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Address:

The Editor-in-Chief,

Bahir Dar University Journal of Law,

School of Law,
Bahir Dar University
P.O. Box 5001
Tel. +251588209850

jol@bdu.edu.et
Bahir Dar, Ethiopia

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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 4, No.2 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to Emily Boersma who did the painstaking editorial work of this issue.

On this occasion, again, the Editorial Committee would like to make it clear that the *Bahir Dar University Journal of Law* is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome.

The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. Many aspects of the life of our society seem to require that we in the legal profession do something today. The Bahir Dar University Journal of Law is here to serve as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the *Bahir Dar University Journal of Law* will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country.

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Content

Absence of a Derogation Clause under the African Charter and the Position of the African Commission

Melkamu Aboma Tolera♣

Abstract

A Derogation clause is an important limitation on state's power during a state of emergency when human rights are in a precarious situation. This article analyses the omission of derogation clause from the African Charter. It examines international and regional human rights instruments, the jurisprudences of human rights monitoring bodies relating to issues of derogation and academic writings. The findings of this article show the absence of a derogation clause in the African Charter is a serious flaw that should be corrected.

Key Words: Derogation Clause, African Charter, African Commission

Introduction

The African Charter on Human and Peoples' Rights (hereafter ACHPR, African Charter or Charter) unlike the other regional and some international human rights instruments contains no derogation clause. The Charter neither explicitly prohibits nor allows state parties to derogate from their human rights obligations under the Charter should they face exceptional situations justifying such action under international law.

♣ LLB (Bahir Dar University, School of Law, Ethiopia), MA (Addis Ababa University, Institute For Peace and Security Studies, Ethiopia), LLM (University of Groningen, Faculty of Law, the Netherlands); Lecturer, Bahir Dar University, School of Law. I am grateful to Alebachew Birhanu (Editor-in-Chief, Bahir Dar University Journal of Law), Dr. Antenor Hallo de Wolf and the anonymous reviewers for insightful and valuable comments on earlier drafts of this article. All errors remain mine. The author can be reached at: m.a.tolera@alumnus.rug.nl

The omission of derogation clause under the African Charter involves a number of issues for the following reasons. First, it has been argued that the Charter's unfettered claw-back clauses render a derogation clause unnecessary.[1] Higgins has defined claw-back clauses as those which "allow in normal circumstances, breach of an obligation for a specified number of public reasons."[2] Secondly, many constitutions of African States contain provisions on derogation[3] and states often resort to such constitutional provisions to proclaim state of emergency thereby derogating from certain rights recognized under the African Charter.[4] This is considered by Sermet as a common African constitutional standard not reflected under the Charter.[5]

Thirdly, most of the states' parties to the African Charter are also parties to the International Covenant on civil and Political Rights (ICCPR) which contains explicit provision on derogation. It seems that the African Charter and the ICCPR are requiring different legal commitments from African States. Should a state party both to the African Charter and the ICCPR face emergency situation such as in the event of outbreak of war or natural catastrophe, the question arises whether its behaviour would be regulated under the African Charter or the ICCPR. This is particularly problematic since there is some confusion that the lack of a derogation clause under the ACHPR is understood as positive in that the Charter allows only for less

[1] See for instance, D'Sa, R., Human and People's Rights: Distinctive Features of the African Charter, *Journal of African Law*, Vol. 29, No. 2, (1985), p.76.

[2] Higgins, R., Derogation under Human Rights Treaties, British Yearbook of International Law, Vol. 48, (1976/77), p.281.

[3] Except the constitutions of Benin and Democratic Republic of Congo almost all constitutions of African States contain a derogation clause.

[4] To give a more recent example, on 28 January 2013 ex-president Morsi of Egypt declared state of emergency which applies to three cities along Suez Canal and their surrounding regions. The declared emergency involves curfew and lasts for thirty days.

[5] Sermet, L., The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion, *African Human Rights Law Journal*, Vol. 7, (2007), p.144.

limitation of human and peoples' rights even in extreme cases of emergency situation as implied by some authors and even the African Commission.

These issues raise the following main legal question. Does the absence of a derogation clause under the African Charter mean state parties are prohibited from proclaiming state of emergency and derogating from one or more of their obligations under the Charter in special circumstances threatening the life of the nation? In trying to answer this legal question the following preliminary legal questions would be examined. Do claw-back clauses under the African Charter make derogation clause unnecessary? What is the approach of the African Commission on Human and Peoples' Rights? How can one reconcile international agreements, notably the ICCPR, containing derogation clause and the African Charter? Is the omission of a derogation clause from the Charter to be taken as more or less protective of human and peoples' rights during national emergency which threatens the well-being of the nation? In the face of this omission is there any other legal way out which is potentially helpful in regulating the behaviour of member states to the ACHPR during a state of emergency?

1. Derogation Clause, Related Notion of Claw-back Clauses and the African Charter

1.1. Derogation from Human Rights Treaties: In General

Derogation from human rights obligation is a temporary deviation in a sense of limiting or detracting from one or more of the rights enshrined in human rights instruments.[6] In other words, a derogation clause allows the violation or

[6] Steiner, H., Alston, P. and Goodman, R., (eds.) *International Human Rights in Context: Laws, Politics, Morals: Texts and Materials* (3rd edition), Oxford University Press, Oxford (2008), p.154; Higgins, R., [Derogation under Human Rights Treaties], p.281.

suspension of particular human rights obligation in times of war or public emergency.[7] The Human Rights Committee of the ICCPR points out that measures of derogation from any provision of the ICCPR are of an exceptional and temporary nature.[8] Some human rights treaties envisage a system of derogation which allows member states to adjust their obligations under such treaties temporarily in order to deal with public emergency which threaten the life of the nation.[9] However, the prerogative of states in this respect is not unfettered. The validity of measures of derogation from particular human rights obligation is subject to the fulfilment of a number of preconditions set by the human rights treaty concerned.

The existence of public emergency which threatens the life of the nation is one of the fundamental requirements which permit derogation from the obligation to respect and protect human rights.[10] Articles 4(1) and 15(1) of the ICCPR and the ECHR respectively refer to a situation threatening the life of the nation. In the case of *Lawless v. Ireland* the European Court of Human Rights (ECtHR), qualified the term 'threatening the life of the nations' as "exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of

[7] Kufuor, K., *The African Human Rights System: Origin and Evolution*, Palgrave Macmillan, New York, (2010), p.40.
[8] UN Human Rights Committee (HRC), General Comment No. 29, State of Emergency (Article 4), 24 July 2001, HRI/GEN/1/Rev.9 (Vol. I), p. 234, para. 2.
[9] See, International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171, Article 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, CETS No.: 005, Article 15; American Convention on Human Rights, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 27.
[10] [Covenant on Civil and Political Rights], Article 4(1); [European Convention on Human Rights], Article 15(1).

which the state is composed."[11] This definition and the elements articulated by the European Commission in *Greek Case* are incorporated into Siracusa Principles[12] which, though not binding, can serve as a useful reference as to the precise meaning to be given to the term 'threatening the life of nation' in Article 4(1) of the ICCPR. Accordingly, a state party to the ICCPR can resort to measures derogating from its obligations only when confronted with a danger which is of exceptional nature, one that is actual or imminent which affects the entire population and poses a threat to the organized life of the society.[13]

The second prerequisite for taking valid derogation measures involves the proclamation, notification and termination of public emergency. Article 4(1) of the ICCPR, incorporates explicit requirement that state parties can resort to the right to derogate from some or certain selected rights of the Covenant only after the existence of public emergency is officially proclaimed. Putting it in different words, prior proclamation of the existence of an emergency situation is a *conditio sine qua* non ("an essential technical prerequisite") to put Article 4 of the Covenant into operation.[14]

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[11] *Lawless v. Ireland* (No.3), Chamber Judgment of 1 July 1961, European Court of Human Rights (ECtHR) Reports, 1961, para. 28.

[12] O'Donnell, D., Commentary by the Rapporteur on Derogation, *Human Rights Quarterly*, Vol. 7, No. 1, (1985), p.23. United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

[13] [Siracusa Principles], Principle 39. See also O'Donnell, D., [Commentary], p.24.

[14]Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, (2nd ed.), N.P. Engel Publisher, Kehl, (2005), p.92. The HRC enunciates this proclamation must be in accordance with constitutional and other relevant provisions of domestic law that regulate such proclamation and the exercise of emergency powers. [General Comment No. 29], para. 2.

The duty of international notification is an additional safeguard to prevent abuse of the right of derogation.[15] This requirement serves two purposes. First, it helps the HRC assess whether the measures of derogation being taken is triggered by the exigencies of the emergency situation.[16] Second, notification allows other member states to oversee compliance with the provisions of the ICCPR.[17]

The primary objective of suspension of a limited set of derogable rights of the ICCPR on the grounds of public emergency can be invoked only to the extent and for a period of time strictly necessary to return to state of normalcy.[18] This means a state party availing itself of derogation must take immediate measures necessary to be able to restore the full enjoyment of the rights and freedoms when the situation which led to measures of derogation abates.[19]

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[15] Article 4 paragraph 3 of the ICCPR requires a state party wishing to derogate from its obligations under the Covenant to inform other state parties forthwith "of the provisions from which it has derogated and of the reasons by which it was actuated." On the requirement of immediacy of such communication the European Court of Human Rights in *Lawless Case*, found the duty to notify derogation measures must be "without delay." Therefore, it is possible to argue that there is no substantial difference between the three instruments relating to the duty to notify. See, [American Convention on Human Rights], Article 27(3); [European Convention on Human Rights], Article 15(3); [*Lawless v. Ireland*], para. 47.

[16] Even though Article 4(3) of the ICCPR does not clearly envisage, the HRC is of the position that it is for the Committee to monitor whether the domestic laws of member states on derogation enable and secure compliance with the provision of Article 4 of the Covenant. [General Comment No. 29], para. 2.

[17] [General Comment No. 29], para. 17.

[18][General Comment No. 29], para. 1, Megret, F., Nature of Obligations, In Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), p.143.

[19] Since duty of international notification equally applies to the termination of derogation, a second notification stating a date on which derogation measures was lifted should be communicated to other states parties. See, [Covenant on Civil and Political Rights], Article 4(3).

The principle of proportionality, the third precondition for taking valid derogation measures, together with the list of non-derogable rights is a very crucial substantive limit on permissible derogation measures imposed on the prerogative of states.[20] Proportionality with respect to derogation means no right, despite the fact that it is derogable, will be suspended in its entirety and rendered wholly inapplicable to govern the behaviour of a derogating state party.[21]

Article 4 paragraph 1 of the ICCPR makes explicit reference to this principle by indicating that the Covenant's derogable rights and fundamental freedoms may be derogated from only "to the extent strictly required by the exigencies of the situation."[22] This has to do with duration, geographic scope and severity of the state of emergency[23] which are three ways to look at whether measures of derogation are proportional to combat public emergency situation threatening the life of the nation.

Moreover, a situation of emergency where the limitations or restrictions allowed in normal times under various provisions of the Covenant would be sufficient to combat threat to the life of the nation any measure of derogation is not 'strictly required by the exigencies of the situation'.[24] This means limitation clauses in normal times must be exhausted before recourse to derogation provisions of Article 4.

The fourth precondition for taking valid derogation measures is the principle of consistency. A state cannot invoke the right to derogation in violation of

[20] Nowak, M., [*CCPR Commentary*], p.97.
[21] [General Comment No. 29], para. 4.
[22] See also Article 15(1) of the European Convention and Article 27(1) of the American Convention.
[23] [General Comment No. 29], para. 4.
[24][Siracusa Principles], Principle 53.

the derogating state's other obligations under international law.[25] The phrase 'under international law' refers equally both to customary international law and international treaty law.[26]

The prohibition against discrimination is another fundamental requirement in taking derogation measures. The ICCPR and the ACHR incorporate express prohibition on discrimination in a sense that states may not impose derogation measures that discriminates on the ground of race, colour, sex, language, religion or social origin.[27] Even though provisions of the ICCPR on the prohibition of discrimination are not included in the 'non-derogable rights' list of paragraph 2 of Article 4, elements of non-discrimination which are mentioned under Article 4 paragraph 1 are not subject to derogation measures.

Even when the foregoing preconditions are met, the derogation provisions of the ICCPR and the two other regional conventions indicate there are rights

[25] Article 4 (1), Article 15(1) of the ECHR and Article 27(1) of the ACHR prohibit any measure of derogation which is in general departure with the respective member states' obligation under other regimes of international law.

[26] Basically these obligations include those which are envisaged under other human rights treaties, and instruments in the area of international humanitarian law, notably the minimum guarantees found in the common Article 3 of the 1949 Geneva Convections and in the two 1977 Additional Protocols. See, [Siracusa Principles], Principle 67; Nowak, M., [CCPR Commentary], p.99. In addition, these obligations also include state obligations under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, the ILO Conventions on Forced Labour, Freedom of Association and Equal Rights of Workers as well as the 1998 Rome Statute of the International Criminal Court. Lastly, other provisions of the ICCPR itself other than Article 4 may give rise to an obligation which limits the right to derogate.

[27] [Covenant on Civil and Political Rights], Article 4(1); [American Convention on Human Rights], Article 27(1).

which are not subject to derogation in any case.[28] Here it must be emphasized that some rights are defined as non-derogable in all circumstances does not mean that other rights can be suspended at will.[29] The principle of proportionality mandates states to reduce derogation measures to those strictly required to deal with the emergency situation. Neither does the listing of a given right as non-derogable exclude the application of specific limitation clauses.[30]

The lists of non-derogable rights, however, differ significantly within the three instruments.[31] From the lists of Article 4(2) of the ICCPR, Article 15(2) of the ECHR and Article 27(2) of the ACHR it is evident that each later adopted instrument is broadening the scope of non-derogable rights. This has led some authors to conclude that the definition of non-derogable rights is a "progressive development."[32]

Rights and freedoms which are named under paragraph 2 of Article 4 are not subject to suspension by the mere fact that they are listed as such.[33] The HRC

[28] See, [Covenant on Civil and Political Rights], Article 4(2); [European Convention on Human Rights], Article 15(2); [American Convention on Human Rights], Article 27(2).
[29] See [General Comment No. 29], para. 6-7.
[30] For instance, even though freedom of religion is non-derogable, limitations under Article 18(3) do still apply with respect to freedom to express one's religion. However, any interference with this freedom even during validly declared state of emergency must be justified having regard to limitations under Article 18(3).
[31] See, [Covenant on Civil and Political Rights], Article 4(2); [European Convention on Human Rights], Article 15(2); [American Convention on Human Rights], Article 27(2).
[32] Steiner, H., Alston, P. and Goodman, R., (eds.) [*International Human Rights in Context*], p.388.
[33] Some authors such as Hartman cited in Nowak assumed that the rights listed under Article 4(2) of the ICCPR are *jus cogens.* While the list of non-derogable rights under Article 4(2) of the Covenant is somewhat related with the issue of whether some rights are of the nature of *jus cogens* (such as the right to life, freedom from slavery or servitude and the freedom from torture), there are other rights in the list because their suspension is not relevant to combat

in its second General Comment on Article 4 expands the scope of non-derogable rights.[34]

At this juncture, it is interesting to look at the nature of supervision since the prerogative of states to derogate from their human rights obligations is subject to international monitoring. This is evident from the requirement of the duty to notify. However the practice of international bodies is not consistent in this respect. While the ECtHR has granted a margin of appreciation to member states of the ECHR,[35] the HRC has not made reference to such standard in the context of derogation.[36] Despite the difference in approach with respect to domestic margin of appreciation, from the jurisprudences of the ECtHR and the HRC it is clear that international bodies maintain reviewability of states' determination of not only what constitutes state of emergency but also the measures necessary to combat the situation.

1.2. Derogation Clause and Claw-back Clauses under the African Charter

Even though the African Charter contains no derogation clause, the formulation of the Charter's rights is characterized by the predominance of

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state of emergency or simply impossible. For instance, a state cannot justify imprisonment on the ground of inability to pay debt or suspending freedom of thought, conscience and religion to deal with any emergency situation. In addition, some rights can never be derogated from because they constitute states' other obligation under international law. It is also true that the scope of *jus cogens* or peremptory norms of international law goes beyond the listing under Article 4(2) of the Covenant. So as Nowak correctly observed "it is doubtful whether these essential rights are all *jus cogens.* [General Comment No. 29], para. 11; Nowak, M., [*CCPR Commentary*], p.93.

[34] See, [General Comment No. 29], para. 9-13, Nowak, M., [*CCPR Commentary*], p.96-97.

[35] See, [Ireland v. United Kingdom], para. 207; [Lawless v. Ireland], para. 28.

[36] Landinelli Silva et al. v. Uruguay, Communication No. 34/1978, Human Rights Committee (HRC), CCPR/C/12/D/34/1978, (8 April 1981), para. 8.3.

claw-back clauses. These clauses are attached to the exercise of most rights enshrined in the Charter and are open ended.[37] In contrast, in most human rights treaties limitation clauses are qualified by the requirement of "necessity in democratic society" to protect public order, national security, public safety or public health even though quite a few claw-back clauses can be found in these instruments.[38] Therefore, limitations to the enjoyment and exercise of individual rights and freedoms must be necessary in democratic society in order to be compatible with such instruments. This requirement makes it difficult for states to simply invoke desirable social goal and take measures which are not necessarily important to further such goal.[39] The ECtHR clarifies what this requirement implies in the *Case of Silver and Others v. United Kingdom*, in that any limitation must "correspond to a pressing social

[37] The enjoyment of specially civil and political rights under the Charter are guaranteed "except for reasons and conditions previously laid down by law", "subject to law and order", "within the law", "provided that he abides by law", "subject to the obligation of solidarity provided for in Article 29", "subject only to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others", "provided he abides by law", "in accordance with the laws of those countries and international conventions", "in accordance with the provisions of the law", "in accordance with the provisions of appropriate laws". See, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, Banjul, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Articles 6, 8, 9(2), 10(1) and (2), 11, 12(1) and (3), 13 and 14.

[38]The ICCPR, ECHR and ACHR require that limitations should be those which are necessary in a democratic society. See, for instance, [Covenant on Civil and Political Rights], Articles 21 and 22(2); [European Convention on Human Rights], Articles 8-11; [American Convention on Human Rights], Articles 15 and 16. A few instances of claw-back clauses can also be found for instance in Article 12 of the ECHR with respect to the right to marry and found a family where the enjoyment of this right is subject to national laws regulating the exercise of this right. Similarly, Articles 12(3) and 30 of the ACHR incorporate claw-back clauses.

