that inspired another 20th Century jurist, Joseph Raz, to consider Kelsen's theory as being "doubly pure".

Hence, it is possible to summarise that:

a) The premise of Kelsen's theory is anti-natural law. All natural law theories assume a dualism of *what the law is* and *what the law ought to be*. Kelsen rejected this dualism. However, he was very concerned about law and morals and his theory had to explain these so as not to mix the two concepts.

b) Kelsen believed that law is self-defining, and it should not be described politically, sociologically etc. For Kelsen, law is free of the impurities of other disciplines. This is a defect that Kelsen noticed

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> in Hart's and Austin's theory as these approaches, according to Kelsen, are non-scientific and unduly mixed with a lot of other elements.

In short, what Kelsen tried to do for law is what the sciences do to understand nature's physical elements. Kelsen adopted an "objective/ descriptive" approach. His theory looks at the "science of law" which would describe conduct as legal or illegal or making statements about legal rights and duties as objectively as possible. By definition, Kelsen meant what legal and illegal actions are and what they entail in the form of understanding delicts (actions which require sanctions) and sanctions (ought statements to the officials requiring them to apply sanctions).

These for Kelsen were issues of effective administration of coercion in a jurisdiction and did not raise issues of morality coming into it. Kelsen believed that taking this approach made sense as law is created by man, for man, and thus one has to study how law is humanly made and used. To this end, he formulated his theory as a system with several component parts linked together.

1. Law as the primary norm that stipulates a sanction as a direction to officials

For Kelsen, a norm is a description of law. So the question is what is a norm? A norm is an "ought" statement or a statement that depicts a standard which includes imperative concepts which tells the officials of law that "if X happens (delict), then Y ought to apply a (sanction)" whereby Y is the official and he or she has to apply the necessary sanction. Kelsen wrote his theory primarily in German, and it is incorrect to assume that he used the word "*ought*" in the same way as the natural lawyers (writing in English) or even Austin used it.

For Kelsen, norms can also take the form of permissions and authorisations such as using propositions "*should*", "*may*", "*can*". Every type of such propositions functions as a measure of human behaviour to determine the legal origins of the actions scientifically and objectively. Hence, in Kelsen's theory, "*ough*t" statements come from de-psychologised acts of will which can be objectively understood. In contrast, Austin believed that '*ought'* statements come from the sovereign.

Consider the example of the contrast of the gunman vs. the taxman scenarios where both parties take money from a number of people. According to Hart's descriptive subjectivism they are both doing the same thing . But in their objective meaning, the gunman's actions measure against the norms of law as illegal whereas, the Tax Office has an "ought" permission to take tax money

from others. The latter is a legal action as it is authorised. Hence law must be understood according to the objective meaning of commands as measured against other norms.

Kelsen does not deny the existence of human commands but instead argues that one has to study norm "commands" objectively against other norms and it is the conditions under which the commands are issued that makes the command a law. In other words, what makes a particular act legal is the existence of a legal norm in respect of which the act is carried out with other norms in the background authorising and permitting other acts that valdify the required action stated in the primary norms.

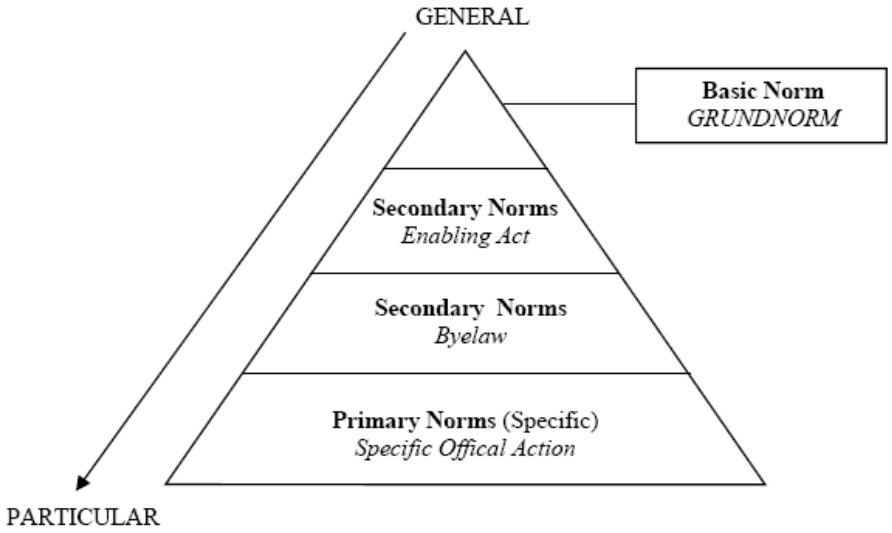
2. Law as a system of norms which are self-organising (Of Hierarchies and Validity)

Commands become a law where laws as norms exist in a system which are self-organising in a hierarchical system. This part of Kelsen's theory is not dissimilar from H.L.A. Hart's theory of *secondary rules* which validate the *primary rules*. In this respect, Kelsen introduces his *pure theory* which considers law as a system of norms which are self-organising such that higher norms validate lower norms and that lower norms furthermore are imputed by higher norms. In effect, the whole sphere of legal norms is self-referential.

According to Kelsen, norms cannot exist by themselves in the legal system as one norm depends on another, higher authorising norm. So every norm has to be related to other legal norms which are in turn related to higher legal norms. Such chain of norms therefore creates a hierarchy of norms with the *Primary Norms* at the bottom of the triangular/pyramid structure. The next level of norms constitute the *Dependent* or *Secondary Norms* which give validity to the bottom of the triangle, i.e. the primary norms.

Other higher Dependent Norms give validity to the lower Dependent Norms but this is not an infinite system and there is an apex end point. This apex end point is at the top of the hierarchy. It is known as the "*grundnorm*" or the "*basic norm*". The links between all the norms can be understood as validifying forces between the norms.

The diagram below illustrates this hierarchy in the shape of a pyramid. From the top down. The norms become general (at the top) to specific (at the bottom). Thus the higher norms will be dealing with issues such as how law is created. And, the administration of justice at the bottom level specifies certain actions in specific cases with each norm gaining legal validity from another, higher norm.



Hence, according to Kelsen all norms originate from primary norms which derive their power from sanction while they derive their validity from higher norms. All primary norms are linked to two types of sanction:

a) Transcendental: this is an assumed sanction whereby there is no necessarily physical or even imminent or present punishment.
b) Social and Physical sanctions: this is an imminent sanction from stigmas to other forms of punishments which are authorised by primary norms.

Primary norms are concerned with authorising bodies to apply sanctions while citizens are not directly addressed by the norms and therefore are incidental to this part of the theory. In a bid to keep his theory pure, Kelsen did not consider citizens except as subjects who may cause the official actions which require the hierarchy of legal norms to be in place.

The next level is that of the dependent norms that can either take the forms of byelaws expressing the primary norms or enabling acts that also express the primary norm.

Finally, at the top of the pyramid, there is the *basic norm* or the *Grundnorm* which gives the whole system its validity while putting a logical and finite end to the hierarchy. This is a presupposed (on account of the actual activity of the officials applying the primary norms) and transcendental concept

which goes beyond facts and can be termed as a legal necessity as it is understood that if a norm exists, its validity is presupposed and hence, as the validity can only flow from a higher norm down to a lower norm, then the higher norms exist which in turn derive their validity from other higher norms until the culmination of a valid *Grundnorm*. Hence, the existence of a *Grundnorm* depends on the fact that the primary norms are consistently and regularly applied by the officials while on the other hand, the *Grundnorm* ultimately gives legal validity to the whole system.

To sum up, it is possible to note that while the validity of norms depends on higher norms, the validity of the *Grundnorm* depends on the efficacious application of the lower norms. So to establish whether the Grundnorm works, what needs to be seen is whether the directions given to the officials as per the primary norms are applied. This is where the discussion of Kelsen starts and must logically end thereby indicating the circular nature of Kelsen's arguments.

3. Can a norm exist if it is not effective?

Keslen devised a system whereby the test of legal validity was efficacy and from the discussion above it becomes obvious that a norm cannot exist if it is not effective. Efficacy for Kelsen can be judged by two criteria. The first criterion is to see whether the rules that can be deduced from legal norms are obeyed.

And the second criterion is whether the primary norm stipulates certain actions that the officials must take if the rule to be complied with is not obeyed. If there is a break-down or a revolution, most people start to ignore the norms, and therefore, they are no longer effective. What happens is that the norms are no longer effective and therefore, no longer valid and thus the *Grundnorm* will have to change to accommodate this allowing for a new set of legal norms to be created.

An illustration can be made by a hypothetical case whereby a rule can be deduced saying "Do not do X" as inferred from the norms that "if Y does X, then (an official) ought to…" If a large proportion of the population commits the crime X, and furthermore, if the officials of the society do not enact what they ought to as per the norm, the norm (in Kelsen's view) is no longer valid, and it can no longer apply and will have to be replaced. The only way to replace this is if the *Grundnorm* changes to accommodate the situation. According to Kelsen, if the officials of a state no longer (efficiently and effectively) apply the primary norms, then the *Grundnorm* of the state is no longer valid and has to change.

4. Criticisms of Kelsen's pure theory

Although Kelsen's theory is a respected theory of law, it suffers from several major defects. Its reclusive emphasis on the elements of law without considering other elements such as politics, morality and questions of justice leaves a significant gap in the theory because law does not exist in a vacuum. Critiques of Kelsen believe that this theory is an exercise in logic, and that there is lack of reality in his theory thereby rendering it insufficient to understand the whole implications of legal systems and laws.

Furthermore, Kelsen's emphasis on the role of officials in the system of law unduly focuses on the issue of law enforcement. In effect, it ignores the ordinary citizen's role in the state as well as their interests in the development of law. For Kelsen, the common citizens have little to do with the law other than acting in the ways which justify the application of sanctions by the officials. This is an unnecessarily one-sided view of the law which only looks at the external, coercive element of the law while disregarding the fact that laws can also bind citizens to act or to forebear to act in certain ways. Moreover, Kelsen, (in rejecting the subjective meaning of acts) ignores a very important point in Hart's theory that citizens also obey the law out of a sense of duty. This is an aspect of citizens' interaction with law which Kelsen has ignored completely.

Kelsen's theory holds that, legal norms can exist only in a system which is on the whole efficacious and that such a system is comprised of a hierarchy of valid legal norms, which again predicates upon a valid basic norm in such a manner that validity is based on efficacy. Efficacy is also described as meaning the regular and effective application of sanctions by officials and does not at all deal with issues such as the legitimacy of the law-making authority. This may therefore imply that anyone who is capable of usurping power in a given society can then enforce his new power by applying sanctions efficaciously which then results in the 'legitimate' change of the basic norm. This is a problematic feature of the theory as it seems to legitimize revolutions and power usurption *ex-post facto* by allowing claims of legitimacy due to a change in basic norms.

Finally, the identification of the basic norm in any society is an extremely problematic exercise because its pre-supposed and transcendental nature makes it ambiguous. This renders the whole system of validation unclear because the top-most validifying norm is nearly impossible to identify or explain. This failure may have the effect of proving that the concept that holds Kelsen's theory together is its weakest link, which has the effect of weakening the whole theory.

In conclusion, it is to be noted that Kelsen (like Austin) is not only a positivist, but also an Imperative theorist. Hence, some of the criticisms regarding Austin can also be forwarded in relation to Kelsen's theory. Imperative positivists hold the view that sanctions (in one way or another) constitute a necessary part of all valid law. The existence of a large body of laws which do not require sanctions (power-conferring laws etc.) proves that this is an incorrect view.

Moreover, imperative theories of positivism emphasize the separation between law and morality. However, the link between law and morality while unclear, can be said to exist especially in light of questions of justice and as equity. Morality can also be involved in citizens' "sense of obligation" to obey the law, at times, irrespective of sanctions. ■

N.B- For notes on Austin, see Elise G. Nalbandian " Notes on Jurisprudence: Early Legal Positivism: Bentham and Austin" Mizan Law Review Volume 2, No. 1, page 147

ZWEIGERT AND KÖTZ ON WEST EUROPEAN LEGAL TRADITIONS

Abridged with adjustments mainly from:
Konrad Zweigert and Henin Kötz (1992) *Introduction to Comparative Law,* Oxford: Clarendon Press (Pages 63- 99, 138-162, 187-211, 296-344) [*]

Elias N. Stebek [**]

1. Classification of Legal Traditions

1.1- Purpose of classification

The grouping of legal systems into legal families is made *primarily* "for taxonomic purposes with a view to arranging mass of legal systems in a comprehensible order." The first purpose of classification of legal families is thus *technical*. In other words, classification facilitates a better understanding and comprehension of the study of past and present legal systems/ traditions.