[39] Megret, F., [Nature of Obligations], p.142.

need and be proportionate" to the legitimate aim sought to be defended.[40] When it comes to the African Charter, its claw-back clauses provide for limitations to the Charter's guarantee which are almost totally discretionary in that these clauses seem to give precedence to domestic laws. They tend to give wide discretion to states and recognize the right in question to the extent granted by national laws.[41]

However, as the African Commission itself rightly notes for instance in the case of *Media Rights Agenda and Others v. Nigeria* to allow domestic legislations take priority over international law would render the purpose of agreeing on the treaty text non sense.[42] The Charter should be interpreted in such a manner to give meaningful protection to individuals and should not be taken to allow state parties to take away rights recognized under international instruments, the African Charter in this case, simply by adopting legislation regardless of the interest such law serves.

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[40] *Case of Silver and Others v. United Kingdom*, Chamber Judgment of March 1983, Europena Court of Human Rights (ECtHR), Reports, 1983, para. 97.

[41] Mugwanya, G., Human Rights in Africa: *Enhancing Human Rights through the African Regional Human Rights System*, Transnational Publishers, Ardsley, New York, (2003), p.348; Heyns, Ch. and Killander, M., Africa, In Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), p.485; Kufuor, K., [*The African Human Rights System*], p.41; Singh, S., The Impact of Claw-back Clauses on Human and Peoples' Rights in Africa, *African Security Review*, Vol. 18, No. 4, (2009), p.100-101.

[42] *Media Rights Agenda and Others v Nigeria*, Communications 105/93, 128/94, 130/94 and 152/96, (2000) AHRLR 227, (ACHPR 1998), African Commission on Human and Peoples' Rights (ACmHPR), (12th Annual Activity Report), para. 68. See also, *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v Nigeria*, Communications 140/94, 141/94 and 145/95, (2000) AHRLR 227, (ACHPR 1999), African Commission on Human and Peoples' Rights (ACmHPR), (13th Annual Activity Report), para. 41.

It has been argued that in the face of the Charter's broadly worded claw-back clauses there is no need for a derogation clause.[43] This means claw-back clauses of the Charter apply during public emergency to regulate the behaviour of states in proclaiming state of emergency and derogating from their obligation under the Charter. However, this position is dangerous and difficult to defend. Even though derogation clauses and claw-back clauses both share some common features, they serve different purpose and apply in different context. They both are methods of accommodation in a sense that they restrict rights of individuals in order to allow the states undertake its public duties in the interest of common good.[44] They are, thus, exceptions to the general principle that rights recognized must be exercised and therefore derogation and claw-back clauses must be narrowly interpreted.[45]

Nevertheless, derogation and claw-back clauses differ fundamentally. Derogation clauses as provided for by other human rights instruments especially the three main general human rights treaties, the ICCPR, ECHR and ACHR, operate during situations of public emergency. Accordingly, derogation clauses are applicable only in exceptional circumstances where the life of the nation is at stake. Such clauses allow the suspension of rights which

[43] D'Sa, R., Human and People's Rights: Distinctive Features of the African Charter, *Journal of African Law,* Vol. 29, No. 2, (1985), p.75-76; Mugwanya, G., [Human Rights in Africa], p.352. Mutua, M., The African Human Rights Court: A Two-Legged Stool? *Human Rights Quarterly*, Vol. 21, (1999), p.358. Rachel Murray has also commented "It could be argued that derogations may be permitted through the use of claw-back clauses and the margin of appreciation they give to States." Murray, R., [*The African Commission on Human and Peoples' Rights and International Law*], p.126. See also, Ouguergouz, F., *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy*, Martinus Nijhoff Publishers, the Netherlands, (2003), p.431, with further notes and references.

[44] Higgins, R., [Derogation under Human Rights Treaties], p.281.

[45] Mugwanya, G., [*Human Rights in Africa*], p.352.

are already guaranteed.[46] Claw-back clauses however "restrict rights *ab initio*."[47] Claw-back clauses are not triggered by situations of public emergency which threatens the life of the nation. In the words of Mugwanya, claw-back clauses "form part of the day to day normal enforcement and implementation of human rights and freedoms."[48] They are permanent in a sense that they come into existence from the moment the human rights treaty in question came into existence and "presumably remain in force unless changed or deleted through subsequent amendment or repeal of the entire treaty regime."[49]

In contrast to derogation clauses, claw-back clauses offer limited protections. Derogation clauses regulate states' behaviour in many important ways. As already discussed, it specifies circumstances in which derogation can be possible. Even when the prescribed circumstances are readily apparent derogation clauses require states to go through certain procedural requirements before taking measures which suspend rights of individuals. In addition, derogation clauses define rights which are not subject to derogation in any case and attach the requirement of proportionality with respect to rights which are amenable to derogation. Furthermore, any recourse to derogation measure is subject to supranational supervision. When it comes to claw-back clauses in particular those contained in the ACHPR, the limitations they allow are less protective, in most cases left to the discretion of states parties to the Charter. For example the right to liberty and security of a person is guaranteed except for reasons and conditions previously laid by law.[50]

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[46] Gittleman, R., [The African Charter on Human and Peoples' Rights], p.692.
[47] Ibid.
[48] Mugwanya, G., [*Human Rights in Africa*], p.353.
[49] Kufuor, K., [*The African Human Rights System*], p.42.
[50] [African Charter on Human and Peoples' Rights], Article 6.

Likewise one can express his or her opinion within the law.[51] Neither do claw-back clauses of the Charter require the existence of public emergency, nor do they require the supervision of the African Commission whenever the exercises of rights protected by the Charter are limited.[52]

Therefore, claw-back clauses are more prone to abuse than to derogation clauses. In light of what has been, said claw-back clauses in the African Charter, no matter how broadly worded,[53] may not be applicable to situations involving public emergency which threatens the life of the nation in order to ensure the continued existence of the nation and the safety of people. This does not however mean that claw-back clauses do not apply during state of emergency. They do always apply whether or not there is an emergency threatening the life of the nation as long as the human rights instrument containing them is in force and regardless of whether or not measures derogating from fundamental rights and freedoms are taken. Nevertheless, they do not operate with a view to combating such situations. Even when a given right is qualified as non-derogable, it may still be restricted where this is necessary in the democratic society in the interest of public order, national security, public safety or public health.[54]

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[51] Ibid., Article 9. See also Articles 8, 10-14.

[52] Kufuor, K., [*The African Human Rights System*], p.41.

[53] The fact that the Claw-back clauses in the Charter are not qualified by reference to "necessity in democratic society" does not change the nature of such clauses. It only leaves the extent of interference open to debate. Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.436.

[54] The HRC illustrates this point by reference to freedom of religion which is one of the non-derogable rights in Article 4(2) of the ICCPR but subject to specific limitation clause under Article 18(3) of the Covenant. Thus, as the Committee observes, "(...) the permissibility of restrictions is independent of the issue of deorgability." [General Comment No. 29], para. 7.

Similarly derogation clauses do not operate in normal daily life. Similar positions were held during the drafting of both the ICCPR and ECHR.[55] Thus, the argument that claw-back clauses under the ACHPR are applicable to situations of emergency to regulate the conduct of member states to the Charter in such circumstances is not without serious flaws.

2. Absence of a Derogation Clause under the African Charter and the Jurisprudence of the African Commission

The omission of a derogation clause from the African Charter like other features of the Charter, notably its claw-back clauses, has been the source of controversy.[56] Therefore, it is interesting to examine the issue from different perspectives.

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[55] By the time the ICCPR and ECHR were drafted it was argued that limitations attached to the enjoyment of certain rights also regulate situations which derogation clauses are meant to regulate. However, it was concluded in favour of inserting derogation clause in these instruments on the ground that exceptional circumstances where the life of the nation is at stake do not fall within the scope of limitation clauses. See, Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.435-436.

[56] See, Murray, R., [*The African Commission on Human and Peoples' Rights and International Law*], pp.123-126; Mugwanya, G., [Human Rights in Africa], pp.352-356; Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], pp.423-479; Sermet, L., [The Absence of a Derogation Clause from the African Charter], pp.142-161; D'Sa, R., Human and People's Rights: Distinctive Features of the African Charter, *Journal of African Law*, Vol. 29, No. 2, (1985), p.75-76; Mugwanya, G., [Human Rights in Africa], p.352. Mutua, M., [The African Human Rights Court], p.358; Gittleman, R., [The African Charter on Human and Peoples' Rights], pp.704-709; Cowell, F., Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR, *Birkbeck Law Review* Vol. 1, Issue 1, (2013), pp.135-162; Umozurike, U., The African Charter on Human and Peoples' Rights, *The American Journal of International Law*, Vol. 77, No. 4 (1983), p.910; Meron, T., [*Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, (1989), pp.218-219; Viljoen, F., *International Human Rights Law in Africa*, (2nd ed.), Oxford University Press, United Kingdom, (2012), pp.333-334.

2.1. Omission of a Derogation Clause: Possible Interpretations

In light of the fact that the ACHPR neither explicitly outlaws nor allows derogation in the event of national emergency such as the outbreak of war or natural catastrophes which threatens the life of the nation, there can be different ways of understanding the omission of a derogation clause from the Charter. Ouguergouz forwards three possible legal interpretations of this omission of a derogation clause from the African Charter. The first line of thinking is that the absence of a derogation clause under the ACHPR means state parties to the Charter are prohibited from violating or allowing violation of some of their obligations under the Charter in any situation.[57] As the subsequent sub-section demonstrates, this is the position of the African Commission when it comes to individual communications. While it is true that the absence of a derogation clause under the ACHPR is not devoid of any relevance at all, given the fact that the Charter does not specifically outlaw[58] the right of member states to derogate from certain human and peoples' rights, this line of thinking goes to the extreme and thus difficult to defend provided that there is no clear agreement from which the intention of the state parties to this effect can be gathered.[59]

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[57] "(…) by not including any derogation clause, the African States have precluded the option of derogating from the African Charter, regardless of what the circumstances are." Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.425.

[58] One can point to the general rule of treaty interpretation envisaged in the Vienna Convention on the Law of Treaties. The terms of the African Charter must be given their natural meaning in their context having regard to the object and purpose of the Charter. In the face of the silence of the Charter, it is difficult to conclude that the Charter outlaws the right to derogation. See generally, Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p.331, Article 31.

[59] Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.425; [Vienna Convention on the Law of Treaties], Article 31(3) (a).

The second way of looking at the omission is, even though the ACHPR is a treaty its normative content is not so strong that the drafters of the Charter never intended to describe the obligation of member states more fully.[60] Similarly, Rosalyn Higgins after noting the absence of a derogation clause from the Universal Declaration of Human Rights (UDHR) observes:

> *In the move to formally binding instruments, it became necessary to consider such a clause. The International Covenant on Economic, Social and Cultural Rights contains no derogation provision, thus implicitly confirming the view that such a clause should only be deemed necessary where there are strong implementation provisions.*[61]

This argument with respect to the ACHPR is not sufficiently convincing and can be automatically rejected because, as Ouguergouz also argues, the African Commission and the African Court on Human and Peoples' Rights as the ACHPR's implementation monitoring bodies can give the Charter meaningful "intrinsic legal value."[62] The third way of interpreting the omission is to conclude that by not including a derogation clause under the ACHPR, member states do not simply want to govern their behaviour during state of emergency which threatens the life of the nation by the provisions of the Charter.[63] They instead "reserved the right to invoke the derogations which may be possible under general international law."[64] In other words, the lawfulness or otherwise of measures taken by state parties to the ACHPR in derogation of their obligation to protect human and peoples' rights in times of

[60] Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.427.
[61] Higgins, R., [Derogation under Human Rights Treaties], p.286.
[62] Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.427.
[63] Ibid.
[64] Ibid.

emergency can be seen from the point of view of the rules relating to the termination and suspension of treaties under international law particularly the Vienna Convention on the Law of Treaties (breach of the Charter obligation by one party, impossibility of performance of the Charter's obligations and fundamental change of circumstances) and from the perspective of the law of the international responsibility of states.[65]

This is a position held by some authors.[66] However, this line of thinking like the foregoing ones is difficult to defend because on the one hand defences available under the law of treaties may result in the suspension of the whole treaty regime,[67] in this case the whole content of the ACHPR and some of the defences available under the law of treaties are not applicable to human rights treaties in general and the ACHPR in particular.[68] On the other hand, the

[65] See, generally [Vienna Convention on the Law of Treaties], Articles 60-62; UN International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 20-25.

[66] See, Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.427. Likewise Benedik argues "the exceptions allowed by international law and spelt out in the Vienna Convention on the Law of Treaties apply." Benedek, W., The African Charter and Commission on Human and Peoples' Rights; How to Make it More Effective, *Netherlands Quarterly Human Rights*, Vol. 11, No. 25, (1993), p.27.

[67] See, for example [Vienna Convention on the Law of Treaties], Article 61(1). However, the entire treaty regime would not be rendered inapplicable by the operation of derogation clause. Derogation clause seeks to carefully limit the right of states to derogate from their human rights obligation by providing for the catalogue of non-derogable rights and by requiring any measure of derogation to be in strict proportion with the reason which necessitated such measures relating to derogable rights. For instance, with respect to the International Covenant on Civil and Political Rights (ICCPR) the proportionality requirement is understood to ensure in practice that no provision of the human rights treaty in question will be inapplicable in its entirety even when validly derogated from. UN Human Rights Committee (HRC), [General Comment No. 29], para. 4.

[68] For instance a member state to the ACHPR cannot suspend the operation of the Charter simply because one or more of the other member states breached their obligation under the Charter given the nature of the African Charter as human rights treaty governing the

nature and purpose of a derogation clause and that of circumstances precluding wrongfulness are different.[69] The International Law Commission (ILC) Draft Articles, even though not binding as a matter of treaty law, articulates six grounds for precluding internationally wrongful acts of states. These are consent, self-defence, counter measures in relation to internationally wrongful act, force majeure, distress and necessity.[70] The first three presuppose reciprocal relationship between states parties to a given treaty. Therefore consent, self-defence and counter measures in relation to internationally wrongful act should be excluded without further examination since unlike other treaties human rights treaties are not based on the principle of reciprocity. Despite the *erga omnes* nature of human rights obligations, states primarily undertake obligation towards individuals.

Likewise, force majeure and distress are not comparable to derogation clauses under human rights treaties. Force majeure involves a situation which renders

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obligation of states towards individuals instead of the obligation among states. Accordingly, even when one of the contracting parties acted in breach of the Charter's obligation, the other member states should observe their obligation since human rights treaties and thus the ACHPR is not subject to the principle of reciprocity. See, Megret, F., [Nature of Obligations], pp.124-130. As indicated under Article 60(5) of the VCLT arguably defences available under international law in favour of non-performance of treaty obligations are not applicable to those treaties dealing with the protection of human person. See, [Vienna Convention on the Law of Treaties], Article 60(5).

[69] "(…) derogation momentarily neutralizes the obligation which no longer has to be complied with, whereas the set of circumstances precluding wrongfulness leaves the obligation intact but removes the wrongful aspect of the conduct of the State and, consequently, exonerates it from all of its responsibility" subject to the obligation to pay compensation for the harm sustained as a result of the act in question. Ouguergouz, F., [The African Charter on Human and Peoples' Rights], p.470; [UN International Law Commission, Draft Articles on Responsibility of States], Articles 20-25 and 27.

[70] [UN International Law Commission, Draft Articles on Responsibility of States], Articles 20-25.

the performance of treaty obligation absolutely impossible.[71] However, the entire treaty regime cannot be rendered inapplicable by the operation of derogation provision. As discussed in the previous section, the list of non-derogable rights and the condition of strict necessity ensure that the human rights treaty in question still operates regardless of the existence of a validly declared state of emergency. When it comes to distress, it relates to a circumstance where an individual whose acts are attributable to a state commits an internationally wrongful act, being in a state of peril, with a view to saving his life or that of a person under his care.[72] It has nothing to do with saving the life of the nation and cannot be applicable to human rights obligations in times of public emergency.

The state of necessity somewhat resembles derogation provisions of human rights instruments. The invocation of this ground is subject to stringent requirements as this is evident from the negative formulation adopted by the ILC's in defining it.[73] In addition, a state of necessity can only be invoked to safeguard an essential interest against grave and imminent danger.[74] However, Article 25 of the Draft Article does not define the essential interest a state in question should seek to protect. Thus it highly depends on the subjective assessment of a state invoking state of necessity. On the contrary, derogation provisions of human rights instruments make it clear that derogation measures can only be taken with a view to averting war or other situation of public emergency which pose danger to the life of the nation. This means the defence of state of necessity does not perfectly match to and thus cannot be a

[71] Ibid., Article 23(1).
[72] Ibid., Article 24(1); UN International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001), p.78.
[73] See, [UN International Law Commission, Draft Articles on Responsibility of States], Article 25.
[74] Ibid.

substitute for a derogation clause. Therefore, the silence of the African Charter on the issue of derogation is simply a defect.

2.2. Jurisprudence of the African Commission: Double Standard?

2.2.1. Individual Communications

Confronted with the defence of emergency situation, the African Commission has had the opportunity to pronounce itself on the issue of derogation under the African Charter. In individual complaints, the African Commission rejected the defence of derogation in a series of cases. It has held the opinion that the African Charter does not allow derogation and member states cannot invoke the right to derogate from the human and peoples' rights in times of war or other circumstances where the life of the nation is at risk.

The case of *Commission Nationale des Driots l'Homme et des Liberties v. Chad* is the first communication in which the African Commission held that the ACHPR outlaws the right to derogation.[75] This communication alleges serious and large scale human rights violations in Chad which involves harassment of journalists by unidentified individuals claiming to be government's security personnel.[76] The communication also claims arbitrary arrest and detention as well as killings, disappearances and torture because of the civil war between security forces and other groups.[77] The government of Chad on its part argued that its agents did not commit any violation and it was

[75] *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Communication 74/92, (2000) AHRLR 66, (ACHPR 1995), African Commission on Human and Peoples' Rights (ACmHPR), (9th Annual Activity Report).
[76] Id., paras. 1 and 2.
[77] Id., paras. 3-6.

not able to protect individuals against violations committed by other parties owing to the state of civil war in Chad.[78]

The government of Chad did not clearly invoke the right to derogation, but the African Commission held, in contrast to other human rights treaties, the ACHPR "does not allow for member states to derogate from their treaty obligations during emergency situation."[79] Accordingly, the Commission further noted, the civil war in Chad cannot be invoked to excuse violation of rights by the Government, neither does it justify permitting violation of rights in the Charter.[80] Eventually the Commission came to the conclusion that Chad violated the Charter's protection of the right to life, prohibition against torture, inhuman and degrading treatment, the right to security of the person, the right to fair trial and the freedom of expression.[81]

From this decision, it seems that the Commission would not tolerate any violation of the Charter's guarantees even in extreme situations[82] such as civil war in the present case threatening the life of the nations in question. While it is true, as the Commission also noted,[83] that it is the duty of state parties to the ACHPR to protect individual rights against violation by third parties and this is also well recognized in the jurisprudence of the other human rights monitoring bodies,[84] the view of the commission totally rejecting any defence of derogation is contestable.