The *second* purpose is to enable current legal systems to borrow legal materials and mechanisms of solving legal problems from past or modern legal systems/ traditions they are affiliated to. Such materials can serve as *authority* in the interpretation and development of a contemporary legal system provided that due consideration is made to new realities and current needs.

1.2- Tests or criteria of classification

In the course of identifying tests of classification, we need not examine every difference between legal systems. Only important or essential differentiating qualities are regarded as hallmarks of the classification. The following factors are crucial for the style of a legal system or legal family:

- historical background and development,
- predominant and characteristic mode of thought in legal matters,
- distinctive institutions,
- the kind of legal sources a legal system acknowledges and the way it handles them, and,
- ideology.

[*] Abridged in April 2004 as part of Summary Notes on European Legal History

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a) ***Historical development*** is one of the factors which determine the style of modern legal systems. The common law is perhaps the clearest example of this. Yet, it is not easy to group the legal systems of Continental Europe (i.e Europe other than the United Kingdom) on the basis of this factor.

b) Another test in the classification of legal systems is ***a distinctive mode of legal thinking***. The *Germanic* and *Romanistic* families are marked by a tendency to use abstract legal norms, to have a well articulated system containing well-defined areas of the law. Looking at the salient features of the Anglo-Saxon legal family enables us to realize how distinctive these stylistic elements are. These differences in style correspond with the differences in the Continental and English mentalities, attributable to different historical developments, especially those of an intellectual order. If we may generalize, the Continental European tends to making plans, to regulating things in advance, and therefore, in terms of the law, to drawing up rules and systematizing them. He/she approaches life with fixed ideas, and operates deductively. The Englishman, on the other hand, inclines to improvising and towards delay in making a decision until he has to. Theorizing has little appeal; and so he is not given to abstract rules of law. The Englishman is content with case-law as opposed to enacted statutes and codes of law. But recently, the attitudes of Common Law and Continental law have been drawing closer. On the Continent, lawyers have begun to treat '*jurisprudence constante*' of the courts as an independent source of law. At the same time, the need for large-scale planning and ordering of social affairs has forced Anglo-American law into using abstract norms and statutes.

c) *Certain* ***legal institutions*** are so unique that they lend a ***distinctive*** style to a legal system. For instance, the institutions which gave the socialist systems their distinctive style would include the different kinds of ownership, the peculiarities of contract in a planned economy… and many others.

d) The style of legal systems is also marked by the choice of ***sources of law*** which are recognized by the legal system and by the methods of interpreting and handling them in connection with the court machinery and rules of procedure.

e) Finally, ***the ideology of a legal system***, in the sense of political or economic doctrines or religious belief, may have a distinctive effect on its style. This is manifest in the case of the religious legal systems and of the socialist systems. The legal ideologies of the Anglo-Saxon, Germanic, Romanistic, and Nordic families are essentially similar; and it is because of other elements in their styles that they must be distinguished.

To conclude, these are the *stylistic factors* which enable us to identify the families of legal systems. But, the weight to be given to each of these factors varies according to the circumstances. *Ideology* is an effective ground for distinguishing the religious and socialist systems, but does not help us to separate the legal families of the West. There it is *history, mode of thought and distinctive institutions* which distinguish legal families. *Sources of law* are distinguishing features of Islamic and Hindu law and also help us to divide the Anglo Saxon from the continental legal families, but we cannot use them as a basis for distinguishing between the Romanistic, Germanic and Nordic families.

1.3- Classification within the Romanistic-Germanic civil law tradition

The term 'civil (continental) law seems to be too broad, and we can reclassify civil law tradition into:

- the Romanistic legal family comprising the French, Italian and other legal systems that have through reception promulgated laws that significantly share the content, style and features of the French Codes,
- the Germanic legal family, that includes Germany, Austria, Switzerland, etc., and,
- the Nordic legal family that includes the legal systems of Northern Europe.

Sections 2 and 3, here-below, highlight the first two legal families of the civil law tradition (i.e. the *French* and *Germanic* Civil Codes); and Section 4 forwards an overview of the English common law legal tradition.

2-History and features of the French Civil Code

2.1- French private law until the eighteenth century

The Romans had introduced their law in Gaul as they did in all the provinces they conquered. Even after the fall of Rome in 476 A.D, Roman law did not lose its validity in parts of France where it continued to serve as the law of the non-Germanic people. In 506, Alaric II, king of the Visigoths, passed a statute that contributed to the survival of some knowledge of French law in the Southern part of France.

In the North, the incursion of the Franks and the establishment of the Frankish state did largely oust Roman law, because the Franks brought with them their own developed customary laws of Germanic origin which were later crystallized as statutes. In the 10th and 11th centuries, the Frankish state broke

up into many different systems, and a number of law books were written in the 13th century. Yet, the customary laws of Northern France depended mainly on oral tradition of various localities and thus gave rise to the proliferation of different customary laws thereby creating a great legal uncertainty.

In 1454, Charles VII ordained that customs of various territories be written down and those which were already recorded be drafted anew with the cooperation of a royal committee of experts. The task of recording the customs took longer than expected and was resumed several times in the decades and centuries that followed.

In spite of prolonged efforts towards writing down customs, only the major ones were recorded. The mere task of writing down the major customary laws paved the path towards the gradual recording of the common customary laws (*droit coutimier commun*). However, the problem of legal uncertainty was not yet resolved.

As French kings consolidated their power, the creation of unitary private law common to the whole of France became indispensable. Series of jurists played a vital role in the development of the foundation for the emergence of a common private law for the whole of France. In the Seventeenth and eighteenth centuries, we find works of jurists which were indeed useful materials and models for the draftsmen of the later generations.