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[78] Id., para. 19.
[79] Id., para. 21.
[80] Ibid.
[81] Id., para. 28.
[82] Kufuor, K., [*The African Human Rights System*], p.45.
[83] [*Commission Nationale des Droits de l'Homme et des Libertés v. Chad*], para. 20 and 22.
[84] For instance, in the *Case of Velasquez-Rodriguez v. Honduras* the Inter-American Court of Human Rights after noting that States are responsible for violation of human rights perpetrated by public authority or by persons under the authority of States held "An illegal act

Measures derogating from rights of individuals can be actuated only when there is no other means to ensure the continued existence of the life of the nation. In other words, states can invoke the right of derogation only when other available means, particularly limitations attached to the exercise of specific rights in normal times are no longer useful to ensure public safety. As Mugwanya observes, in the day to day implementation of the African Charter, normal limitation clauses allow governments to keep the state alive and ensure the safety of their people.[85] But such clauses are insufficient to combat exceptional situations which carry danger to the life of the nation, safety of its people and exercise of their human and peoples' rights making it absolutely necessary to derogate from some of the Charter's obligations.[86]

Subsequently, in two similar communications against Nigeria,[87] the African Commission held the same position on the prohibition of the right to derogation under the African Charter. In *Media Rights Agenda and Others v. Nigeria*, it is alleged that following the annulment of the Nigerian election of 12 June 1993, the government issued a number of decrees whereby the publication of certain magazines and newspapers were banned, their premises

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which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." *Case of Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights (IACtHR), Series C No. 4, para. 172. Similarly, the Human Rights Committee in *Delgado Paez v Colombia* stated, States parties cannot ignore threats to the security of the person under their jurisdiction. "They are duty bound to take appropriate and reasonable measures to protect them." *Delgado Paez v Colombia*, Communication No. 195/1985, Human Rights Committee (HRC), U. N. Doc. CCPR/C/39/D/195/1985, (23 August 1990)., para. 5.5.

[85] Mugwanya, G., [*Human Rights in Africa*], p.354.

[86] Ibid.

[87] [*Media Rights Agenda and Others v. Nigeria*]; [*Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria*].

were sealed and the copies of the magazines and newspapers confiscated.[88] It is also claimed that regular courts are ousted from examining the constitutionality of such decrees and new registration requirement of newspapers is decreed which vests in the board set up under such decree exclusive discretion whether or not to register.[89] Even though the government of Nigeria did not invoke the defence of derogation at all[90] the Commission went into the discussion of the issue and held:

> *In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.*[91]

Likewise, in *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria* involving similar issues[92] decided a year later, the

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[88] [*Media Rights Agenda and Others v. Nigeria*], paras. 1 and 2.

[89] Id., para. 3-6.

[90] The government of Nigeria has not properly addressed all issues involved in the communication either in written or oral submission. But, with respect to the new requirement of registration it seems the government invoked defences available under normal limitation clauses while it argued, "The government is convinced that such registration fees are reasonable and justifiable in any democratic society." Id., paras. 12-15. As some authors observe the Commission confused derogation with limitation. In other words, the Commission seems to to consider derogation as one form of limitation. Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.434; Viljoen, F., [*International Human Rights Law in Africa*], (2012), p.334; Sermet, L., [The Absence of a Derogation Clause from the African Charter], p. 152. However, the specificity of derogation must be emphasized. Despite the similarity between derogation and limitation clause there is a significant deference between the two.

[91] [Media Rights Agenda and Others v. Nigeria], para. 67.

[92] The Communications involved in this case also alleges the proscription by name of the publication and circulation of certain newspapers within the Country by decrees issued by the Nigerian military government which are also claimed to constitute violation of the rights of Nigerians to receive information and express and disseminate their views. Further it is

Commission once again upheld its position reconfirming the prohibition of derogation under the African Charter with the same statement.[93]

In *Amnesty International and Others v. Sudan*, the communications submitted allege widespread and large scale violation of human rights including arbitrary arrest and detention, torture and summary executions following the coup d'état of 30 July 1989.[94] The African Commission said derogation from African Charter is not possible since the Charter does not contain provision permitting state parties to derogate from their obligations in times of emergency.[95] However, the Commission is not firm in this case in a sense that it did not automatically reject the defence of derogation like in the case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*. The Commission in this case is rather careful and took note of the difficulties states may face.[96]

However, in another more recent communication against Sudan involving the mass atrocities committed in the Darfur region of the country, the Commission viewed that armed conflict cannot be invoked to justify a derogation from the ACHPR and found the state party liable for violation of the right to life and the prohibition against slavery under the Charter.[97] Even

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claimed that the decrees banned courts from evaluating the validity of such decrees. [*Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria*], paras. 1, 4-5.

[93] Id., para. 41.

[94] *Amnesty International and Others v. Sudan*, Communications 48/90, 50/91, 52/91 and 89/93, (2000) AHRLR 297, (ACHPR1999), African Commission on Human and Peoples' Rights (ACmHPR), (13th Annual Activity Report), paras. 1-7.

[95] Id., paras. 42 and 79.

[96] Id., para. 42.

[97] *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications 279/03 and 296/05 (2009) AHRLR 153 (ACHPR 2009), African

though the right against arbitrary deprivation of life and the prohibition against slavery are non-derogable rights even in times of war or armed conflict under human rights treaty regimes envisaging for the right of derogation, the reasoning of the Commission does not rest on this fact. The Commission merely reiterated the absence of such clause under the African Charter and referred back to its previous decisions in *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* and *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria*.

The African Commission continued to hold its persistent view declaring the prohibition of derogation under the ACHPR in *Article 19 v. Eritrea*.[98] This case, decided in 2007, involves a communication alleging the continued incommunicado detention of eighteen journalists since 2001.[99] The state party argued the acts alleged in the communication were taken in time of war when the very existence of the nation was at risk[100] which is the usual requirement for taking derogation measures in treaties that do allow them. However, the Commission rejected the submission and noted that the ACHPR does not permit member states to derogate from their obligation under the Charter in times of war or other emergency.[101] It further viewed the existence of war, turmoil or other emergency situation in the member state cannot excuse breach of any right under the ACHPR.[102]

Commission on Human and Peoples' Rights (ACmHPR), (28th Activity Report), paras. 165-167.

[98] *Article 19 v. Eritrea*, Communication 275/2003, (2007) AHRLR 73 (ACHPR 2007), African Commission on Human and Peoples' Rights (ACmHPR), (22nd Activity Report).

[99] Id., para. 2.

[100] Id., para 87.

[101] Id., paras. 87, 98-99.

[102] Ibid.

The foregoing cases demonstrate that the African Commission is not willing to accept the breach of the Charter's obligation in times of public disturbances where the life of the nation in question is at stake.[103] The question is, however, what reasoning does the Commission have for its position? Unfortunately, the Commission, apart from pointing to the fact that there is no derogation clause under the ACHPR has not provided any reason as to why derogation is prohibited under the African Charter. The Commission does not go into the discussion of why the behaviours of the state parties in question are contrary to the terms of the Charter. Neither has it pointed out that the omission of a derogation clause from the ACHPR is a gap or defect in the Charter. These are important given the fact that the omission does not necessarily mean either prohibition or carte blanche. Therefore, it is difficult to defend the position of the Commission.

Firstly, the Commission is too unrealistic in its position. The Commission imposed obviously a high threshold of legal protection in expecting state parties to the ACHPR never to derogate from the Charter's obligations which cannot be realized in the event of natural catastrophes, military insurgency, terrorism, turmoil or the outbreak of war.[104] Indeed various African countries

[103] This has led some authors to argue that the African Commission in its non-derogability jurisprudence raised the Charter's rights up to the level of peremptory norms. Viljoen, F., [International Human Rights Law in Africa], p.334. However, this is not altogether clear. Even with the assumption that the position of the Commission is tenable, the fact that a given right is non-derogable does not necessarily mean that the right in question is peremptory norm. As indicated in the previous section while the list of non-derogable rights under human rights treaties allowing derogation is related to the question of whether a particular right is peremptory norm there are also rights which are not subject to suspension either because their suspension is irrelevant for combating the emergency situation, impossible or constitute states' other obligation under international law. Therefore the fact that the Commission view all of the rights enshrined under the African Charter are non-derogable does not necessarily lead to the conclusion that these rights have attained the status of peremptory norms.

[104] Viljoen, F., [*International Human Rights Law in Africa*], p.333-334.

already have in their national constitutions derogation provision and they are at the same time parties to the ICCPR which contains express provision on derogation.[105] Secondly, the view of the Commission would inevitably lead member states to resort to defences available under general international law such as necessity whenever they are confronted with real emergency situation which may be abused to the detriment of the protection of human and peoples' rights.[106] Scholars have long recognized that in the face of absence of derogation provision there is a potential danger that state parties may resort to "customary law exceptions of state of necessity" to suspend the Charter's guarantee and expressed hope that the African Commission would not let this happen by accommodating the various interests involved.[107] But, as the forgoing cases demonstrate, the Commission failed to do so.

Derogation provision carries specific safeguards of necessity, proportionality, inviolability and temporality in order to avoid abuse.[108] More importantly, the Commission should have considered the general tendency of African states to abuse human rights of individuals particularly during state of emergency. Derogation clauses are inserted in international and regional human rights treaties with a view to prevent abuse of emergency powers to the detriment of

[105] See for instance Constitution of the Republic of South Africa, 4 December 1996, Article 37; Constitution of the Federal Republic of Nigeria, 1999, Article 305; Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995, Article 93; Constitution of the Republic of Mozambique, 16 November 2004, Article 72 and Constitution of the Arab Republic of Egypt, 1971, (as Amended in 2007), Article 148.

[106] Mugwanya, G., [Human Rights in Africa], p.355.

[107] Meron, T., [*Human Rights and Humanitarian Norms as Customary Law*], p.219. See the preceding sub-section on why the customary law exceptions are not appropriate to be applicable to human rights during state of emergency.

[108] Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.150; See generally section 2 of this article.

human rights.[109] Such clauses make greater inspection by supranational body possible and help to limit state power.

2.2.2. State Reports

In examining state reports, the African Commission took a completely different approach on the issues of derogation. The Commission failed to reiterate its position as expressed in individual communications. The approach of the Commission in state reports rather tends to regulate the behaviour of state parties during a declared state of emergency. To begin with the reporting guidelines, in particular, on civil and political rights adopted by the African Commission in October 1991, it requires member states to provide information on whether their constitutions or bill of rights contain provisions on derogation and the situations in which such provisions operate.[110]

During the oral examination of state reports, the Commissioners never challenged the delegates of member states by pointing out that the omission of a derogation clause from the ACHPR means the Charter's guarantees are not subject to derogation. The initial report of Zimbabwe mentions the state of emergency was renewed covering also the time when the report was submitted, but with the improvement in 1986 allowing detainees to challenge their detention under emergency legislation before courts of law.[111] But the

[109] Nowak, M., [*CCPR Commentary*], p.84-85. Under human rights instruments which incorporate derogation clause any recourse to measures derogating from human rights must fully comply with all the requirements for valid derogation. In addition, such measures should not offend rights which are not derogable at all times regardless of the prevailing situation.

[110] African Commission on Human and Peoples' Rights, Guidelines for States Periodic Reports, Second Annual Activity Report of the African Commission, Annex X, (1989).

[111] Summary of Zimbabwe's First Report to the African Commission on Human and Peoples' Rights, p.11, available at, http://www.achpr.org/states/zimbabwe/reports/1st-1986-1991/,

Commission only inquired whether there are detainees despite the court order for their release.[112] With regard to state report of Gambia, the Human Rights Desk Officer of Gambia presenting the report indicated that the Gambian Constitution incorporates a derogation clause and pointed out circumstances in which such clause can be put into operation.[113] It is also indicated that the prohibition against discrimination on the ground of race is one of the derogable rights.[114] However, neither the special rapporteur dealing with the report of Gambia nor other Commissioners challenged the derogation on ground of race at all. In a similar fashion, during the oral examination of state report of Togo, the Commissioners expressed concern on whether the Charter has been rendered totally inapplicable by the emergency situation in the member state.[115]

With respect to the decades old declared state of emergency in Egypt, in its initial report the state party has sought to justify the emergency law by reference to the rules in Article 4 of the ICCPR and the jurisprudence of the HRC pursuant to this provision.[116] Nevertheless, the African Commission

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(accessed on 21 April 2013); The African Commission on Human and Peoples' Rights, Examination of State Reports, Gambia-Zimbabwe-Senegal, 12th Session, (1992), available at, http://www1.umn.edu/humanrts/achpr/sess12-complete.htm, (accessed on 21 April 2013).

[112] [The African Commission on Human and Peoples' Rights, Examination of State Reports, Gambia-Zimbabwe-Senegal].

[113] Ibid.

[114] Ibid.

[115] The African Commission on Human and Peoples' Rights, Examination of State Reports, Nigeria – Togo, 13th Session, (1993), available at,
http:// http://www1.umn.edu/humanrts/achpr/sess13-complete.htm, (accessed on 21 April 2013).

[116] Arab Republic of Egypt, Ministry of Justice, General Department for International and Cultural Cooperation, The First Report of Egypt Presented to the African Committee of Human Rights held at Nigeria during 28/2/1991 to 13/3/1991, available at, http://www.achpr.org/states/egypt/reports/1st-1986-1992/, (accessed on 21 April 2013). The African Commission on Human and Peoples' Rights, Examination of state Reports, Egypt-

failed to challenge this by arguing that derogation is not possible under the ACHPR. The question posed to members of the delegate during the examination of the report is merely confined to whether it was necessary to have the declared state of emergency in force ten years later.[117] More recently, in its concluding observation adopted after examining the seventh and eighth state report of Egypt the Commission simply stated that the time is ripe for Egypt to restore the full enjoyment of the African Charter's rights and freedoms.[118]

Generally, the oral examination of the state reports and concluding observations of the African Commission reveals that the Commission seeks to monitor the conduct of member states in taking measures which relieve state parties from honouring some of their obligation under the ACHPR. The effort of the Commission to monitor the action of states during state of emergency is logically sound. Nevertheless, the inconsistency of its approach in dealing with individual communications and state reports is regrettable. In the interest of consistent application of the ACHPR, it is imperative that the Commission adopt the same standard in its consideration of individual communications and states reports. In addition, it is not clear against which standard the commission seeks to measure the behaviour of state parties in state reports. This is of particular significance given the fact that the African Charter simply omits a derogation clause without either prohibiting or allowing it. That seems the reason behind why the Commission remained superficial in its

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Tanzania, 11th Session, (1992), available at, http://www1.umn.edu/humanrts/achpr/sess11-complete.htm, (accessed on 21 April 2013).

[117] [The African Commission on Human and Peoples' Rights, Examination of state Reports, Egypt-Tanzania].

[118] African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the Seventh and Eighth Periodic Report of the Arab Republic of Egypt, Thirty-Seventh Ordinary Session, Banjul, Gambia, (2005), paras. 11 and 26.

examination of state reports and even failed to challenge the Constitution of Gambia which allows measures of derogation which discriminate on the ground of race. In general terms, it is unfortunate that the Commission is unable to produce consistent jurisprudence on issues of derogation which may guide state parties in this respect.

2.3. Arguments for and against the Inclusion of Derogation Clause under the African Charter

In light of the omission of a derogation clause from the African Charter, arguments are forwarded both in favour and against the inclusion of such clause under the Charter. At this juncture, it is important to emphasize that the position which seeks to justify legal standards favourable for a better protection of human and peoples' rights should be defended. To begin with arguments against the inclusion of derogation clause under the Charter, it is argued that African States may abuse the right to derogation. Viljoen puts forward two reasons. African State parties to the ICCPR generally failed to honour their obligation to report to the Secretary General of the United Nations whenever they take derogation measures.[119]

But the question that this line of thinking fails to answer is in how far it is legally sound to deny African States their customary right and/or duty to ensure the continued existence of their nation whenever there is exceptional peril which poses danger to the very existence of the nation in question. It is

[119] This author compares the African practice with that of states in Latin America and point to the failure by African States to honour their duty to notify when they declare state of emergency under Article 4 of the ICCPR. Viljoen, F., [International Human Rights Law in Africa], p.334. See also Ssenyonjo, M., Economic, Social and Cultural Rights in the African Charter, In Ssenyonjo, M., (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*, Martinus Nijhoff Publishers, Leiden, Boston (2012), p.97; Cowell, F., [Sovereignty and the Question of Derogation], p.152.

not disputable that the duty of international notification is an additional safeguard against abuse of the right to derogation on the part of derogating state to the detriment of individual rights in that it allows international supervision. But this requirement is not a substantive condition; *a conditio sine qua non* to the exercise of the right to derogation. Arguably, as it stands now under international human rights instruments which envisage the right to derogation, failure to observe this requirement would not lead to the invalidity of the measures taken entailing temporary suspension of individual rights. In *Landinelli Silva v. Uruguay* the HRC is clear in its position on this issue when it observes "the substantive right to take derogatory measures may not depend on a formal notification being made in accordance with Article 4 paragraph 3 of the ICCPR.[120] Therefore, it is questionable whether the failure to honour the duty to notify the international community could justify the prohibition of derogation under the African Charter's human rights system.

Secondly, it is also submitted that African States often resort to declare state of emergency when confronted with threats.[121] Therefore according to this line of thinking African States should be denied the right to derogate from their obligation under the Charter.[122] This is rather an argument of a political nature and merits little or no legal value.

Arguments in favour of maintaining the absence of a derogation clause under the ACHPR seems to rest on the theoretical assumption that the omission of derogation provision reduces the power of states to restrict human and peoples' rights and ensures better protection of such rights. In reality that is not the case. On the one hand, the omission of a derogation clause is arguably more prone to abuse than when such clause exists. Despite the position the

[120] [*Landinelli Silva et al. v. Uruguay*], para. 8.3.
[121] Ibid. Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.161.
[122] Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.161.

African Commission took in individual communications, there is nothing under the ACHPR which stops state parties from proclaiming state of emergency and thereby derogating from their obligation under the Charter. As Murray correctly observes, such omission "may actually provide states with more room by failing to set any standard at all, allowing states to act as they please."[123]

On the other hand, the construction that derogation measures are prohibited under the ACHPR cannot be, in any way, taken to enhance the protection of human and peoples' rights. If the member states of the African Charter know that the African Commission would not accept any defence of state of exception to derogate from their obligation under the Charter, they are not going to resort to the Commission for guidance should they face crisis situation which would trigger the operation of derogation provision under

[123] Murray, R., [*The African Commission on Human and Peoples' Rights and International Law*], p.123. As far back as 1983 Umozurike notes "The question is not whether any such suspensions are permissible, but when and to what extent. Declarations of emergency for military, political, or even economic reasons are thus discretionary-tempered, unless stated otherwise, only by states' duty "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter." Umozurike, U., [The African Charter on Human and Peoples' Rights], p.910. See also Mutua, M., The African Human Rights System: A Critical Evaluation, p.8. But, like the African Commission there are authors who point out that states parties to the ACHPR should live up to their commitment even during state of emergency by emphasizing the omission of derogation clause from the Charter and without providing any reasoning why this is the case. See, Scheinin, M., and Vermeulen, M., Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fights against Terrorism, *European University Institute Working Papers*, (2010), p.21; Yerima, T., Comparative Evaluation of the Challenges of African Regional Human Rights Courts, *Journal of Politics and Law*, Vol. 4, No. 2, (2011), p.123.

human rights treaties expressly allowing derogation.[124] This would undoubtedly weaken the Charter's system of protection in times of crisis.

Other authors also share the view that the omission of a derogation clause puts human and peoples' rights in a dangerous situation.[125] This is also implicit in the position held by the UN Sub-Commission on Human Rights which invites all states whose legislation, notably constitutional laws or bill of rights, does not incorporate derogation provision to adopt such provision in light of international standards with a view to ensuring the legality of declaration of a state of emergency.[126]

A derogation provision which conforms to internationally accepted standards enhances the protection of human and peoples' rights by regulating the behaviour of derogating state in its way to proclaim state of emergency and in the course of such emergency when declared.[127] Such provision is not additional source of power for government but an important limitation to

[124] Cowell, F., [Sovereignty and the Question of Derogation], p.139.

[125] Sermet sees such omission "renders exceptional circumstances common place leading to their improper perpetuation." Likewise Mugwanya argues the absence of derogation provision allows states invoke powers outside the constitutional order which can be easily abused given the fact that such powers are not subject to constitutional and judicial checks and balance. Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.154; Mugwanya, G., [Human Rights in Africa], p.355.

[126] United Nations High Commission for Human Rights, The Sub-Commission on Prevention of Discrimination and Protection of Minorities, Question of Human Rights and State of Emergency, Sub-Commission Resolution 1995/33, 35th Session, 24 August 1995, para. 4 available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/91ee27f8de08901380256665004e8ede?Opendocument, (accessed on 10 June 2013).

[127] Mugwanya, G., [Human Rights in Africa], pp.355-356.

governmental power in a sense of protection of individual rights by curtailing the power of the government in situations when they are most needed.[128]

It should also be noted that the notion of derogation is based on the principle that the exercise of certain rights may be limited in special circumstances owing to the negative consequence that the exercise of such rights may bring to the protection of human rights of the whole society.[129] Similarly, the fact that rights cannot be exercised to the detriment of the rights of others is suggested to a certain extent under other provisions other than derogation provisions of Article 5(1) of the ICCPR and Article 17 of the ECHR. Therefore, a limited derogation measures for instance from the right to liberty would ensure the right to liberty for the whole society in the long run.[130] In this way derogation provision helps maintain human rights in times of crisis and promotes the protection of human and peoples' rights.

By pointing to Article 53 of the Vienna Convention on the Law of Treaties, it has been argued that a derogation provision is generally contrary to *jus cogens*.[131] This is not convincing for maintaining the omission of a derogation clause under the ACHPR because it is possible to provide for the catalogue of non-derogable rights in order to avoid offence to *jus cogens*. It is evident under human rights instruments incorporating a derogation provision that the

[128] Id., p.356; Cowell, F., [Sovereignty and the Question of Derogation], p.153.
[129] Cowell, F., [Sovereignty and the Question of Derogation], p.139.
[130] Ibid.
[131] Sermet, L., [The Absence of a Derogation Clause from the African Charter], pp.159-160. Article 53 of the VCLT reads *"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*

catalogue of non-derogable rights goes far beyond *jus cogens.*[132] And this is even extended through the jurisprudence of human rights monitoring bodies.[133] In addition, the principle of consistency ensures that the power to derogate does not extend to states' other obligations under international law let alone those human rights norms which are of customary nature, especially when they have attained the status of *jus cogens*.[134]

Another important reason for arguing in favour of the inclusion of a derogation clause under the human rights system the African Charter creates is due to the apparent incompatibility between the ICCPR to which almost all African states are parties and the ACHPR.[135] Under the ICCPR states are allowed to keep their domestic emergency provisions and derogate under Article 4. This has more than theoretical relevance because African states parties both to the ICCPR and ACHPR may, as Egypt has done, invoke the provisions of Article 4 of the ICCPR before the African Commission when confronted with serious crisis situation where the life of the nation in question is at stake. In such circumstances Article 30(4) of the VCLT which tries to regulate the relationship between different treaties dealing with the same subject matter does not seem to offer way out. As Sermet argues, the fact that these instruments deal with the protection of human person rules out the application of Article 30(4) of the VCLT.[136]

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[132] See [International Covenant on Civil and Political Rights], Article 4(2); [European Convention for the Protection of Human Rights and Fundamental Freedoms], Article 27(2).

[133] See for instance, [UN Human Rights Committee (HRC), General Comment No. 29], paras. 7-16.

[134] See the preceding section.

[135]Currently 51 African States are parties to the ICCPR. See, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en, (accessed on 18 June 13).

[136] Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.144. The fact that all rules which do apply to ordinary treaties do not necessarily apply to human rights

There is no other rule of international law which governs the hierarchy between human rights treaties. In the absence of such rule, it is not possible to argue that as a universal human rights treaty the ICCPR does have precedence over other regional human rights instruments such as the African Charter or vice versa. Therefore, as noted in this very section preference should be given to an instrument which is more protective. In such a situation, Article 5(2) of the ICCPR is already interesting. This provision prohibits restriction of or derogation from any of the human rights which member states recognize outside the ICCPR on the ground that the latter recognizes such rights only to a lesser extent. Therefore, the question that must be addressed is whether the ACHPR is more protective during state of emergency than the ICCPR. Unfortunately this is not the case and as established above nothing stops member states of the Charter from derogating from their obligation to protect human and peoples' rights should there arises extra ordinary situation which risk the life of the nation.

This in effect means the Charter cannot serve to restrain any abuse on the part of a state derogating from its obligation and may be ignored in a situation where the Charter's protection is most needed. Thus, it cannot be said the Charter protects individual rights to a greater extent than the ICCPR does during a state of emergency. It is imperative that a comprehensive derogation clause at least in the form of jurisprudential declaration be included within the Charter's human rights protection system so as to hold member states

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treaties is indicated under Article 60 of the VCLT. Paragraph 5 of this particular provision indicates that the rules pertaining to the termination or suspension of the operation of a treaty as a consequence of its breach do not apply to treaties on the protection human person. Arguably the same is true when it comes to the rule which regulates the application of successive human rights instruments when a need arise to determine which should be picked against the other.

answerable for their abusive conduct both before proclaiming a state of emergency and in the course of proclaimed state of emergency.

Moreover, free consent as a basis for treaty making is now universally recognized.[137] And it is implied in the concept of state sovereignty that states are bound by certain rule or prohibition only when they expressly consented to it. From this it naturally follows that whatever sovereign states have not expressly agreed to give up is not given up. In the absence of clear indication under the Charter, why the Commission should not take this in to account and determine which rights under the Charter are derogable and which are not?

Finally, it is worth to note that the absence of a derogation clause under the African Charter stands in sharp contrast with the African constitutional practice. Almost all constitutions of African states incorporate derogation provision and such provisions are often consulted to proclaim state of emergency and take measures involving the suspension of human and peoples' rights.[138] Must not this be considered as subsequent practice of African states in interpreting the omission of derogation provision under the ACHPR? Should the African Commission not consider this in dealing with both individual communications and state reports? Article 31 paragraph 3(b) of the VCLT indicates the possibility to interpret a treaty whose terms are not clear in light of state practice. This particular provision speaks of any subsequent practice of member states to a given treaty which establishes their agreement relating to the application of such treaty. Therefore, how can one accept the position of the African Commission with respect to individual communications rejecting any defence of state of emergency altogether?

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[137] See generally, [Vienna Convention on the Law of Treaties].

[138] Only very recently Egypt and Nigeria imposed state of emergency on 28 January 2013 and 14 May 2013 respectively. The Constitutions of both countries incorporate derogation provision.

More importantly, the African Commission has a legal mandate to draw, among others things, upon international human rights law to which state parties to the ACHPR are members, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law and general principles of law recognized by African States in its task of interpreting the Charter.[139] Here, it is interesting to look at how the Commission approached the issues of missing rights under the Charter such as the right to housing in accordance with its mandate to draw upon other international human rights law. In *Social and Economic Rights Centre and Another v. Nigeria*, the Commission pointed to Articles 60 and 61 for the interpretation of the African Charter and continued to argue that the Charter guarantees the right to housing despite the fact that this right is not expressly recognized by the Charter.[140] However, the Commission never employed this approach in the context of derogation. If African State confronted with real emergency situation dangerous enough to risk the life of the nation takes measures derogating from its obligation under the Charter in compliance with notably the ICCPR, why does that not constitute a valid legal defence before the Commission? In the interest of the consistent application of the Charter the Commission should adopt the same approach with respect to derogation.

[139] [African Charter on Human and Peoples' Rights], Articles 60and 61.

[140] *Social and Economic Rights Centre and Another v. Nigeria,* Communication No. 155/96 (2001) AHRLR 60, (ACHPR 2001), paras. 49 and 60.

3. *De Lege Ferenda*: Inclusion of Derogation Clause under the African Human Rights System

3.1. Jurisprudential Declaration

3.1.1. The African Commission: Drawing upon International Human Rights Law

The ACHPR vests the African Commission with promotional, protective and interpretive functions.[141] The Commission's protective and interpretive mandates offer it a legal authority to introduce a derogation clause by way of jurisprudential declaration.[142] Within its protective mandate the African Commission is generally enjoined to ensure the protection of human and peoples' rights under the conditions laid down by the ACHPR.[143] It examines state reports and considers inter-state and individual communications of alleged violation of human and peoples' rights.[144] In doing so, the Commission in one or another way necessarily engages itself in the task of interpreting the Charter. Under Article 45(3) the Commission has the power to interpret the ACHPR at the request of a state party, organ of the African Union (AU) or an African Organization recognized by the AU.

In interpreting and applying the African Charter, the Commission is instructed to draw upon international law on human and peoples' rights. These are norms of international human rights law which are binding at least on most of

[141][African Charter on Human and Peoples' Rights], Article 45.
[142] The idea of jurisprudential declaration is first suggested by Sermet. He pursued this argument by pointing to the General Comment No. 29 of the HRC on States of Emergency as evidence showing that the interpretation of Article 4 of the ICCPR "could not be fixed by its texts." Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.155.
[143] [African Charter on Human and Peoples' Rights], Article 45(2).
[144] Id., Articles 62, 47 and 55.

the African State parties to the ACHPR either as a matter of customary or treaty law obligations. More specifically these include the Charter of the UN, the Universal Declaration of Human Rights (UDHR), instruments adopted within the framework of the UN which lay down rules expressly recognized by member states of the AU mainly the two UN human rights treaties; the ICCPR and the ICESCR, as well as African practices consistent with international norms on human and peoples' rights and customs generally accepted as law.[145] This calls for contextual interpretation of the Charter in light of the relevant rules of international human rights law applicable to member states of the African Charter.[146]

So the African Commission has a very wide discretion under Article 60 and 61 of the ACHPR to look outside the Charter at the derogation provision of importantly the ICCPR and the jurisprudence of the Human Rights Committee to determine the circumstances in which member states of the ACHPR can declare state of emergency and take measures derogating from their obligation under the Charter to prevent abuse of governmental power.

With these provisions, the African Charter is said to offer sufficient flexibility without the need for amendment whenever a need arise for adjustment and to correct the flaws of the Charter.[147] While it is not disputable that the Charter creates a flexible system, pursuing this argument to the extent that the provisions of Articles 60 and 61 render the amendment of the Charter

[145] [African Charter on Human and Peoples' Rights], Article 60 and 61.

[146] This technique of interpretation is mentioned in the Vienna Convention on the Law of Treaties. Therefore a given treaty can be interpreted contextually having regard to "any relevant rules of international law applicable in relation between the parties. Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p.33, Article 31(3)(c).

[147] Heyns, Ch., The African Regional Human Rights System: In Need of Reform? *African Human Rights Law Journal*,Vol. 2, (2001), p.157.

unnecessary is less convincing simply because the jurisprudence of the Commission does not offer the same normative value as amending the Charter itself. It is true that as the ACHPR's monitoring body the African Commission clarifies the content of the Charter through its jurisprudence on individual complaints, resolutions and concluding observations. These are subsidiary means of determining norms of human and peoples' rights and are not formal source of binding rules. In addition, treaty interpretation comes into play only whenever the meaning of the treaty in question, the African Charter in this case, is disputed. Adopting additional protocol to the Charter on state of emergency, however, means having the rule out there always to guide states on their way to proclaim state of emergency and take derogation measures. Further, the question of accessibility is worth considering. The jurisprudence of the Commission is not as accessible as the amending protocol. So taking Articles 60 and 61 of the ACHPR to argue that in the presence of these provisions amendment of the Charter is not important is not without serious flaws. However, it is still an important way out up until such time when the amendment of the Charter is secured and enters into force. Even when this is the case, it serves vital role with respect to member states of the Charter which do not ratify such amendment protocol.

Scholars emphasize the importance of looking beyond the Charter to interpret it as decisive to secure the protection of human and peoples' rights during state of emergency as the absence of derogation provision undermined the Charter's protection.[148] The African Commission should reverse its position with respect to its interpretation of the absence of derogation provision relating to individual communications. It is necessary that the Commission carefully describe situations which would trigger the operation of derogation

[148] Gittleman, R., The African Charter on Human and Peoples' Rights: A Legal Analysis, *Virginia Journal of International Law*, Vol. 22, No. 4, (1981-1982), p.709.

measures, provide for the catalogue of non-derogable rights under the ACHPR that states parties could not derogate from in any case and prescribe the conditions thereof with respect to other rights from which derogation is permissible. In this respect there is no doubt that the Commission hugely benefits from the jurisprudence of other human rights monitoring bodies such as the Human Rights Committee and the (now defunct) European Commission and the European Court of Human Rights which have considerable reputation.

Some authors doubt whether it is possible, in the absence of derogation provision in the ACHPR and in light of the African constitutional diversity, to give a list of rights non-derogable in all situations and everywhere in Africa.[149] However, fifty one of the African States are now parties to the ICCPR. The constitutions or bill of rights of these states and thus their terms on derogation are expected to conform to that of the ICCPR. Therefore, the African Commission should have no difficulty in determining circumstances in which state parties can take derogation measures and in identifying norms which they should always comply with despite the existence of validly declared state of emergency. The same conclusion also applies with respect to the African Court on Human and Peoples' Rights.

At this juncture, it is important to look into the normative content of such jurisprudential declaration. Here one must distinguish between the interpretations given by the Commission at the request of a state party, organ of the AU or an African organization from those given with respect to state reports, inter-state complaints or individual communications. The interpretations of the Commission under Article 45(3) of the ACHPR, those which are given at the request of the above mentioned entities, have no

[149] Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.156.

binding force at all. Even though member states cannot simply set it aside, interpretations which are given under Article 45(3) should not go beyond recommendation.

However, it becomes different with respect to declaration of a derogation clause when this takes place within the competence of the Commission in dealing with state reports, inter-state complaints or individual communications. The interpretation of the Commission concerning the consideration of communications that determine substantive or procedural rule of law, and thus jurisprudential declaration of a derogation clause in this context, is in general opposable to the member states involved since the interpretations given in this case has to do with the monitoring of the implementation of the Charter.[150] In other words, the views of the Commission has more weight even though it is not strictly speaking formally binding in itself when it comes to consideration of communications since as already indicated above the Commission's views are not source of binding rules.

However, these views constitute authoritative interpretation of the African Charter. This is implied in member states consent to be bound by the ACHPR and to accept the authority of the Commission.[151] Thus, member states of the Charter are required to comply with the Commission's position in good faith which is now a well-established principle of international law.[152] Otherwise,

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[150] Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.570.

[151] Chinkin, C., Sources, in Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), 119.

[152] In its General Comment No. 33 on the obligation of member states of the Optional Protocol to the ICCPR the HRC has correctly stated that it is imperative that member states cooperate with its views in good faith and communicate to it the progress thereof by pointing to the Committee's role both under the Covenant and Optional Protocol and the principle of good faith in performing treaty obligation. UN Human Rights Committee (HRC), General

there is no point in vesting the Commission with the mandate to ensure the protection of human and peoples' rights. Therefore, the basis from which the legal authority of the interpretation of the Commission derives regarding communications is Article 45(2). Furthermore, the Commission's views with respect to individual communications manifest some characteristics of judicial determination since the Commission's decision making procedure is quasi-judicial even though in most cases the jurisprudence of human rights monitoring bodies in general and the African Commission in particular lack adequate reasoning comparable to judicial organ.[153] In short, the interpretations of the Commission involving the declaration of derogation clause which relate to state reports and individual and inter-state communications should be given more weight than its views under Article 45(3) of the Charter.

Once the African Commission, and this is also applicable to the African Court, is able to declare a derogation clause which is opposable to the behaviour of member states of the ACHPR in conformity with the minimum threshold of protection set out under Article 4 of the ICCPR and as further clarified by the jurisprudence of its HRC the next question is in how far this is applicable invariably to all since there are still fraction of African States not parties to the ICCPR and thus are not bound by the standard set out by it. In principle a given treaty does not create obligations or rights for a third state

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Comment No. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 5 November 2008, CCPR/C/GC/33, para. 13-16. Schmidt, M., United Nations, in Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), 413.