These efforts took a long time to materialize, and France was very far from having a unified private law on the eve of the 1789 Revolution. The wide difference between the written laws of the south (*drot écrit*) and the customary laws of the North subsisted. Although important customs of the North were written down, the documents rather revealed the difference between the customs of the various localities rather than their unity and coherence. The following ironic remarks of Voltaire were made during such period of legal uncertainty and extreme legal diversity:

> "Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? … When you travel in this kingdom, you change legal systems as often as you change horses."

The idea of unified French private law had become a leading theme of French jurisprudence and there was the intellectual basis for the unification of the law, both in theory and in practice. And, ultimately, the impetus of the French Revolution and the corresponding subjective factors such as the authority of Napoleon Bonaparte and his prompt decision making style turned the idea of unified French law into a reality.

2.2- French private law during the revolution

The French Revolution (1789 to 1799) thoroughly altered the traditional social, economic and political order thereby rooting out the absolute monarchy, the feudal regime of land, the tie between the crown and the clergy, the country's traditional division, the court system, the tax system and the various institutions of the former regime. No longer were citizens required to deal with the intermediary status groups of the former regime, but directly with the state itself.

Legislation was instrumental toward freedom of citizens from the traditional authority of feudal, church, guild and other status groups, and laws targeted at the entitlement of citizens with equal rights. In pursuit of these aims, hectic and radical legislation of private law was made during the years of the revolution.

The legislation of the French Revolution brought about far reaching social transformation. In 1791, the decrees of the Constituent Assembly abolished all feudal servitudes and differences (based on age and gender) which had existed in the law of successions. In 1793, the National Convention devised various restrictions against the transfer of ownership in the direct line so that descendants could inherit equal share from the property of ascendants.

In the realm of family law, the paternal rights of the father over adults were abolished. The requirement of paternal consent to marriage was reduced to a minimum. The freedom of divorce was extremely widened. The Central Register of Civil Status was introduced. Illegitimate children recognized by their parents were declared to be equal to legitimate children, save that 'adulterine children' (i.e. children at the time of whose conception either parent was married to a third party), could not have more than one-third of the inheritance of a legitimate child.

The Constituent Assembly had also decreed that 'a code of civil law common to the whole kingdom will be drawn up.' The first draft was rejected in 1793 for being too detailed although it had only 697 articles. A simpler and more philosophical version was recommended.

The following year, the drafter (Cambacérés) offered a second draft with only 297 articles, but the National convention found it too sparse and terse. Cambacérés produced a third draft in 1796. The legislative organ of the Directorate was undertaking a protracted discussion over the draft when it was interrupted by the coming into power of Napoleon in 1799. It was Napoleon's Codes which ultimately brought these efforts and aspirations towards fruition.

2.3- The enactment of the *Code civil* of 1804

Things moved briskly after Napoleon took over power. Napoleon appointed a commission of four prominent experienced professionals to draft the Civil Code. Many of the extreme positions of the laws enacted during the revolution were abandoned by the more composed draftsmen. The draft was submitted (in sections) to the Tribunal that had the power to adopt or to reject it. But the Tribunal rejected the very first draft out of envy and suspicion to Napoleon rather than reasons of substance.

Napoleon withdrew the whole legislative proposal stating that the calm setting and consensus required for the adoption of the Civil Code had not yet been acquired. Then he purged members of the Tribunal who were hostile to him. After a year, the legislative process was resumed and in 1803 and 1804 thirty-six separate statutes were passed and were finally consolidated by the Law of March 31, 1804 as '*Code Civil de Français*.' Years after his downfall, Napoleon remarked that:

> "It was not in winning 40 (forty) battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my *Code civil* will not be forgotten. It will live forever."

2.4- Essential features of the French Civil Code

a) Accommodation of revolutionary principles and tradition

One of the major features of the *Code civil* was the accommodation of the gains of the revolution and longstanding traditions and customs. The French Civil Code of 1804 was generated by the spirit of the French Revolution (1789 to 1799) which sought to eradicate feudal institutions of the past and institute in their place the natural law values of property, freedom of contract, family, and family inheritance. The Civil Code of 1804 embodied the results of a long historical development by blending the traditional legal institutions from the written law (*droit écrit*) of the Southern France, influenced by Roman law, and the customary law of the North influenced by Germanic-Frankish customary law.

This north-south division should not be overstated because both laws shared many elements and features in common. Moreover, the reception of Roman law in the South was not dogmatic reception because various laws of Roman law origin were adopted on the basis of their inherent merit and depending on their conformity with customs and values of French society.

The Civil Code retained the great achievements of the revolution and is also based on a large number of traditional institutions. The principle of equal

division of estates upon succession, the complete secularization of marriage, the total abolition of feudal servitudes and many other principles that represent the gains of the revolution were embodied in the Code.

However, the Code abandoned or qualified rules that were extremely radical. For example, divorce was made possible, but the !804 French Civil Code used many complex rules of procedure which severely restricted the possibility of divorce by mutual consent. The freedom to dispose of one's property on death or in life had been largely abolished during the revolution in the aim of parceling out landed estates; but was reintroduced in the Code though only to a much lesser degree than the German or Anglo-American legal systems.

During the French revolution, the requirement of parental consent to marriage was considered as restricting an adult's freedom to marry. But the *Code civil* required parental consent for marriage of a man under the age of 25 and a woman under the age of 21. At 25, a man was allowed to marry without parental consent, but only if he had sought their consent three times by issuing a 'respectful request' at monthly intervals. For a man over thirty (30), a single request (*sommation*) was sufficient.

Another retrogressive step taken by the *Code civil* was in the domain of matrimonial life. The revolutionary principle of the equality of citizens had been applied between spouses, and thus Cambacérés had in his First Draft proposed that 'the rights of spouses in the administration of their property are equal. Every legal right which sells, binds, burdens or pledges the property of either spouse requires the consent of both.'

But in his Third Draft, Cambacérés abandoned this position and, as the *Code civil* was later to do, the draft gave the right to administer the property to the husband alone. It was believed that the principle of equality should control social relationships, but in the matrimonial sphere, the precedence of the husband was taken as the natural order, and it was believed that to deny it would lead to quarrel and destroy the pleasures of domestic life.