[153] For instance the HRC is of the opinion that its views "exhibit some important characteristics of a judicial decision since they are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions." [General Comment No. 33], paragraph 11.

unless it consented to be bound by it.[154] Thus, jurisprudential declaration of a derogation clause in accordance with Article 4 of the ICCPR may not bind member states of the ACHPR not parties to the ICCPR. However this rule is not without exception. The rules of Article 38 of the VCLT indicate that treaty provisions bind third states if they recognize customary rules of international law.[155] The question is then whether the rules of Article 4 of the ICCPR are reflections of customary international human rights law. Even though this is not the case by the time the Covenant is drafted, it is arguable that the rules of Article 4 have attained the status of customary international law over the years since it entered into force. States pay lip service to this provision in general and this is evident from the notification communicated to the Secretary General of the United Nations. In addition the list of non-derogable rights under paragraph 2 of Article 4 includes fundamental human rights which are peremptory norms of international law which bind all states invariably. Furthermore as Gittleman argues "it is in the interest of consistent judicial determination or application of the ACHPR that the Commission maintain the same standard of reviewability to states not parties to the ICCPR."[156]

3.1.2. The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights with a possible merger with the African Court of Justice in the future[157] is another ACHPR's monitoring body, perhaps more important than the African Commission,

[154] [Vienna Convention on the Law of Treaties], Article 34.
[155] Ibid, Article 38.
[156] Gittleman, R., [The African Charter on Human and Peoples' Rights], p.707.
[157] See, African Union, Assembly of Heads of State and Government, Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, 5th Ordinary Session, 4-5 July 2005, Assembly/AU/Dec.83 (V); Protocol on the Statute of the African Court of Justice and Human Rights, 1 May 2008.

potentially able to make jurisprudential declaration of derogation clause in to the African human rights system. This Court established by the Protocol to the ACHPR on the establishment of an African Court on Human and Peoples' Rights is meant to complement the protection mandate of the Commission.[158] It has both advisory and contentious jurisdiction which should enable it to introduce a derogation clause to the system.

In its advisory jurisdiction, the Court may deliver its opinion on any legal issue mainly relating to the Charter but also with respect to any other relevant human rights instrument when requested by a member state of the AU, the AU itself, any of its organs or any African Organization recognized by the AU except where the Commission is being seized of the issue.[159] So the Court can declare a derogation clause at the request of any of the foregoing organs. This opinion is not formally binding not because this is said to be the case somewhere in the Protocol but it follows from the very nature of advisory opinions. However, there is no doubt that the Court's opinions have more legal authority than that of the Commission given that the Court is a judicial body and thus more authoritative and persuasive. Therefore, the Court's advisory jurisdiction is important to develop a regional derogation clause for Africa.[160] As already mentioned, the Court should decline considering any matter which is being examined by the Commission. This is understood to refer to matters which are on the table of the Commission by the time they are brought before the Court as opposed to those upon which the Commission

[158] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, Ouagadougou, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Article 2.

[159] [Protocol to the African Charter on Human and Peoples' Rights], Article 4(1).

[160] Udombana, N., Toward the African Court on Human and Peoples' Rights: Better Late than Never, *Yale Human Rights and Development L. J*, Vol. 3:45, (2000), p.93.

had pronounced itself.[161] Accordingly, the Court can declare a derogation clause in its advisory jurisdiction even when this constitutes a matter previously dealt with by the Commission.

A question may be asked whether the Court can review the compatibility of domestic constitutional provisions on the state of emergency in light of international standards. While there is no express provision to this effect, the language of Article 4(1) of the Protocol does not seem to exclude this possibility. As Muigai observes, the advisory jurisdiction of the Court is broad enough so as to encompass the power of reviewing not only domestic legislations but also regional initiatives.[162] Similarly Mugwanya argues Article 4(1) with the use of the word 'may' appears to cover the authority to review domestic legislations for their compatibility against international standards.[163]

The Court's contentious jurisdiction is another important tool available to it to jurisprudentially declare a derogation clause. The Court's jurisdiction in this respect covers all cases and disputes relating to the interpretation and application of the ACHPR and also any other relevant human rights instrument.[164] This is where the Court's finding is formally binding.

In terms of source of law, it is evident from the provisions of Article 3 of the Protocol that the Court is not limited to the African Charter. Unlike the

[161] Naldi, G., The African Union and the Regional Human Rights System, in Evans, M., and Murray, R., (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, (2nd ed.), Cambridge University Press, United Kingdom, (2008), p.43.
[162] Muigai, G., From the African Court on Human and Peoples' Rights to the African Court of Justice and Human Rights, in Ssenyonjo, M., (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*, Martinus Nijhoff Publishers, Leiden, Boston (2012), p.275.
[163] Mugwanya, G., [*Human Rights in Africa*], p.327.
[164] [Protocol to the African Charter on Human and Peoples' Rights], Article 3.

Commission which is merely mandated to draw upon international human rights law under Article 60 and 61 of the Charter, the jurisdiction of the Court extends to the interpretation and application of the Charter and any other relevant human rights instrument.[165] More importantly, Article 7 indicates that the Court should not limit itself to the ACHPR when it envisages that "the Court shall apply the provisions of the Charter and any other relevant human rights ratified by the states involved" in a particular issue before the Court.[166] This means the Court can decide in accordance with obligations flowing from international human rights instruments provided that such instruments are ratified by the states involved in the issue before it.[167] The liberality the Protocol offers in this respect can be seen from the point of the two other regional human rights systems of the European and Americas. The material jurisdiction, *ratione materiae*, of both the European and Inter-American Human Rights Courts are limited to matters relating to the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols there to and American Convention on Human Rights respectively.[168]

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[165] Id., Article 3. The instruments referred to by the Protocol are mentioned both in the Preamble of the African Charter and Articles 60 and 61 but only as a source of inspiration by the African Commission.

[166] Id., Article 7.

[167] Viljoen, F., Communications under the African Charter: Procedure and Admissibility, in Evans, M., and Murray, R., (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, (2nd ed.), Cambridge University Press, United Kingdom, (2008), p.132; Udombana, N., [Toward the African Court on Human and Peoples' Rights], p.90; Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.714; Eno, R., The Jurisdiction of the African Court on Human and Peoples' Rights, *African Human Rights Law Journal*, Vol. 2, (2002), p.226.

[168] [European Convention for the Protection of Human Rights and Fundamental Freedoms], Articles 32, 33 and 34; [American Convention on Human Rights], Article 62(1).

Therefore, the African Court on Human and Peoples' Rights unlike its regional counterparts can directly apply the provisions of Article 4 of the ICCPR to which almost all African States are parties. This is also much more solid legal basis compared to Articles 60 and 61 of the Charter to put the Court in a better position to introduce a regional derogation clause by way of jurisprudence. This enhances the protection of human and peoples' rights during state of emergency as it makes possible to hold African States accountable before the Court pursuant to the terms of Article 4 of the ICCPR for violation of the Charter's protection for lack of safeguard it offers during such time.

3.2. Amendment to the African Charter: Adoption of Additional Protocol

The last option for introducing a regional derogation clause in to the African human rights system is by way of amendment to the African Charter. Treaty amendment is generally regulated by the Vienna Convention on the Law of Treaties (VCLT). The wording of Article 40 paragraph 1 of this Convention recognizes that multilateral treaties like the African Charter may, as they usually do, envisage for amendment mechanisms. When it comes to the ACHPR amendments to it is possible in accordance with the provisions of its Article 68. This can be set in motion once request is made by a member state of the Charter and is eligible for adoption upon the approval by simple majority of member states.[169] Although treaty amendment is always not an easy task since negotiation and agreement on the proposed amendment is part

[169] [African Charter on Human and Peoples' Rights], Article 68. Once member states are informed of the proposal for amendment and the African Commission pronounced itself on it the Assembly of Heads of States and Governments proceeds with its consideration.

of this process,[170] Article 68 of the Charter only requires simple majority for the approval of the proposal for amendment which is less stringent requirement in any case. In addition, since the norms and jurisprudences of other human rights treaty regimes, notably that of the ICCPR and ECHR are now well-developed it should be less difficult than it would be to agree on the content of such amendment protocol on derogation. The drafting of the amendment protocol in this respect can hugely benefit from these norms and jurisprudences.

Here the African Commission is given the chance to reflect on the proposed amendment. The language of Article 68 seems to suggest that the opinion of the Commission pertains to whether the proposed amendment is necessary. However, nothing in the provision prevents it from reflecting on the content of the proposed amendment. This offers the possibility to ensure that the proposed amendment conforms to international norms on state of emergency.

4. Conclusion

Derogation clauses are inserted in to human rights instruments with a view to limit the power of states to suspend human rights during state of emergency when the life of the nation is at stake. This is evident from the routine and stringent requirements built around the prerogative of states in human rights treaties which incorporate derogation clauses.

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[170] Cognizant of the problem associated in particular with amendment of multilateral treaties, Antony Aust observes "(…) the process of agreeing on amendments and then bringing them into force can be nearly as difficult as negotiating and bringing into force the original treaty, and sometimes even more troublesome." Aust, A., Amendment of Treaties, in Orakhelashvili, A. and Williams, S., (eds.) *Forty Years of the Vienna Convention on the Law of Treaties*, MPG Books Group, Great Britain, (2010), p.41. Thus as already indicated, the importance of judicial declaration of derogation clause lies in the fact that such declaration can potentially provide immediate way out until the amendment to the Charter is realized.

The African Charter on Human and Peoples' Rights omits a derogation clause. This has been a source of controversy among international human rights lawyers given the fact that the Charter neither prohibits nor allows derogation in times of emergency. The problem is magnified since almost all African States are parties to the International Covenant on Civil and Political Rights which incorporates express provision on derogation. In addition it is a common constitutional practice of African States to include such clause in their constitutions and invoke it whenever they face emergency situation. This puts the Charter at odd with such African constitutional practice.

The position of the African Commission is not entirely consistent. The Commission rejected all defence of derogation on the ground of state of emergency but only with respect to individual communications. Unfortunately the jurisprudences of the Commission lack any meaningful reasoning as to why derogation is not possible under the African Charter. The Commission simply point out the absence of a derogation clause under the Charter and reached a conclusion that this constitutes prohibition of derogation in a number of instances.

Apart from lacking strong legal justification this position of the Commission puts human and peoples' rights in a precarious situation in times when states face emergency situation. This is not only because it leads member states to resort to customary means of suspending the operation of treaties which lack the necessary power limiting requirements as derogation clauses do and thus potentially prone to abuse, but also turns the ACHPR to a suicidal charter unable to play a restraining function due to interpretational inflexibility. Thus, the article concludes omission of derogation clause from the ACHPR is simply a lacuna which is unfavourable to the protection of human and peoples' rights during state of emergency.

When it comes to examination of state reports, the African Commission failed to confirm its stance with respect to individual communications. The oral examinations of states reports and the resulting concluding observations of the Commission indicate that it seeks to regulate the behaviour of states during state of emergency. Even though this is important and should also be the case with respect to individual communications, the Commission should first make clear a legal standard against which it can measure the behaviour of states. The importance of introducing such standard lies in the fact that the present legal protection of the Charter is inadequate during state of emergency. Therefore, the Commission should look at the rules of other international human rights instruments on derogation in the interest of greater protection of human and peoples' rights during such time as it does with respect to the Charter's claw-back clauses.

Equally the African Court on Human and Peoples' Rights can play an essential role in introducing such standard of measure since the Protocol establishing the Court allows it to directly apply relevant international human rights law to a dispute before it on the condition that such instrument is ratified by parties to a dispute before it.

Application of the Duty not to Cause Significant Harm in the context of the Nile River Basin

Zewdu Mengesha*

Abstract

The duty not to cause significant harm is an obligation of customary international law relating to utilization of international watercourses. This duty requires a state sharing freshwater resources to refrain from causing significant harm to other states through its use of a shared international watercourse. It also requires consideration of all relevant factors that are essential for its effective implementation in any given international watercourse. In relation to this duty, *the Nile Basin States adopted the Nile Basin Cooperative Framework Agreement to regulate the use, development, protection, conservation and management of the Nile River Basin and its resources. However, the Nile River Basin Cooperative Framework Agreement did not set out detailed guidelines on how the Nile River Basin Commission should promote and facilitate the implementation of the principles enshrined under this Framework convention, which includes the duty not to cause significant harm. This entails drawbacks for the application of the principle in the Nile Basin. Thus, this Article examines how the duty not to cause significant harm should be applied in the Nile Basin.*

Key Terms: the duty not to cause significant harm, equitable and reasonable utilization, the Nile basin

* LLB (Bahir Dar University), LLM (Addis Ababa University), Lecturer in Law at Bahir Dar University School of law. The author is very grateful to Mr. Fasil Amedetsion, Dr. Tadesse Kassa, the editor-in-chief and the anonymous reviewers for valuable comments on earlier drafts of this article. All errors remain mine. The writer can be reached at: zewdu_mengesha@yahoo.com

Introduction

The duty not to cause significant harm is among a few principles that govern the issue of international watercourses. The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourse Convention) is one of the most recent and comprehensive international watercourse agreements with regard to Non-navigational uses of International Watercourses. The convention incorporates this principle under the second part, entitled 'general principles.' This implies that the duty not to cause significant harm is among the most important principles regulating issues regarding non-navigational uses of international watercourses.

Another most cardinal principle of international watercourses law incorporated under the UN Watercourse Convention (1997) is the principle of equitable and reasonable utilization and participation. Article 5 of this convention states that watercourse states shall, in their respective territories, utilize an international watercourse in an equitable and reasonable manner. It further stipulates that an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse states concerned, and consistent with adequate protection of the watercourse.

It is commonly believed that it is only upstream riparian states that can harm downstream states by affecting the quantity or quality of water flowing to them. It is not generally realized that downstream riparian can also harm upstream riparian by foreclosing their future uses of water through the prior use of, and the claiming of rights to such water.[1] For this reason, downstream riparian states require that they be notified of any activity upstream to ensure that such activity will not harm their interests. Many believe that this is a unilateral requirement imposed upon the upper riparian countries and does not apply to downstream states. Along these lines of thinking, it is also widely believed that only upstream riparian's can harm downstream riparian's, and not the other way around.[2] But it is also important to note that, contrary to popular belief, in some cases "harm" can be caused by a downstream state to its upstream riparian neighbors. For example, by foreclosing the upstream state's future water uses through the prior utilization of such water.[3]

The application of the duty not to cause significant harm under international watercourses law has always been controversial. In the absence of a detailed

[1] Salman M.A. Salman (2010), Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses, *Water International* Vol. 35, No. 4, Rutledge Taylor & Francis Group, P.350.
[2] Ibid, P.351
[3] Wouters, Vinogradov, Allan, Jones & R. Clark (2005), *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*, Technical Documents in Hydrology, No. 74, UNESCO, Paris, p. 54 [hereinafter Wouters et al, *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*].

and universally accepted set of rules, the actual implementation of the principle is bound to be problematic. No comprehensive international treaty framework exists that could be enforced against all the riparian states in the Nile River Basin. What is more, the absence of a unified legal regime and the unique geopolitical setting of the region may a negative effect on the possibilities of integrated river basin planning and utilization.

Except for the Constitutive Act of the Nile Basin Initiative, which describes the Nile as a shared resource of all the riparian communities and recognizes a common commitment to its equitable utilization across the basin region, one would note, perhaps with a degree of dismay, that throughout its long history, the Nile had never been subjected to a single legal arrangement. Such an agreement would no doubt acknowledge that all the co-riparian states of the Nile have the right to the water resources, but that such rights are limited by the principle of just and equitable water sharing.[4] In the absence of an inclusive treaty framework, disputants must resort to customary international law and general principles of law to fill the legal gaps left unaddressed by formal agreements.

The Nile River Basin Cooperative Framework Agreement (CFA) provides that when utilizing the Nile River System's water resources in their territories,

[4] Nurit Kliot, *Water Resources and Conflict in the Middle East*, Rutledge, London and New York, 1994, p.91 [herein after Kliot, *Water Resources and Conflict in the Middle East]*.

the basin states shall take all appropriate measures to prevent causing significant harm to other states. The stipulation does not, however, set out clear guidelines which direct the effective application of the principle in the specific context of the basin.[5] Similarly other regional watercourse agreements fail to clearly stipulate guidelines to be considered for the effective application of this principle. In this context, the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin may be mentioned.

This highlights the need to scrutinize such specifics as the relationship of the rule with other principles of international watercourses law, to identify which scales of utilization or what patterns of use are subjected to the protected regime of the no significant harm rule, and to analyze how the contemporary

[5] Article 16(a) of the Nile River Basin Cooperative Framework Agreement states that "[t]he Nile River Basin Commission is mandated with the promotion and facilitation of the implementation of the principles that are enshrined in the Cooperative Framework Agreement of the Nile. CFA is a regional watercourse agreement deals about the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States. The convention is not yet into force. In April 2010, seven of the Nile Basin states agreed to open the CFA for signature. Egypt and Sudan rejected this proposition, despite these disagreements; the Agreement on the Nile River Basin Cooperative Framework was officially opened for signature on 14 May 2010. Ethiopia, Rwanda, Tanzania, Uganda, Kenya and Burundi signed the CFA. Ethiopia, Rwanda and Tanzania ratifies CFA in June 13, 2013, August 28, 2013 and March 26 2015 respectively. http://www.nilebasin.org/index.php/spotlight/99-cfa-overview last visited 19/05/2015.

setting of international law as well as its evolution addresses the application of the no significant harm rule in the general context of river basins.

1. The Patterns of Utilization in the Nile River Basin

The Nile River is the principal artery of life in Egypt. However, this basic fact does not apply in the same way to the other riparian states. Indeed, the Nile River has shaped the life, habits and culture of Egyptian people over centuries, and its periodic flooding has constantly renewed the life cycle.[6] The river has brought life-giving waters through the heart of the North African desert for millennia, and has been relied on by farmers, and others in Egypt, for a long period of time.[7]

In the modern era, water utilization in modern times began in 1834, when Mohammed Ali Pasha attempted to expand the area utilized for summer crops by creating a system of canals in the delta; that year Mohammed Ali tried to regulate the river by constructing a barrage across the Nile on its bifurcation at the head of the delta.[8] The barrage was intended to raise the level of water, but it was not until 1861 when British engineers completed the construction

[6]Ancient Egyptian history indicates that the people became used measuring the level of the river and considered this measurement an indication of the economic and civilized conditions of the country. Hamdy A. Hassan and Ahmad Al Rasheedy, 'The Nile River and Egyptian Foreign Policy Interests', *African Sociological Review* 11(1) 2007, p.26.

[7] Joseph W. Dellapenna., Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property, *Case W. Res. J. Int'l L.*, vol. 26:027, 1994, p.47.

[8] Kliot, supra note 4, Water Resources and Conflict in the Middle East, p.32.

that the Delta Barrage functioned properly.[9] In fact, a number of factors have contributed to the history of water utilization, management, and development in the Nile Basin in the past century. Among the notable factors, the presences of British interests in the basin during the colonial era and a policy of water security pursued by Egypt in the subsequent decades may be mentioned.[10]

The impending struggles over the waters of the Nile follow the patterns that have been found in river basins worldwide.[11] As is generally the case, development in the Nile Basin occurred earlier and faster in the lower basin than in the upper basin. This creates a set of existing users who demand protection for their "prior rights" and a class of disadvantaged potential users upstream who demand developmental equity.[12] In the past, Egypt and Sudan ignored the interests of the upper riparian states and failed to invite them to take part in the planning or construction of major water projects, including the Aswan Dam.[13]

[9] Ibid, p.32.
[10] Mohammed Abdo , The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin, 2004 p.46, available at:http://sam.gov.tr/wp-content/uploads/2012/01/4.-Mohammed-Abdo.pdf.
[11] Dellapenna, supra note 7, p.51.
[12] Ibid. p.51.
[13] Kliot, supra note 4, *Water Resources and Conflict in the Middle East*, p.90.

Following the Egyptian failure to implement the Century Storage Project which evolved from several sources,[14] all the riparian states, but especially Egypt, gradually developed their own separate water projects.[15] Egypt has utilized the Nile for irrigation for centuries. Agriculture in Egypt is almost entirely dependent on irrigation from the Nile since there is no significant rainfall except in a narrow strip along the Mediterranean coast. The total irrigation area in 1997 was about 8 million *feddan*,[16] which equates to approximately 3.36 million hectares (ha).[17]

The major controlling structures on the Nile in Egypt include the High and Old Aswan Dams and a number of downstream barrages. The Old Aswan Dam was completed in 1902 with a storage volume of about 1 BCM.[18] By increasing the height of the dam, the storage capacity was increased to 5 BCM in 1934. The High Aswan Dam (HAD), upstream of the (Old) Aswan Dam, was completed in 1964, and the Lake Nasser reservoir created by the dam drastically improved the regulation of the Nile water.[19] According to a study conducted by the Food and Agriculture Organization (FAO) on

[14] Basically, the plan envisaged storage of water on the Blue and White Nile from affluent years for use during periods of drought. Although the plan calls for dams to be built in several basin states, its primary aim is to maintain the interests of Egypt.
[15] Kliot, supra note 4, *Water Resources and Conflict in the Middle East*, p.37.
[16] Arab Republic of Egypt, Ministry of Water Resources and Irrigation (2005) 'National Water Resource Plan for Egypt – 2017', Cairo, pp. 2-31.
[17] NB: 1 *feddan* = 4 200 m^2 = 0.42 ha = 4.2 x 10-4 x 1 000 ha
[18] Arab Republic of Egypt, Ministry of Water Resources and Irrigation, supra note 16, pp.2-4
[19] Ibid, pp.2-4.

"irrigation potential" and actual irrigation by country and river basin, Egypt has irrigation potential of 4,420,000 ha of land within the basin, of which 3,078,000 ha are already in use.[20] The Republic of Sudan, both prior to and after the secession of south Sudan, has made only moderate use of the resource so far, but has been embarking on a program of agricultural expansion. The FAO study indicated that the irrigation potential of Sudan within the basin was an estimated 2,750,000 ha, of which 1,935,200 ha are in use.[21] According to the document issued by FAO In 1997, the gross irrigational water requirements in the Nile Basin were estimated as standing at 124 BCM per year, of which 19.98 was in Ethiopia, 38.5 in Sudan and 57.46 in Egypt.[22]

The states further upstream, including Ethiopia, Tanzania and Uganda which supply the waters of the river, have only begun to make use of the water very recently. At the close of the last millennium, Ethiopia was irrigating fewer than 200,000 ha of farmland, although a total of 3.7 million ha had been classified as potentially irrigable.[23] This gross underdevelopment of this capacity to grow food and industrial crops spurred the Irrigation Development

[20] www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014.
[21] www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014 The study is made before south Sudan succeeds from former republic of Sudan.
[22] FAO irrigation potential in Africa, available at: http://www.fao.org/docrep/w4347e/w4347e00.htm, last visited 3/19/2014.
[23] Federal Democratic Republic of Ethiopia, Ministry of Water Resources (2002) 'Water Sector Development Program Main Report', Addis Ababa, vol. II,p.46.

Program (IDP) to generate a plan to increase irrigation substantially within 15 years (2002–2016).[24] In this regard the irrigation potential of the Nile Basin in Ethiopia has been estimated at more than 2.2 million hectares.[25] The irrigated area was about 23,000 hectares in 1989. In the same manner, Uganda is in much the same position as other upper riparian states of the Nile. The irrigation potential of Uganda is estimated 202,000 ha of which only 5,550 ha are irrigated.[26] This unequal development of a river can cause great political, economic and legal difficulties in the proper application of the duty not to cause significant harm.[27]

The difference in the pattern of utilization between the upper and lower riparian states has its own effect in the appropriate application of the principle. Sooner or later, the state which has been slow to develop the portion of the river in its territory will need more and more water for domestic and sanitary purposes, for agriculture, for hydro-electric power, for industry and so forth.[28] Considering that Egypt's water resources mainly originate beyond its borders, Egypt will campaign to maintain her water security in the Nile River. Despite the fact that the Blue Nile comes from the Ethiopian Highlands, which provides almost 85 percent of the Nile's water share;

[24] Ibid. p.46.
[25] www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014.
[26] Ibid.
[27] C. B. Bourne, 'The Right to Utilize the Waters of International Rivers', University of British Colombia, *The Canadian Yearbook of International Law*, 1965, p.187.
[28] Ibid. p.187.

Ethiopia has been largely neglected in all Nile water agreements, which date from the twentieth century. Ethiopia, the uppermost riparian state of the Blue Nile basin, protested to Egypt and Sudan when the two countries concluded the 1959 Nile Agreement that divided the Nile waters exclusively between them. Ethiopia has since been objecting to most of the projects undertaken by Egypt and Sudan on the Nile because Ethiopia has realized that those projects could have a negative effect on its future use of the Nile waters, and its equitable and reasonable share of the resource.[29] However no measures of integrated planning have been applied in the Nile Basin. Moreover, since the only multipurpose (and highly consumptive) project, the Aswan High Dam, is located in Egypt (for the sole benefit of Egypt and Sudan), any plan for future utilization of the upper Nile waters, whether in Ethiopia or other upstream states, is interpreted in Egypt as a threat to its very existence.[30]

Economic development is often accompanied by greater diplomatic heft. Egypt can exert its influence on international organizations to block international financing of Nile projects. For instance, Egypt has blocked Asian Development Bank (ADB) funds meant to aid Nile riparian states in their exploitation of the Nile. It has also contributed towards the establishment of the World Bank's Operating Directive 6.50, which

[29] Salman M.A. Salman , The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?, *International Water Resources Association Water International*, vol. 32, no. 1, 2007, p.9.
[30] Kliot, supra note 1, Water *Resources and Conflict in the Middle East*, p.266.

conditions disbursement of World Bank funds for the development of projects along internationally shared rivers upon agreement by all riparian states.[31] Thus, the inability of upper riparian states to raise the massive amounts required for Nile projects has precluded them from building dams along the river for hydroelectric purposes and irrigation schemes.[32]

For decades, the political turmoil in Ethiopia prevented the country from developing the Nile's waters. If, however, Ethiopia succeeds in remaining stabile and undertakes major development projects, this picture will change.[33] In fact, Ethiopia's relative political stability and economic strength have led to a realization that more substantial water use is inevitable, because economic growth is more likely and effective planning could be undertaken. The last few years witnessed the Ethiopian economy continuously improving which, in turn, has led to the implementation of various projects on the Nile River. For instance, Ethiopia announced the commencement of construction of its Grand Renaissance Dam, which will generate 6000 MW of hydro-power, making it Africa's largest hydroelectric plant. This has caused tense diplomatic confrontations between Egypt, Ethiopia and, to a certain degree, Sudan.

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[31] Fasil Amdetsion, Where Water is Worth More than Gold: Addressing Water Shortages in the Middle East and Africa by Overcoming the Impediments to Basin-Wide Agreements, *SAIS Review*, vol. 32, no. 1, Winter-Spring 2012, pp. 169-183, Johns Hopkins University Press, p.174.
[32] Ibid.p.174.
[33] Dellapenna, supra note 7, p.50.

Developmental disparities frequently establish a pattern whereby lower-basin water users have military power to enforce their will, while upper-basin users have the water and the ability to cut it off or contaminate it. The resulting tension can be managed only if the water is controlled in such a way as to assure the equitable participation of all states sharing the basin for their economic developmental activities.[34]

2. Application of the No Significant Harm Principle in the Nile River Basin

The application of the principle prescribing a duty not to cause significant harm could stir difficulty in any given region. Article 7 of the UN Watercourse Convention provides that states have to "take all appropriate measures to prevent the causing of significant harm". If "harm" is caused, Article 7(2) also provides that a watercourse state "take all appropriate measures" to eliminate or mitigate such harm.

This duty requires that states exercise due diligence to utilize a watercourse in such a way as not to cause significant harm. However, the fact that an activity causes significant harm does not by itself necessarily constitute a basis for barring it. A watercourse state can be deemed to have violated its due diligence obligation only if it knew or ought to have known that the particular use of an international watercourse would cause significant harm to other

[34] Ibid.p.51.

watercourse states.[35] Sometimes, even an equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", because an international watercourse might not always be capable of fully satisfying the competing claims of all the states concerned. For example, where there is insufficient water in a watercourse to satisfy the expressed needs or claims of the states concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse, even if that allocation was, in fact, equitable.[36] However, such harms to a watercourse state cannot entail a legal "injury" or be otherwise considered a wrongful act by the other riparian states.

Here it is important to consider how far a watercourse state's existing utilization of the Nile is protected. As stated in Article VIII of the Helsinki Rules on the Uses of the Waters of International Rivers, an existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible

[35] ILC (1994), *Report of the International Law Commission on the work of its forty-sixth session*, U.N. Doc. A/49/10, p.104.

[36] Report of the International Law Commission on the work of its thirty-eighth session (5 May- ll July 1986), Document A/41/10, Official Records of the General Assembly, Forty-first session, Supplement No.10,Par.41.

use.[37] As stated in the commentary of the Berlin rules, a Basin State cannot preclude present uses by another basin state by a claim that the objecting states will need the water at some time in the future. On the other hand, such existing uses of water allocated to another state do not become a vested right relative to later beginning uses in the state to which the water is allocated.[38] However no corresponding provision was incorporated into the UN Watercourse Convention or the agreement on the Nile River Basin Cooperative Framework, nor would such an insertion be indispensable in any event. Both instruments prescribed that in deciding the equitability of utilization, an existing use of any basin state, however vital, would not necessarily receive complete protection. In fact, an existing use constitutes only one of the numerous factors considered cumulatively, and as such, it

[37] The Helsinki Rules on the Uses of the Waters of International Rivers which was adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966 under Article VIII states that:-

1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.
2. (a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation.
(b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandoned.
3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use.

[38] International Law Association Berlin Conference (2004) Water Resources Law, P.22

occupies no particular position of pre-eminence.[39] For example, Article 6(1)(e) of the UN Watercourse Convention refers to both existing and potential uses of the international watercourse in order to emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case.[40]

Hence first appropriators cannot legally presume that entrenched uses in shared river courses will be accorded secure protection in perpetuity. When new users of a resource become "ready to use the waters or to increase an existing use, in this case the entire question of equitable utilization of the waters is opened up for review… and the rights and needs of the various states would be considered".[41] This means that the existing use of a state will be maintained if this utilization is in line with the principle of equitable and reasonable utilization with respect to that common international watercourse. This implies that in the long term, were the rule of equitable utilization

[39] Tadesse Kassa Woldetsadik (2013), *International watercourses law in the Nile River Basin: Three States at a Crossroads*, (Routledge Taylor and Francis Group, London/New York), p.254. [Herein after Tadesse, *International watercourses law in the Nile River Basin: Three states at a crossroads]*.

[40] International Law Commission (1994)**,** *Report of the Commission to the General Assembly on the work of its forty-sixth session*, vol. II, Part II, United Nations, New York and Geneva, p.101.

[41] Tadesse K. Woldetsadik, supra note 39, p.254

enforced, Egypt and Sudan could be confronted with the risk of losing a great deal of the benefits they now enjoy through prior appropriation.[42]

Moreover, it is true that the material application of the duty not to cause significant harm raises a number of other difficult questions. For example, it will be problematic to determine what action would be adequate to satisfy the duty of "all appropriate measures" under Article 7(1) of the UN watercourse convention. In addition, it is stated that a watercourse state could be required to pay compensation "where appropriate" if it has caused significant harm to another watercourse state. But again, there could be disagreement about when compensation is "appropriate."[43] Beyond this, the term "harm" is not defined. Does the use of more water by Ethiopia constitute harm to Egypt, for example? Or does "harm" only refer to serious pollution of the waters that would in turn affect a downstream state? There is no adequate guidance about this.[44] Thus the ambiguity makes the application of the duty not to cause significant harm will pit upstream and downstream states against each other.

2.1 Positions Advocated by Upper and Lower Riparian States

The structure of the legal argument related to the specific framework is categorized by opposing claims. Every state bases its rights on the refutation

[42] Ibid.p.254.
[43] Christina M.Carroll, 'Past and Future Legal Framework of the Nile River Basin', *The Georgetown International Environmental Law Review*, vol.12, (1999-2000), p.289.
[44] Ibid. p.290.

of the rights of others. When we come up to the position of the lower riparian states, for example, Egypt holds the view that she has "natural and historic" rights over Nile waters acquired by long usage and recognized by other states such as Great Britain and Sudan, and that the 1929 and 1959 Nile water treaties have been declaratory of international customary law relating to fluvial law.[45] The 1929 Agreement was an 'Exchange of Notes' between Egypt and Britain**.** This treaty did not only bind Sudan to Egypt's approval before undertaking any irrigation project, but also gave Egypt rights over the use of Lake Victoria and other water bodies around the River Nile. Egypt, as the downstream state, had its interests guaranteed in three-fold ways, these include: - Having a claim to the entire timely flow at a total amount of 48 BCM/year, having rights to on-site inspectors at the *Sennar* dam, which is outside of Egyptian territory, Being guaranteed that no works would be developed along the river or on any part of its territory, which would threaten Egyptian interests.[46] The 1929 Egyptian-British treaty was last revised in 1959.

[45] Arthur Okoth-Owiro, *The Nile Treaty State Succession and International Treaty Commitments: A Case Study of The Nile Water Treaties*, Konrad Adenauer Stiftung and Law and Policy Research Foundation, Nairobi 2004 ,p.16.

[46] Patrick L. Otieno Lumumba**,** The Interpretation of the 1929 Treaty and its Legal Relevance and Implications for the Stability of the Region, African Sociological Review 11, 1, 2007,P.13

The 1959 agreement was a treaty between United Arab Republic and Sudan for the Full Utilization of the Nile Waters Signed at Cairo, on 8 November 1959; in force 12 December 1959. This agreement is concluded without involving other watercourse states of the basin. According to Article 2(4) of this treaty Egypt is allowed to take the lion's share which is 55½ Milliards and 18½ Milliards for the Republic of the Sudan.

The lower riparian states have submitted that their water rights cannot be affected by any upstream diminution of the flow of the water based on factual and legal bases. Egyptian scholars have argued that according to the 1959 agreement, Egypt has been allowed to utilize 55.5 BCM of water.[47] Egypt argues that this constitutes only "55.5 BCM out of total 200 BCM of water resources in the Nile basin," i.e., about 4 percent of the total precipitation falling over the Nile basin which is estimated at around 1,600 BCM of water."[48]

The average annual rainfall in the upper part of the basin is much higher than the rainfall in the lower basin. For example, in Ethiopia the average annual

[47] The 1959 Agreement for the Full Utilization of Nile Waters guaranteed that 55.5 BCM per year would flow into Egypt without any hindrance from Sudan. The agreement also allowed Egypt to construct the Aswan Dam for "long term" water needs.

[48] Marawan Badr, Egyptian Ambassador to Ethiopia, an interview with journalists from the Ethiopian Press Agency focused on issues related to the Ethio-Eritrean border dispute, the Nile waters and peace efforts in Somalia. 23 July 1998, available at: http://www.geocities.com/~dagmawi/News_July23_Egypt.html.

rainfall is 1125 mm, whereas in Egypt it is 15 mm.[49] Therefore on different occasions Egypt has argued that, as a nation of limited endowments, it "relies totally on the waters of the Nile for its survival, because it is an arid desert land."[50] Egypt has sought to highlight this dearth of precipitation in defending its utilization of the Nile. It has attempted to differentiating between the Nile River and the Nile Basin. While the former carries between 90-100 billion cubic meters of water down the watercourse, the latter actually receives some 1,660 billion cubic meters of rainfall, 85 percent of which falls on the Ethiopian high plateau and the rest over the other upstream nations.[51] Rather than fixate on its water quota, Egypt contends that upstream countries would be better off focusing their own energies on exploitation of this untapped water supply, much of which is currently lost to seepage and evaporation.[52]Beyond it is also observed while the Lower riparian states maintained that upper riparian states do have other available water resources outside the Nile Basin area.

In defense of its existing uses and rights which cannot be subjected to upstream harm, Egypt builds its legal argument on the basis of successive

[49]www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014.
[50] Shams Al Din Al Hajjaji , 'The long empty canyon: A study of the old/new legal problems of the Nile basin', *Journal of Water Resources and Ocean Science*, vol. 2, no.5, 2013, p.146, available at; http://www.sciencepublishinggroup.com/j/wros.
[51]Accord or Discord on the Nile? - Part I, Int'l Water Law Project Blog, http://www.internationalwaterlaw.org/blog/2010/07/26/accord-or-discord-on-the-nile-%E2%80%93-part-i/ , last visited 17/03/2014.
[52] Ibid

legal notes and agreements. The crux of the argument submits that the Nile waters should flow to the lower riparian states of the Nile (Egypt and Sudan) without any impediment or diminution. Egypt considers any changing to the present status quo of utilization would violate the duty not to cause significant harm imposed on the Nile Basin countries by virtue of the stipulations of international law. Hence, the duty not to cause significant harm rule has been proposed and construed as a means for maintaining existing patterns of utilization irrespective of the fact that there is no all inclusive agreement among all of the Nile Basin states.[53]

From the forgoing, it is plain that downstream countries of the Nile perceive the duty not to cause significant harm rule as a basic guarantee for the historical and acquired rights which they believe have been established through continuous utilization of the resource prior to the upstream counterparts and as acquired rights obtained from successive notes and conventions, though it is unfortunately refuted by upper riparian countries especially Ethiopia.