Similar distinction was made in the case of divorce. The *Code civil* allowed the husband to demand divorce by proving the wife's adultery, while a wife could demand divorce only where the husband has kept his mistress in the matrimonial home. According to Portalis, one of the draftsmen of *Code civil*, "the infidelity of a wife bespeaks greater vice and has more dangerous consequences than that of a husband."

b) Accommodation of written laws and customary laws

Another major feature of the *Code civil* is its accommodation of the written law of the southern part of France and the customary laws of the North. Por-

talis wrote:

> 'We have made a compromise, if such an expression may be used, between the *droit écrit* (written law) and the customs, whenever we have been able to reconcile their provisions or to modify each in the light of the other, without infringing the unity of the system or causing widespread dissatisfaction.'

The written law (*droit écrit*) was nearly pure Roman law with regard to contract law, the law of neighbours, the law of wills, and the system of dowry. Customary rules, and in particular the customs of Paris, won principally in family law and the law of inheritance. Acquisitive prescription in good faith (Article 2279, *Code civil*) is in line with German legal thinking.

c) The influence of natural law

The tenet of the natural law theory is that there are autonomous principles of nature, quite independent of religious belief, from which one can infer a system of legal rules which, if given intelligible form according to a plan, can act as the basis of an orderly, reasonable, and moral life in society. The early version of the *Code civil* was strongly and directly influenced by the revolution, and largely dominated by this idea of natural law. But the influence of natural law diminished as the Code progressed.

The idea and conception of the *Code civil* are products of the natural law of the Eighteenth Century Enlightenment, but the value of historical continuity was increasingly recognized as it took practical shape. To many contemporaries, the Code seemed to be a 'reaction against the revolution', but succeeding generations who witnessed its extraordinary influence have acclaimed its '*spirit of moderation and wisdom*.'

d) Compressed legislative style rather than extreme details

At the initial phase of the principle of separation of powers, doctrinaire adherents of the principle advocated that the legislative ought to enact laws that are clear and detailed so that judges should have no power at all to develop the laws but apply them (as they are) without room for arbitrary judgments.

For example, the decree that introduced the Land Law of Prussia forbade judges 'to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the ground of allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statute.' The statute with its 17,000 (seventeen thousand) odd paragraphs often amuses us today by the detail into which it had descended, but the intention was to give the judge a precise answer to every

question with a view to rendering interpretation, as far as possible, unnecessary.

In this regard, the draftsmen of the *Code civil* adopted a more sensible course. The drafting committee believed that the function of the legislator was to set up *general rules*; and its interference in questions of interpretation affecting the affairs of individuals would be undignified, time-consuming and would also prolong lawsuits. Consequently, Article 4 of the *Code civil* renders a judge responsible if he refuses to make a decision 'on the ground that the law is silent or obscure or inadequate.'

The *Code civil* avoids the danger of being too detailed. The draftsmen clearly realized that even the most ingenious legislator could not foresee and determine every potential problem in human relations which might arise and they believed that room should be left for judicial decision to make the law applicable to unforeseen individual cases and to enable laws adapt to changing circumstances.

The best example of the compressed legislative style of the *Code civil* is found in Articles 1382 to 1386. These five paragraphs cover the entire French law of extra-contractual liability. These rules are two hundred years old, and are sill in force, almost unaltered in spite of all the economic and technological changes which have taken place.

In fact, the draftsmen of the *Code civil* went too far in the degree of compression. For instance, the General Civil Code of Austria and the German Civil Code have, respectively, 40 and 31 paragraphs on the same subject matter of torts.

e) Other features of the Code civil

Although the French Civil Code has many virtues, it has shortcomings such as technical inaccuracies and rooms for interpretation that could have been avoided. There are terms that are inexact, incomplete or ambiguous. Such terms lack the terminological exactitude which the German Civil Code has.

Moreover, it must be noted that the ideal man in the minds of the draftsmen is not the ordinary man, the artisan or the day labourer, but the man of property, who was considered as the responsible man of judgment and reason, knowledgeable about affairs and familiar with the law. The Code thus guaranteed the freedom of the class engaged in economic activities, and in property, especially landed property. Freedom of contract is therefore the principle which dominates the law of obligations in the *Code civil*, restricted as little as possible by mandatory rules of law.

2.5- Adaptation of the *Code civil* to change

When one considers the economic, social and political changes that have occurred since the time of Napoleon, one may well ask how the Code managed to remain in force in France until today. It is through legislation of special statutes, judicial interpretation and legal writing that the *Code civil* has managed to adapt to socio-economic changes.

a) Legislation of special statutes

In many areas, especially in family and inheritance law, the legislator has kept the Code in line with socio-economic changes by altering its text through special statutes. The position of the married woman has been improved and the right of children born outside wedlock has been recognized. Moreover the extremely wide freedom of contract embodied in the *Code civil* has been subject to due elaboration and regulation (through special statutes) where the unregulated free play of contractual autonomy led to consequences that seemed unacceptable to new social values and needs.

b) Judicial interpretation

The courts (jurisprudence) have also played a significant role in adjusting the rules of the *Code civil* to modern requirements. For instance, on the basis of the rule of Article 1384 of the *Code civil*, French courts have developed the *law of accident compensation* that match with the special dangers of the modern world and its advanced technology. In labour law, the courts, strongly supported by the legislature, have developed rules of social protection of workmen and employees. As in Germany, labour law has been able to gradually develop as an independent area of law outside the *Code civil*. Although Article 544 of the *Code civil* allows an owner to deal with his property as he chooses, French courts have developed the doctrine of *abuse of rights* to limit the rights of owner of property. These illustrate the key role played by courts in adopting the *Code civil* to social change.

c) Doctrinal interpretation

As the Civil Code aged, legal writing (doctrine) became increasingly significant in the development of French private law. In the years immediately following the enactment of the Code, doctrinal literature merely expounded the text of the Code grammatically and logically, and ignored judicial decisions. But, towards the end of the nineteenth century, doctrinal writing and legal materials encouraged the judge to construe the Code not simply logically and systematically, but in light of the requirements of society as it developed, the actual usages and practices in the relevant area of commerce, and also the results of the researches of sociologists and comparative lawyers.