On the other hand, the view of the upper riparian states appears to be different. Ethiopia does not acknowledge any existing treaty or other obligations preventing it from freely disposing of the Nile waters in its

[53] Interview with His Excellency Ambassador FissehaYeimer, Special Legal Advisor for the Minster of Foreign Affairs and former Director General for the international law directorate. December 2013.

territory. For their part, the upper riparian states on whose behalf Great Britain and other colonial powers had signed noninterference treaty obligations do not share the view of the lower riparian states on the perpetual nature of the present regime.[54] Upper riparian states consider the Egyptian defense based on historical rights an excuse to get the lion's share of the Nile water. This argument is considered to be prejudicing their water rights.[55] For example, the Agreement for the Full Utilization of the Nile between Egypt and Sudan aimed at full utilization of the Nile River only between those two nations. Ethiopia and the East African states were not invited to be part of the 1959 agreement.[56] According to Article 34 of the Vienna Convention on the Law of Treaties, a treaty does not create either obligations or rights for a third state without its consent".[57]

Therefore, Ethiopia is not bound by this agreement as she is not a party and also objected to this agreement during its negotiation stage in the 1950s. The east African nations have objected to the agreements on a number of

[54] B.A.Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems,* Graduate Institute of International Studies, Geneva, 1985, p.197

[55] British Yearbook of International Law, 1930, pp. 195-196, as cited by Mohammad Tufail Jawed, Rights of the Riparian, *Pakistan Horizon*, vol. 17, no. 2 (Second Quarter, 1964), p.147

[56] However it is possible to come in to the conclusion that the 1959 agreement incorporates possible future claims by other countries of the Nile as this is tacitly acknowledge within the new agreement of the two states.

[57] Vienna Convention on the Law of Treaties, adopted on May 22, 1969, entered into force on Jan. 27, 1980

occasions; for example, speaking to journalists on February 12, 2002, Energy Minister of Kenya Raila Odinga said that the 1929 Agreement should be renegotiated; "the three countries (Kenya, Uganda and Tanzania) were not independent and were under colonial rule. That is what makes the treaty unfair. Why should we be denied the use of our water in the name of conserving it for others downstream?"[58] Similarly much earlier in 1962, the Government of Tanganyika outlined its policy on the use of the waters of the Nile. The note reads that the provisions of the 1929 Agreement purporting to apply to the countries under British Administration are not binding on Tanganyika. At the same time, however, and recognizing the importance of the waters of the Nile that have their source in Lake Victoria to the governments and people of all riparian states, the Government of Tanganyika stated it is willing to enter into discussions with other interested governments at the appropriate time, with a view to formulating and agreeing on measures for the regulation and division of the waters in a manner that is just and equitable to all riparian states and the greatest benefit to all their peoples."[59]

These riparian states adopted the *Nyerere* doctrine ("clean slate" principle) and declared their intention not to be bound by these agreements.[60] The 1978

[58] Arthur Okoth-Owiro, supra note 45, p.15.
[59] Ibid.pp.14-15.
[60] In this regard, by a communication to the Secretary-General of the United Nations dated March 25, 1964, the Prime Minister of Kenya adopted the *Nyerere* doctrine and declared her intention not to be bound by that treaty. Look ,Ibid

Vienna Convention on Succession of States in Respect of Treaties, which applies to normal cases of state succession, incorporates the "clean slate" principle into its provisions. Specifically, Article 16 of the convention stipulates: "[A] newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of states relates."[61] In fact, Article 11 provides that state succession does not affect "a boundary established by a treaty" or the "obligations and rights established by a treaty and relating to the regime of a boundary."[62] The question of whether the 1929 Nile Waters Agreement falls within the ambit of Article 12, an exception to the "clean slate" doctrine, would seem to provide more fertile ground for disagreement.[63] However, the point remained that the upper riparian states of the Nile strongly maintained that Egypt and Sudan did not have the right to distribute the Nile water share without referring to other riparian states of the Nile Basin.

Although specific geographical, political, and economic contexts shape the legal discourse, the equitable utilization principle is typically advanced by

[61] Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, Article 16.
[62] Ibid. Art.11.
[63] Jeffrey D. Azarva, 'Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create A Transboundary Water Regime In The Nile Basin', *Temple International & Comparative Law Journal*, vol.25, 2011 p.473.

upper riparians, such as Ethiopia, looking to alter or increase the uses of an international watercourse in their respective jurisdictions.

Though Egypt has at different times clearly expressed that every country of the basin has an equitable right to the utilization of the resource of the Nile, she has also taken the position that existing utilization of the riparian states must not be compromised by future utilization of the basin states.[64] Egypt has tended to argue that the right to equitable utilization finds its limitation in the duty not to cause significant transboundary harm.[65] This position aims to protect Egypt's existing utilization of the resource of the Nile.

Upper riparians, in turn, have countered that this argument would amount to a system of prior appropriation and effectively preclude their own development. Therefore, the argument goes, it is the principle of equitable utilization that ultimately takes priority, with downstream harm being merely one factor to be considered in the determination of what is equitable and reasonable.[66] Ethiopia, for example, believes that a Nile agreement should be based on the principle of equitable utilization, and that the "no significant harm" principle

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[64] Jutta Brunnee and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, Vol. 43, no. 1, Winter 2002, pp.149-150.

[65] Egypt expressed reservations about "making the two principles equivalent" and noted that the "no harm rule" was "the cornerstone of any legal regime on international watercourses". Look Ibid, pp.149-150.

[66] Ibid. pp.149-150.

In this regard Ethiopia insisted that according primacy to the no harm rule would render meaningless the right to equitable and reasonable utilization and would disrupt the balance of the regime.

should only operate when a state has exceeded its equitable or reasonable use.[67] Egypt, on the other hand, believes that it has the right to the uninterrupted flow of the river through its territory; any measure that changes the status quo causes significant harm.[68]

And finally, although the Nile Basin Cooperative Framework Agreement includes a provision on the principle of the duty not to cause significant harm, it is noted that there has been disagreement among the riparian states as to the importance of including this rule under this framework convention. Ethiopia, in particular, has constantly argued against inclusion of the principle, understanding that it may jeopardize the interests of upper riparian states that do not utilize the Nile water resources on a par with the downstream countries.[69]

However, the Nile riparian states included the principle of the duty not to cause significant harm under the cooperative framework agreement in much the same way as the UN Watercourse Convention. The reason for the incorporation of this principle has mainly been related to the influence exerted by downstream countries and the willingness of the upper riparian states to

[67] Country paper, Ethiopia, Water Resources Management of the Nile Basin: Basis for Cooperation 9-10 (Feb.24-27, 1997) (unpublished paper prepared for the Fifth Nile Conference, on file with Geo, International Environmental Law Rev.).
[68] Carroll, supra note 43, p.290.
[69] An interview conducted with Ato Fekahmed Negash, the Directorate Director for Boundary and Transboundary River at the FDRE ministry of Water, Irrigation and Energy. October 2013.

acquiesce to such measure as a gesture of developing partnership and trust, but most importantly, there was also a wider perception among all participating states that the principle constitutes a rule of customary international law.[70] But it is interesting to note that though the principle was included, the lower riparian states ultimately decided not to sign the CFA.

A further inclusion of the concept of water security under the CFA could as well be cited as a compromise, although, in the end, its exact essence and scope was subjected to different interpretations and hence engendered conflict about proper application of the concept in the basin.[71] Though Nile Basin states recognize the vital importance of water security to each of them, no consensus was reached on Article 14(b), which reads as follows: "not to significantly affect the water security of any other Nile Basin State, all countries agreed to this proposal except Egypt and Sudan". Egypt proposed that Article 14(b) should be replaced by the following wording: "(b) not to adversely affect the water security and current uses and rights of any other Nile Basin State".[72] The lower riparian states of the Nile sought to maintain their existing uses through this theory, whereas the upper riparian states insisted that there should not be any privileged protection provided for existing uses but rather that protection should be equally provided for existing and potential uses.

[70] Ibid.
[71] Ibid.
[72] Agreement on the Nile River Basin Cooperative Framework, supra note 5, Art.14(b).

The question here is how the parties can possibly apply the duty not to cause significant harm, while they hold such different positions and attitudes with regard to the definition of the duty. Evidently, when the application of the duty not to cause significant harm is considered in the specific context of the legal and developmental realty in the Nile Basin, one must see and give due consideration to all of the contesting positions taken by the riparian states and evaluate the same in light of the dictates of international watercourses law.

2.2 Examination of the Positions under International Water Law

The framework of international water law has reinforced separate and competitive identities among Nile Basin states. It has also served to reinforce self-interested and ultimately unconvincing, legal arguments.[73]

It is not uncommon for states taking different stands on different occasions in relation to the theories and principles of state sovereignty and international watercourses law. States fundamentally strive to protect their interest in utilizing their share in transboundary water resources. In this regard, the disputes that the United States of America with Mexico and Canada are illustrative. The US Department of State defended its rights on the basis of the theory of absolute territorial sovereignty (i.e., the equivalent of the Harmon Doctrine) in its disputes with Mexico regarding the waters of the Rio Grande.

[73]Jutta Brunnee and Stephen J. Toope, 'The Changing Nile Basin Regime: Does Law Matter?' *Harvard International Law Journal*, vol. 43, no. 1, 2002, p.148.

The US submitted that there was no international law which imposed a limitation on riparian states and which dictated how the states should utilize the water resource.[74] In this case the USA is an upper riparian state, as the Rio Grande River flows from southwestern Colorado in the United States to the Gulf of Mexico. Having thus set out its legal position, as viewed by the United States, the declaration concluded that the US was ready to act "in accordance with high principles of equity and with friendly sentiments which should exist between two neighbors".[75] But, in another case, the US took a position which contradicted its legal position regarding the waters of the Rio Grande. In a dispute with Canada, the US embraced a form of the limited territorial sovereignty or integrity principle.

The unresolved relationship between two core principles of international water law, "equitable utilization" and "no significant harm," has allowed watercourse states to maintain irreconcilable positions.[76] As stated earlier, the same is true for the Nile Basin countries. While the upper Nile states have conventionally based their claims on the principle of equitable and reasonable utilization, the lower riparian states have always tried to base their arguments on the duty not to cause harm rule, believing that this principle will preserve pre-existing patterns of utilization of the resources of the Nile River.

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[74] Godana, supra note 54, p.33.
[75] Ibid.p.33.
[76] Brunee et al, sura note 64, p.148.

While it is not readily apparent from a simple reading of the relevant provisions of the UN Watercourse Convention, it has been widely accepted that the convention has to some degree subordinated the duty not to cause significant harm to the principle of equitable and reasonable utilization.[77] In fact careful reading of Article 5, 6 and 7 of the convention should lead to the conclusion that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable and reasonable utilization. Yet this should in no way be viewed as favoring upstream riparians in all circumstances. But what can be agreed is that the principle of equitable and reasonable utilization is the guiding principle of international law since the Helsinki Rules were issued in 1966, duly recognizes, and is based on, the equality of all the riparians in the use of the shared watercourse.[78]

It is evident that the downstream riparians could be harmed by changes in water quality and quantity caused by uses in upstream locations. However it is much less obvious, and generally not recognized, that the upstream riparians can be harmed by the potential foreclosure of their future use of water caused by the prior use and the claiming of rights by downstream riparians.[79]

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[77] Bourne 1997, Caflisch 1998, Paisley 2002, McCaffrey 2007, Salman 2007—all as cited by Salman M.A. Salman, Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses, *Water International*, vol. 35, no. 4, July 2010, Rutledge Taylor & Francis Group. p. 355.
[78] Salman, supra note 29, p.9.
[79] Ibid.p.9.

All of the agreements made in regard to the water of the Nile are of limited scope in their application. None of them managed to involve all the basin states, and all were concluded mainly to secure and safeguard the interests of the two lower riparian states, particularly Egypt. While Egypt and Sudan continue to rely on the 1929 and 1959 agreements by adamantly maintaining that the treaties' provisions remain binding, the upper riparian states have made their own position clear. They will not be bound by such treaties.[80] Here we have to note that these treaties are bilateral, which means that they cannot legitimately be perceived to regulate all of the Nile waters and all of the basin states. These instruments approach the problems in the basin in a splintered manner.[81]

The lower watercourse states' quest to maintain the status quo, on the one hand, and the need for a new water accord, called for by the upper states, on the other, have jeopardized the potential to reach a mutual agreement about proper application of the duty not to cause significant harm.

If one follows the argument put forward by Egypt, it is possible to reach the conclusion that upstream countries in the Nile Basin may be precluded from developing the water resources of the Nile forever. However in resent periods especially after the coming in to power of Mr. Abdul Fattah al-Sisi the position taken by Egypt seems changing and the three states able to sign a

[80] Azarva, supra note 63**,** p.470.
[81] Mohammed Abdo, supra note 10 , p.51.

preliminary deal on sharing water from the Nile River in the capital city of Sudan.[82] A rational approach would have to be devised to understand how the two apparently conflicting principles operate in real settings, and to identify what scales of existing utilization would be protected, if any, and under what circumstances.

2.3 Factors Considered in the Application of the Duty not to Cause Significant Harm

The operation of the "no significant harm" principle requires examination of all the relevant conditions of the watercourse and its riparian states. For example, in applying the equitable use concept in allocating water resources, the question is not what an equitable use is for that particular state, but rather what constitutes equitable use in relation to other states using the same watercourse.

Obviously, the scope of a state's right to equitable use depends upon the facts and circumstances of each individual case, and specifically upon weighing of several relevant factors. Article 6 of the UN Watercourse Convention specifically provides a non-exhaustive list of factors and circumstances that includes geographic and hydrologic factors, social and economic needs, effects of the use of the watercourse on another state, existing and potential

[82] http://www.bbc.com/news/world-africa-32016763 BBC news titled with "Egypt, Ethiopia and Sudan sign deal to end Nile dispute" last visited 25/03/2015

uses, conservation and economic factors, and availability of alternatives.[83] Therefore, the principle of equitable utilization does not provide carte blanche authorization to states to utilize the resource as they deem fit; instead, the objective of the principle is to attain optimal and sustainable utilization thereof by considering all of the factors that are essential to apply the principle.[84]

In the same way, the application of the duty not to cause significant harm requires a careful construction of conceptual interpretation that facilitates its effective application. This is particularly important given that no clear guidance has been stipulated under the UN Watercourse Convention or the Nile River Basin Cooperative Framework Agreement (CFA), except that which flows from the combined reading of Article 5 and 7 of the convention. In the following parts, an attempt will be made to discuss a few of the factors that may have to be considered in the application of the rule in the Nile River Basin- without in any way denying the problematic nature and status of its relationship with the equitable and reasonable use doctrine - now settled in leading literatures on international watercourses law.

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[83] David J. Lazerwitz, The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses, *Global Legal Studies Journal*, Vol. 1:, 1993, p.259.

[84] Mohammed S. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, *Colombia journal of international Environmental Law and Policy*, vol. 18, no.2, 2007, p.344.

2.3.1 Efforts of the Basin States to avoid, minimize and mitigate Harm

The duty not to cause significant harm rule sets limitations on the sovereign freedom of states to exploit their water resources. A state may be held responsible under international law for acts that breach international obligations concerning the use of shared water resources. As the duty 'not to cause significant harm' is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm, what states are required to do is to take due care to avoid, minimize and mitigate harm. A state's compliance with this obligation is not dependent solely on harm not being caused, but rather determined by a country's reasonable conduct in terms of preventative behavior to avoid the harm in question.[85]

Here, what a watercourse state is required to do is to take only those measures of prevention that are deemed appropriate according, for example, to a state's capabilities. The obligation of due diligence contained in Article 7 of the UN watercourse convention sets the threshold for lawful state activity. It is not intended to guarantee that in utilizing an international watercourse, significant harm will not occur. It is an obligation of conduct, not an obligation of result. What the obligation entails is that a watercourse state whose use causes significant harm can be deemed to have breached its obligation to exercise

[85] This was confirmed by the International Court of Justice decision in the Pulp Mills on the River Uruguay case. See also User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule, visited 13/12/2013.

due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it. Therefore, "[t]he State may be responsible . . . for not enacting necessary legislation, for not enforcing its laws . . . or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it".[86]

The type of harm that needs to be avoided is qualified by the term 'significant'- defined as a real impairment of a use, established by objective evidence. For harm to qualify as 'significant' it must not be trivial in nature but it need not rise to the level of being substantial; this is determined on a case-by-case basis. The 'significant' threshold excludes mere inconveniences or minor disturbances that states are expected to tolerate in conformity with the legal rule of 'good neighborliness'.[87]

The issue at stake is whether a state may avoid responsibility for causing harm to another riparian state by adopting conduct that could reasonably be expected or required in order to prevent the harm, or whether the

[86] International Law Commission (1994)**,** *Report of the Commission to the General Assembly on the work of its forty-sixth session*, vol. II, Part II, United Nations, New York and Geneva, pp.101-103.

[87] User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule, visited 13/12/2013.

responsibility of the state is involved, regardless of its conduct, in any case in which the prohibited harm has taken place.[88]

In fact, the extent to which a basin state has made efforts to avoid, minimize and mitigate harm can be seen from different viewpoints. The first is where watercourse states have suffered significant harm due to a state's utilization while the utilization of state concerned is within the margin of the equitable and reasonable utilization principle. The second is where a state's utilization is beyond the equitable uses principle and causes significant harm to the other watercourse states. In cases where a state's utilization is beyond its equitable entitlement and causes significant harm, the state whose actions cause significant harm would be required to stop its activities. Such activities are clearly prohibited under international customary law, the 1997 UN Watercourse Convention and the Nile River Basin Cooperative Framework Agreement.

But, even when a state acts within the margin of its equitable entitlement, it is also important to look at the extent to which the state in question has made an attempt to avoid, minimize and mitigate the possible causing of such harm to other Nile riparian states. If significant harm is caused even after making all appropriate efforts to avoid, minimize and mitigate harm, the liability which

[88] Maurizio Arcari, 'The Codification of The Law of International Watercourses: The Draft Articles Adopted by the International Law Commission', pp.17-18, available at: http://dspace.unav.es/dspace/bitstream/10171/21504/1/ADI_XIII_1997.

will be imposed upon the watercourse state will be different than it would be if the state had not exerted such effort. This derives from the due diligence nature of the obligation not to cause significant harm.[89]

2.3.2 Existing Utilization: Falling within the Margin of Equitable Utilization?

As touched upon in the preceding paragraph, this can be taken as an important factor requiring serious consideration while applying the duty not to cause significant harm in the Nile Basin. Obviously, trans-boundary water resources are the shared amenities of all countries in the basin. No nation will have a monopoly over such waters.

In the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), the Court notes utilization of a river could not be considered to be equitable and reasonable if the interests of the other riparian State in the

[89]The duty not to cause significant harm is considered to be a due diligence obligation of watercourse states. The obligation of due diligence contained in article 7 sets the threshold for lawful state activity. It is not intended to guarantee that in utilizing an international watercourse significant harm will not occur. It is an obligation of conduct, not an obligation of result. The obligation entails that a watercourse state whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from mitigating it.

shared resource…were not taken into account.[90] Therefore, basin countries shall only use water in an equitable and reasonable manner without affecting the equally equitable rights of other countries. This could be easily undertaken when basin states agree to manage and utilize the water resource among them. However, water allocation agreements are not easy to achieve.