With the help of legislation, judicial decision and doctrinal writing, the *Code civil* has been able to adapt itself to new changes and requirements. There have frequently been demands and efforts for a thorough overhaul of the Code; but it has not yet materialized. And, after numerous efforts towards overall reform of the *Code civil*, the French legislator has duly focused on the partial reform of the Code in certain spheres that require amendment.

3- History and features of the German Civil Code

3.1- Factors that led to vast reception of Roman law

Germany came in contact with Roman law around the middle of the 15th century; but the reception of Roman law was much greater in Germany than in France. Central power was weakened in Germany, and this lack of tight centralization of imperial power and the strength of the principalities were very conducive to the reception of Roman law. There was no common German judicial system and fraternity of German lawyers that could oppose or delay the reception of Roman law.

By contrast, the legal methods developed by German law became increasingly unsuited to the needs of time. German customary laws allowed the judge to make decision on the basis of traditional legal knowledge, practical wisdom, experience and practicality, and from an intuitive perception of what best answered the objective and concrete facts of the case.

But such method of finding law based on tradition seemed increasingly incongruous as the social and economic circumstances of the later Middle Ages became more complex, variegated and developed. There was thus a legal vacuum, and in effect, Roman law flowed in because it offered a whole range of concepts and methods of thinking. Moreover, Roman law was not considered as foreign law because the Holy Roman Empire ruled by Germans was the successor of the Roman Empire.

3.2- The impact of the 17th century Enlightenment

The Enlightenment brought about a 'decisive change' in the intellectual climate of Europe. It sought to free the individual from his medieval shackles to rational criticism, and to make it possible for individuals to create a new view of the world on the basis of reason. This intellectual movement had immense effects on law. In Germany, it gave lawyers a standpoint of historically conditioned detail, and helped to purge obsolete legal institutions and put the law in a new systematic order.

One particular product of the enlightenment was the idea of *codification*, the idea that the diverse and unmanageable traditional law could be replaced by

comprehensive legislation, consciously planned on a rational and transparent order. In France, the ideas of the Enlightenment and the law of reason took the form of direct political action and led to the Revolution of 1789. In Germany, however, the law of reason broke loose from its roots in general philosophy and became a system of principles of private law to be taught and learnt.

The greatest systematizers (Puffendorf and others) utilized rigorous logical-mathematical deduction and inferred rules of increasing particularity from the most general principles of the law of reason and made the law appear an artful and articulated system, orderly and comprehensible. The intellectual constructions of the law of reason had no direct influence in German legal practice, but the German princes and their high officials, brought up in the spirit of the Enlightenment were influenced by these ideas and they became the intellectual stimulus of reform.

In France, the ideal of legal reform was the product of a passion for freedom by a large class of citizens. But in Germany the reform came from the altruistic paternalism of enlightened authorities eager to perform their duty.

3.3- Codification in the 18th century

The first code of this period was written in 1754 by the Bavarian Chancellor, Kreittimayr. The Code indicated the legislator's belief in reason for it solved long-contested questions in a reasonable manner and was drafted in a clear and pointed German. The most important codification of the period was the General Land Law for the Prussian territories of Germany from 1794 to the coming into force of the German Civil Code of 1900.

The project towards the codification of the Civil Code began on the initiative of Frederick II. The draft embodied the spirit of law of reason and Frederick's brand of enlightened absolutism. Its structure reflected Puffendorf's system who saw men as having a 'double nature' as an individual and as part of a larger group in society. The Code was not designed to alter society but to portray it faithfully, completely, and objectively so that it states where everyone stood in the state complex.

3.4- The emergence of the Historical School of Law

Around the beginning of the 19th century, the sprit of reform of the enlightenment and the philosophy of rationalism gave way to the desire to regulate (in detail) the actions and relations of individuals. The *Romantic Movement* uncovered the elemental irrational powers in human life, and *optimistic rationalism* gradually grew weaker.

It was at such an epoch that the German Historical School of Law arose with Savigny (1779-1861). The Enlightenment had the view that the legal order is a deliberately planned and purposive creation of an official legislator guided by reason. In contrast, the Historical School of Law (Savigny and his followers) saw law as a historically determined product of civilization, having its roots deep in the spirit of the people and maturing through a long process. The school considered law as a product not of the formative reason of a particular legislator, but as an organic growth of the 'inner secret powers' of the 'spirit of the people' working through history.

After the fall of Napoleon, the Restoration in Europe and the dynasticism of the various German rulers rendered democratic integration of the whole of Germany unlikely. The idea of a unified German Civil Code as the one advocated by Thibaut (a professor in Heidelburg) was severely opposed by Savigny, on the ground that the time was not yet ripe for the production of a unified civil code.

Thibaut proposed to replace the intolerable diversity of the German territorial laws by a general German civil code on the pattern of the French Civil Code, and he believed that this would lay the basis for the political unification of Germany. On the other hand, Savigny's view was that legislation being inorganic and unscientific, was not the right way to create a common German law and would do violence to the traditions it opposed. What was needed in Savigny's view was a thorough absorption and cultivation of the legal material as it had grown through time, a task he would entrust to an 'organically progressive legal science which would be common to the whole nation'.

3.5- The *Pandectist* School of Law

In actual practice, Savigny and his followers turned exclusively to Roman law in its original form. Such idealization of Roman law led Savigny and his followers to the unhistorical view that the legal forms and institutions created by Romans possessed a sort of eternal validity. Savigny and his followers addressed themselves to systematizing, ordering and integrating the concepts of Roman laws.

The Historical School of law thus produced the *Pandectist School* whose only aim was the dogmatic and systematic study of Roman material. For *Pandectists,* the legal system was a closed order of institutions, ideas and principles developed from Roman law. They believed that one only had to apply logical or 'scientific' methods in order to reach at the solution of any legal problem. As a result, the application of law became a mere technical process, a sort of mathematics obeying only the 'logical necessity' of abstract concepts and having nothing to do with practical reason, with social value

judgments, or with ethical, religious, economic or policy considerations. The German method of legal thinking as manifested by remote theorizing professors and the lack of organized and powerful class of practicing lawyers was conducive to the emergence and development of *Pandecticism*.

However, the *Pandectist* school could at least produce a method of studying law which was common to the whole of Germany and had brought about interpretation at the theoretical level. Set of clearly distinguished concepts which contributed to the technical sophistication of the German Civil Code were created, but the *Pandectists* did not bother to seek out the real forces in legal life, and did not seek ethical, practical or social justification for their principles.

3.6- Codification of unified German private law

The law of negotiable instruments was unified in 1848, and the General German Commercial Code was enacted in 1861. Both enactments were gradually adopted word by word by all German states. In 1865, a draft of the law of obligations was produced by a team of famous professors and judges. The draft served as a model for later drafts.

After Bismarck's efforts led to the unification of Germany in 1871, laws were enacted to unify the judicial system, civil procedure and bankruptcy. In 1874, a commission (*The First Commission*) was appointed to produce a draft code of German private law. The draft was published in 1887, along with its supporting 'Motive'.

There was a strong criticism against the draft's unduly scholastic structure largely attributable to the abstract conceptualism of the Pandectist School. It was also criticized for the legal jargon in which it was drafted. It was accurate and precise at the cost of clarity and comprehensibility. The third point of criticism was the draft's complicated system of cross-referencing.

With regard to content, it was criticized for bypassing many vital legal traditions of Germanic origin and for ousting the traditional ethical obligations and the relationship of trust in family and society in favour of extreme impersonal individualism. Moreover, it was criticized for its emphasis on freedom of contract which favoured the socially stronger and propertied classes.

The Second Commission was formed in 1890 and its changes were insufficient. In substance, only '*a few drops of socialist oil*' were added to the First Draft. The second draft was published in 1895 and was adopted in 1896 after minor alterations. Only the Social Democrats voted against it. The entry into force of the German Civil Code was set for January 1, 1900 at the Emperor's

personal request with the hope that the new century would have a brilliant start marked by unified private law for Germany.

3.7- Features of the German Civil Code of 1900

Codes of law either consolidate the results of *reconstruction of society* or reinforce the *status quo*. The former codes are inspired by ideas and models of society in the context of *contemporary* and prospective realities. The latter codes, by contrast, are created at a time of relative social and political stability, and in effect, their spirit is often retrospective and reflective, seeking to maintain a situation favourable to the establishment. The German Civil Code is one of such rather conservative codes.

For the German Civil Code, the typical citizen is not the small artisan or factory worker, but rather the higher and propertied class with freedom of contract and freedom of competition who is also entitled to take steps to protect itself from harm. This is so, because the Civil Code merely regulated and articulated the economic and social realities as they actually existed under Bismarck's united Germany.

In language, method, structure and concepts, the German Civil Code is deep and exact, but abstract. It is not addressed to the citizen, but to the professional lawyer. Repetition is avoided by cross-referencing that requires skills. Yet, it lacks the elegance and the compactness of the French Civil Code. Its advantage is that its exact and technical provisions are not as ambiguous as their matching provisions in the French Civil Code. The German Civil Code is highly appreciated for its intellectual merits due to its profound theoretical foundation and level of academic excellence. Many codes have thus to a larger or smaller extent benefited from the Code.

3.8- Adaptation of the Code to social change

The legislator and courts alike have been able to qualify and limit the liberal (*laissez faire*) principles of law of contract whenever they allowed one party to threaten those basic conditions of decent life which the state of today must guarantee to its citizens. Important areas of the law *outside* the Code (such as labour law) have been created by the legislator and these laws are largely independent of the German Civil Code.

The rigorous individualism of the original contract law of the German Civil Code has been qualified by means of devices developed by the courts. For example, the general clause that requires everyone to perform a contract '*in a manner required by good faith*' has proved a splendid device for adapting the law of contract to the changed social and moral attitudes of society. Judicial

decisions may manifest the risk of being undirected and variable. Yet, some degree of certainty has been created through doctrinal writing and interpretation.

The *tort law* of the German Civil Code still rests on the principle of fault. However, special statutes have been able to update tort liabilities that arise out of fault and other tort liabilities that had not been envisaged by the Code. In Family law, the conservative and patriarchal stipulations of the Code in favour of the husband and other outdated provisions have been brought in line with altered social and economic circumstances through legislation.

Yet, courts bear the task of fitting the original text of the Code to modern demands. In France, it was the gaps and technical imperfections of the *Code civil* which gave the judges the opportunity to develop the law. But the courts in Germany have relied mainly in the *general clauses*, embodied in Articles 138, 157, 242 and 826 of the German Civil Code. The general clauses have operated as a kind of safety valve, without which the rigid and precise terms of the German Civil Code might have exploded under the pressure of social change.

4. The development and features of English common law

> **N.B**. Although various principles, concepts and rules that have developed in the common law tradition have been embodied in our codes, Ethiopia's legal system (other than the laws of procedure) has pursued the civil law tradition. The abridged notes hereunder are thus duly shorter than the notes on the civil law tradition. Other sources have been used to substantiate the abridged notes from (Zweigert and Kötz's) *Introduction to Comparative Law*, pp. 187-211**.**

4.1- The beginning of English legal history

A crude and empirical legal heritage (some of which was in written form) existed under Anglo-Saxon kings, especially since the reign of Alfred the Great (871 to 900 A.D). Yet, English Common Law actually begins since 1066, after the Normans conquered the British Isles. William I and his successors established a tight, integrated and simply organized *feudal* system, with the King as the supreme feudal overlord. An effective central royal authority was organized with the absolute power of the king, who (among other powers) claimed the role of "dispenser of justice" or "fountain of justice".

William I divided all land among some 1,500 (one thousand and five hundred) of his most important followers, in return to which they had to take an oath of *fealty* (faithfulness) and perform specified services or pay sums of

money. The tax system was restructured by William I himself, and all property holdings were inscribed in the Domesday Book of 1086.

The most important taxpayers were the biggest land owners. The taxes paid were thoroughly checked by the *Curia Regis*, a council consisting of the King and his advisers. Under Henry I (1110 to 1131) there developed out of the *Curia Regis*, a Supreme Treasury- *the Exchequer* which gradually took on the character of a court as it decided all legal questions connected with taxes.

Fiscal reasons also entailed increasing intervention by the central royal administration in civil and criminal law. The *Curia Regis* had interest in private legal disputes over large estates. Thus the king took exclusive jurisdiction over serious crimes, and royal justice developed in the twelfth and thirteenth centuries. Although the kings gave up the practice of presiding as chief Judge very early, the courts always followed the King in his travels throughout the country, until the *Magna Carta* in 1215 enacted that the Royal Courts should be fixed in one particular place for the convenience of the public.

4.2- The emergence and development of case law

Case law grew up in England mainly because the early English judges were Normans. They were foreigners to England and they were bound together by an *Esprit de corps* (team or group spirit, or strong feeling of shared beliefs and values) which made them respect each other's decisions, especially when these decisions dealt with matters which were strange and unfamiliar to them. *Esprit de corps* involves feeling of fraternity, pride and honour in the group to which one belongs. The Norman judges had a strong sense of brotherhood and discussed their cases when they met and started the practice of following each others decisions.

Where the best argument in favour of a particular case was the decision of a brother judge in a similar case, they began to take notes of cases and in that manner law reporting came into existence. Law reporting became an established practice in this manner, and this enhanced the development of *case law*, i.e., looking for legal rules and principles from preceding judgments.

The growth of case law in England was also accelerated by the reaction that set it against the reception of Roman law. Local laws were found to be unsatisfactory with the advance of civilization, and the remedy of introducing Roman law was attempted. But English lawyers and judges resorted to the fiction that "there was no legal problem that could not be solved by the application of customary laws, and that every judge carried about in his brains a complete body of such law of amplitude sufficient to furnish principles which would apply to conceivable combination of circumstances".

Maine points out that It is possible that the judges were influenced by Roman law principles, and that they borrowed from Roman law, but they did not rest the authority of their pronouncements on either the Roman law or *Ipse Dixit* (i.e. on what is asserted but unproved), but on the fiction that their judgments indicated the custom of the land. It was always as indicating the custom of England, and not as an authority, that these decisions were acted upon and followed during the 13th and the 14th centuries.

Soon however, this fiction was dropped, and decisions began to be followed for the sole reason that they came from judges who were delegates of the King entrusted by the King himself to administer justice. During the time of James I, official reporters were first appointed, and case reports facilitated and enhanced the development of case law.

4.3- The development of permanent courts and the decline of local rules of law

Permanent central courts developed gradually out of the *Curia Regis*. The courts were staffed by professional judges, and fixed at Westminster. Their jurisdiction was established by 1300 and lasted unaltered into the 17th century. In addition to the Court of Exchequer, there were the Courts of Common pleas with jurisdiction over normal lawsuits between private individuals and with the power to supervise and review traditional lower courts, which had been run since 1066 by royal officers called sheriffs. There was also the Court of the King's Bench which dealt with matters of particular political importance. Moreover, the King sent 'traveling justices' into the provinces with increasing frequency from the 12th century onwards.

In the centuries that followed, these developments led to the centralization of justice and to the unification of English law. The jurisdiction of local borough and feudal courts gradually diminished. The local rules of law were not abrogated but gradually faded into insignificance in contrast to the law applied by the royal judges. Thus England, at such early stage, enjoyed a ***unified law***, called for this reason '***common law***', and there never existed in England the problem of legal uncertainty, a factor that rendered codification expedient in France and Germany.

4.4- The definition of '*common law*' and its positive role against absolutism

'*Common law*' refers to that part of the law which was created by the King's courts of England as opposed to '*statute law*' which comprises the enactments of Parliament. '*Common law*' is also different from '*Equity*'. The latter does not refer to a group of maxims of fairness, but a part of substantive

law distinguished from the rest by the fact that it was developed by the decision of a particular court, i.e. the Court of Chancery.

Unlike statute law, an absolute monarch cannot take common law into his grips and enact common law as per his instant whims and desires. This is because common law takes decades and centuries to emerge and develop. And it has the tendency to bring forth very strong strata of stakeholders including practicing lawyers, judges and others, who due to the complexity and quantity of case law materials incline to enjoy the monopoly of the profession with its corresponding challenges and opportunities.

English lawyers were devoted to the maintenance of common law. Thus lawyers consistently supported the Parliament in its struggle against the Crown. In the 16th and 17th centuries, various monarchs attempted to establish an absolute monarchy by imposing an absolutist legal system under the pretext of enacting Roman law which could support the political claim that whatever pleased the King had the force of law.

Ultimately, however, common law prevailed and was considered as a mighty weapon in the hands of the parliamentary party in the struggle against the absolutist prerogatives of the king. In its long history, common law had developed certain tenacity, and its cumbrous and formalistic technique had enabled it to challenge direct attack from above. Ever since, the Englishmen have thought of the Common Law as being the essential guarantee of freedom thereby serving as protection against the arbitrary inroads of absolute authority.

4.5- Blackstone's Commentaries on Laws of England

Until the 18th Century, all the great lawyers were practitioners and almost always important judges. But in the 18th century, William Blackstone (1732 – 1782), a lawyer who, after a moderate career as a barrister became Professor in Oxford, had a lasting influence in English law. Blackstone's fame rests in his *Commentaries in the Laws of England*, a four-volume systematic portrayal, based on the whole of English law and criminal law. The commentaries were published in 1765– 1769 and were considered as the leading treatise on the common law of England

The commentaries are believed to have rendered English law more comprehensible because English case law had grown more confused. The Commentaries were not as conceptually sophisticated and profound as the ones that were written by continental lawyers. Yet, Blackstone's accomplishment was a big step in the systematic exposition of English common law.

4.6- Utilitarianism –versus- sociological jurisprudence

During the 19th century, Jeremy Bentham (1748–1832), the leader of the Utilitarian School contended that the rules of Common Law are based on historical accident rather than rational design, and that they were obstacles on the way of major reform towards "*the greatest good for the greatest number of people*". He also criticized the traditionalism of the conservative practitioners. Bentham promoted legal reform which he thought could only be achieved through codification.

Bentham's reformist views had influence in altering the court structure and inducing reforms in the law of civil procedure and to some extent, in certain areas of substantive law. His efforts had also influenced the US legal system, until the (20th century during which) schools of Sociological Jurisprudence, Realism and others became predominant in their influence against extensive codification. ■