The Nile Basin states may have different views about what constitutes utilization in an equitable and reasonable manner. For example, Egypt in the present days uses the greatest share of the Nile's water and may consider its utilization equitable because it has no other source of water that can be substituted for the Nile. Ethiopia, on the other hand, may have a different view of what constitutes equitable use. Ethiopia may believe that it is entitled to a greater share of Nile water as the country contributes the lion's share of the Nile waters.[91]

Though contribution of water from each watercourse state is not clearly stipulated as a relevant factor for determining equitable utilization under Article 6 of the UN Watercourse Convention, the Nile River Basin Cooperative Framework Agreement's Article 4(2) (h) explicitly states that the contribution of each basin state to the waters of the Nile River system will be

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[90] International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, Par, 177, it can be reached at http://www.icj-cij.org/docket/files/135/15877.pdf last consulted 27/02/2015.

[91] Carroll, supra note 43, p.288.

one among other factor in determining equitable utilization among the basin states of the Nile.

As discussed earlier, the application of equitable and reasonable utilization in a particular watercourse does not necessarily prohibit utilization that causes harm unless it exceeds the limits of the using state's equitable share. While the Drafting Committee of the UN Watercourse Convention had finally agreed on a text for Article 7, it was generally agreed that, in certain circumstances, 'equitable and reasonable utilization' of an international watercourse might still involve some significant harm to another watercourse state, so long as the activity is within the parameters permitted by Article 5 on reasonable and equitable utilization. It was equally true that the state should not be relieved from the obligation to consider the interests of the other riparian states. That obligation is the exercise of due diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse states.[92] If, despite the equitable and reasonable utilization of the water resource and the exercise of due diligence, significant harm was caused to another watercourse state, the parties should consult, first, to verify that the use of the watercourse was reasonable and equitable; secondly, to check whether some ad hoc adjustments to the utilization could eliminate or

[92] International Law Commission (1994), *Summary records of the meetings of the forty-sixth session*
2 May-22 July, vol. 1,pp.167-168.

minimize the harm; and, finally, in case harm has occurred, to decide whether compensation would be possible for the victim watercourse state.[93]

Thus, even if a state's utilization of the Nile causes significant harm to another watercourse state, if such utilization falls within the margin of equitable and reasonable utilization as permitted under international law, the injuring state will not be required to stop its utilization of the resource. However, an important limitation could perhaps be that in cases where a use entails significant harm to human health and safety, this may be understood to be inherently inequitable and unreasonable.[94] The state where the harm originates may be required to negotiate with the state where the harm is experience in order to provide the injured state adequate compensation or other relief (for example, a modification in the operation of the activity so as to avoid or minimize future damages).[95]

However the application of this factor remains in question as there are no rules or guidelines that clearly state the water shares of the Nile Basin states. In fact this is also a common problem for other watercourses. As there is no comprehensive water allocation agreement exists among the riparian states; it

[93] Ibid.p.168.
[94] Arcari, supra note 88, p.23.
[95]For these conclusions, see the report of the Working Group on International Liability established by the ILC at its 1996 session, in Report of the International Law Commission on the Work of its Forty-Eight Session, General Assembly Official Records, 51st Session, Supplement. no.10, UN Doc.A/51/10, p.235- 327 (in particular pp. 235-236 and 270-272). As noted by Ibid. pp.24-25.

is not easy to apply this factor effectively. Despite the existence of such water allocation agreements, if the riparian states were able to negotiate with the view of expanding their utilization, the Nile Basin states might able to use the resources fairly. It might be possible to assess the actions of the watercourse states and their utilization of the water, if the basin states were able to come together to negotiate.

2.3.3 The Type and Extent of Harm Suffered

In the application of the duty not to cause significant harm, there is a need to assess the extent of damage (harm) suffered by watercourse states through the acts of other watercourse states. One has to define clearly the extent and type of damage forbidden by the duty not to cause significant harm. It is important to ascertain the threshold at which the harmful consequences of the use of an international watercourse become legally relevant to the application of the rule, and is therefore prohibited.[96]

One determination of the extent of damage depends on the agreement of watercourse states as to the allocation of the Nile resource among them and a mechanism that clearly stipulates the harms that may be experienced by the other states due to excessive over-utilization of the watercourse states outside the allocated share of water. In order to determine this degree of harm, the riparian states of the Nile must clearly stipulate the possible forms of harm

[96] Ibid.p.17.

and formulate the corresponding degree of harm by providing evaluative parameters.

Although it may require some extra effort from basin states, it is conceivable that in situations where the harm concerns the quantity of water, the extent of damage could be assessed by specifying the amount of water that the other watercourse states will lose as a result of the acts of the harming state. For example, the riparian states of the Nile may agree that if the harming state's utilization causes a loss of X amount of water quantity of the share (or equitable entitlement) of the other watercourse countries, it will be considered to constitute significant harm to the other states. This will help them to clearly state the threshold of harm happening to the other watercourse states.

But the issue at the heart of international water quantity disputes is the fact that there are no comprehensive rules that are internationally accepted for allocating shared water resources or their benefits. This makes it difficult to come up with guidelines. Beyond the problem is compounded by the fact that water is a vital resource that is mobile and fluctuates in time and in space, ignoring political boundaries.[97] Despite the challenges, it is essential to come up with an allocations agreement or a similar arrangement which indicates in some form the equitable entitlement of each state to the waters or beneficial uses of the shared resource. This would serve to determine how much harm

[97] Aaron T. Wolf, Criteria for equitable allocations: The heart of international water conflict, *Natural Resources Forum*, vol. 23(1), 1999, pp. 3-30.

may have been suffered by a watercourse state of the Nile Basin through the utilization of the harming state beyond the allocated share or its recognized equitable entitlement.

With regard to harms related to the quality of water, the Nile Basin states need an agreement as to what extent of harm will be deemed tolerable and what degree of harm will not. However, it should be mentioned here that an assessment of harm relating to quality is complicated and requires a detailed scientific study.

2.3.4 Other Relevant Factors

In addition, there may be other relevant issues in the application of the duty not to cause significant harm in the Nile Basin. The watercourses states are expected to clearly state how far the factors in question affect the harming state and have influenced it to not comply with its duty not to cause significant harm. Here again, due diligence is required. For example various circumstances may force a state to utilize the watercourse beyond its presumed entitlement or allocated share of the resources of the Nile.

As the nature of the duty not to cause significant harm is a due diligence obligation, it is very important to consider whether the state in question is performing this obligation with due care. Evidently, even when a state performs its activities with due diligence, there may be circumstances that

force it to utilize the shared water resource beyond its presumed rights or allocated shares. In such cases, it is important to examine how far the state concerned has exerted efforts to tackle and possibly avoid over-utilization of the resource. For example let assume that one riparian state A of the Nile utilize the water resource of the Nile beyond its allocated share and due to this one among other riparian state B of the Nile suffers harm which amount to "significant". In this case the harming state A, may stipulate that it is due to a difficult circumstance that force the state concerned to utilize exceeding the allocated share. In such like cases the watercourse states of the Nile have to assess whether such like situation will force a state A to utilize the shared resource beyond what is allocated to it? This may be measured taking in to account objective standards set forth by the watercourse states. If it is finally found that the harming state in normal course of things does have the option to resort to other mechanism and able to culminate the significant harm happened to the other riparian state B of the Nile; in such cases state A may not avail itself as a means to minimize the obligation incurred because of its over utilization of the shared watercourse resources which causes "significant harm". However I argue that if it is proved through objective standards set forth by the watercourse states that the harming state A has not any other option than doing such like harm to the state B, the liability imposed upon state A due to noncompliance of the duty not to cause significant harm have to be minimized or its obligation to pay compensation through subsequent

negotiation of these watercourse states have to take in to consider the attentiveness of the state A.

Therefore, if the state concerned is able to prove that there are factors that prevent it from performing its duty to the other watercourse states, despite fulfillment of the due diligence obligation, these factors may be taken into account. However, this could only happen in cases where the watercourse states or any other organ established for settling such issues - including the Nile River Basin Commission which will be established to handle such issues - finds that this is a valid and justified act, such that the state in question was forced by that factor not to perform its obligations emanating from this principle. Therefore, the duty imposed upon the harming state may be reduced and, if there are damages assessed, the assessed compensation payment may be reduced.

3. Possible Problems in the Application of the Duty not to Cause Significant Harm in the Basin

3.1 Disagreement in the Allocation of the Shared Water

A water allocation agreement among basin states is important for effective application of the duty not to cause significant harm. However, it is not easy for the Nile Basin states to enter into such an agreement.

The upper riparian states of the Nile Basin argue that the 'no significant harm' principle must be applied from the perspective that there is no prior right that should be maintained automatically. In operational fact, and on the basis of a correct reading of the pertinent provisions of the UN Watercourse Convention and the CFA, the principle is implemented as if there are no established rights. Even where a pattern of previous utilization exists, this must simply be seen as one factor among many in the allocation of a shared resource among the Nile Basin states. Therefore the application of the principle may also be affected by the diverse interest of the Upper and lower of the riparian states of the Nile with regard to the allocation of the shared water.

3.2 Divergence in Defining Terms

There is a disagreement among the Nile Basin states as to application of the principle. This originates in the states' divergent views in defining the 'no significant harm' rule. The upper and lower riparian states of the Nile want to maintain their respective interests, and for this reason, they define the principle so as to maintain these interests. It is observed that upper riparian states fail to give primacy and considerable due regard to the already established rights of the lower riparian states. These countries state that the 'no significant harm' rule is not a basis for the maintenance of the states' historic rights, but rather a duty that will be imposed upon watercourse states after proper allocation of water resources has taken place. Such differences

between the upper and lower riparian states' viewpoints were also enshrined when these states drafted the Cooperative Framework Agreement.[98] Thus, downstream countries campaigned to maintain their existing utilization through the concept of water security.

The other divergence in the Nile riparian states' viewpoints relates to the way in which the degree of harm rule is read. There is no specific guideline about the percentage of reduction of the flow of water that amounts to harm with a threshold of 'significant'. This has its own effect on proper application of the duty not to cause significant harm in the Nile Basin.

3.3 Weight Accorded for Each of the Factors

Unless there is agreement among the riparian states of the Nile about how much weight to accord to each factor, it will be difficult for them to implement the principle effectively in the basin. Here, the analysis should not be limited to the factors that apply to the duty not to cause significant harm, but rather expanded to look at the factors enshrined in the equitable and reasonable utilization principle. For example one of the purposes and objectives of the Nile Basin Commission is "to promote and facilitate the implementation of the principles, rights and obligations provided for in the

[98]At the end of the negotiations, no consensus was reached on article 14(b), which reads as follows: "not to significantly affect the water security of any other Nile Basin State, all countries agreed to this proposal except Egypt and Sudan. Egypt proposed that Article 14(b) should be replaced by the following wording: (b) not to adversely affect the water security and current uses and rights of any other Nile Basin State."

Framework".[99] Therefore, the Commission is expected to promote and facilitate a mechanism that will help it to perform this mandate.

After an agreement about equitable and reasonable utilization is reached among the riparian states of the Nile, through detail scientific study of the factors a standard assessment of weight should be provided for all of these factors so that it is easy to apply the principles. Despite the ease with which this may be stated, it is up to the states of the Nile to come with agreements in this regard. A comprehensive agreement will affect the proper application of the duty not to cause significant harm in the Nile Basin.

Conclusion

The application of the principle of the duty not to cause significant harm under international watercourse law remains controversial. Especially, in the absence of detailed, legally-binding rules developed with a view to applying the principle in a basin, implementation will be problematic. This is true for the Nile River Basin as well. Though Article 7 of the UN Watercourse Convention provides that states have to 'take all appropriate measures to prevent the causing of significant harm', this has been difficult to apply in practice. If 'harm' is caused, Article 7(2) also provides that a watercourse state 'take all appropriate measures' to eliminate or mitigate the harm. But it will be difficult to determine what action is adequate to satisfy the duty to

[99] Supra note 72, Art.16(a).

take ‘all appropriate measures.’ Beyond this, the term ‘harm’ has not been defined. Does the use of more water by Ethiopia constitute harm to Egypt, for example? Or does “harm” only refer to serious pollution of the waters that would in turn affect a downstream state? There is no adequate guidance here. Thus, the application of the duty not to cause significant harm will pit upstream and downstream states against each other.

Therefore in order to effectively apply the duty not to cause significant harm in the Nile Basin we must see significant harm in more holistic terms and acknowledge that it can emanate from both upper and lower riparian states. The subject requires a detailed study of the basin countries’ interests, including their shared history. The hydro-politics of the Nile is to a great extent based on the colonial history of the Nile Basin. After the British gained effective control over Egypt in 1882, they were quick to realize the importance of the Nile River for their continued existence in Egypt. The treaties were concluded mainly by the British colonial government on behalf of Egypt and gave Egypt more rights to the waters of the Nile than other riparian countries. This situation has been replicated by the lower riparian states: Egypt and Sudan.

Application of the “no significant harm” rule requires the examination of all the relevant conditions of the watercourse and its riparian states. It requires the consideration of various factors that are relevant to effective application in

that particular watercourse. These factors might include a basin state's efforts to avoid, minimize and mitigate harm caused by existing utilization; whether current utilization is falling within the margin of equitable utilization and the type and extent of damage sustained.

It is recommended that the Nile Basin states should agree to set aside their differences and work together for their common good. The Nile Basin states need to agree on how to define the duty not to cause significant harm with regard to the threshold of prohibited harm. Beyond the basin states are advised to agree on the rules and procedures for the effective implementation of the duty not to cause significant harm in the Nile Basin. In cases where the reasonable and beneficial uses of all watercourse states cannot be fully realized, "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse state's equality of rights. These adjustments or accommodations should be based on equity, and can best be achieved on the basis of specific watercourse agreements. Therefore Nile Basin states should negotiate. This will enable them to effectively implement basic principles, including the duty not to cause significant harm.

For effective application of the duty not to cause significant harm in the Nile Basin it is advisable to have a water allocation agreement among the riparian states. However, it has not proved easy for the states to come to such an

agreement. The upper riparian states believe that the principle must be applied based on the perspective that there were no prior utilization to be maintained; accordingly the principle should be implemented as if there were no established usage and associated rights. Even where previous utilization exists, it must be seen as only one factor among many in the allocation of the shared watercourse resource among the Nile Basin states. In contrast, lower riparian states, and Egypt in particular, seek to maintain their right to existing utilizations based on agreements such as the 1929 and 1959 treaties. Thus, the application of the principle is affected by the diverse interest and position of the upper and lower riparian states of the Nile.

The Right of Silence and Privilege against Self-Incrimination in Criminal Proceedings: An Appraisal of the Ethiopian Legal Framework

Wendmagegn Gebre Fantaye♣

Abstract

Individuals can, theoretically, lead their lives without ever having to declare any kind of information or testimony to any other person or institution. However, there are a number of occasions whereby they may be lawfully required to provide information or testimony to a state. One such situation is during a criminal proceeding. In view of that, anyone suspected or accused of crime may be confronted with state authorities and thus may be questioned as to an alleged crime. Yet, persons suspected or accused of an alleged crime are entitled to certain minimum basic guarantees during criminal proceedings. Two such guarantees are the right of silence and the privilege against self-incrimination. The precise reach of the right to silence and the privilege against self-incrimination in criminal proceedings is both unclear and thorny. This article examines what they mean according to international standards. It primarily appraises the Ethiopian legal framework relating to such rights in light of the experiences of different countries of various legal traditions and some major international and regional human rights instruments.

Key Terms: the right of silence, self-incrimination, criminal proceedings, Ethiopia

♣ Lecturer of Laws at University of Gondar, LL.B, LL.M specialized in Criminal Justice and Human Rights Law. The author would like to thank Ato Worku Yaze , Asst. Professor, Bahir Dar University School of Law, for his scholarly expertise and professional guidance from the inception to the completion of this article. The author can be reached at <wondearse@gmail.com>.

Introduction

The right of silence and the privilege against self-incrimination give protection to individuals against both the executive and judicial arms of governments not to be compelled to give evidence or to supply information that would tend to be self-incriminatory. This means that public authorities are prohibited from engaging in any form of coercion or compulsion, whether direct or indirect, physical or psychological, in obtaining evidence during criminal proceedings. The right of silence is the right of any individual not to speak or answer questions or provide information during police interrogations and trial; it is a protection given to individuals during criminal proceedings against any coercion and adverse consequences of not speaking (remaining silent).[1] The term "privilege" has different meanings. A narrower use of the term refers to "rules preserving a right to keep certain relevant information [and some other evidence] from one's adversaries…" and includes the privilege against self-incrimination.[2] As will be discussed in greater detail, the privilege against self-incrimination is currently considered as not merely a

[1]Asche, A. *et al*, 'The Right to Silence', 2002, p.4, retrieved from < http://lawdigitalcommons.bc.edu/lsfp/226 > [Accessed on 14 May, 2012]. [Hereinafter Asche *et al]*. However, it is not the right not to be questioned rather it is a right not to be compelled to answer questions and produce documents, though the later is controversial.

[2] Friedman, R., *The Elements of Evidence*, 3rd ed., West, a Thomson Business, USA, 2004, p.378.

rule of evidence but rather as a substantive human right.[3] Hence, like the right to silence, the privilege against self-incrimination in this article is to be understood as one of the substantive rights in the field of human rights law. The privilege against self-incrimination, which has much similarity to the right of silence, can be understood as "…an immunity against compulsion to give evidence or to supply information that would tend to prove one's own guilt."[4] That is, it is the right not to be compelled to incriminate oneself and to be protected against any pressure to make a statement or produce some evidence.[5] The right of silence and privilege against self-incrimination may seem one and the same thing. However, there are many areas of difference between the two that will be dealt with in this article.

The notion that persons suspected or accused of committing/omitting a crime are entitled to certain minimum basic guarantees, such as the right of silence and the privilege against self-incrimination, is incorporated in the different human rights instruments. The right of silence and the privilege against self-incrimination, apart from ensuring fair trial in criminal proceedings, are guaranteed as part of substantive human rights in many human rights agreements. Thus, they are generally recognized in international and regional

[3] Atkinson, R., 'The Abrogation of the Privilege against Self-incrimination', *Queensland Law Reform Commission*, 2004, retrieved from <LawReform.Commission@justice.qld.gov.au > [Accessed on 14 May, 2012]. [Hereinafter Atkinson].
[4] Ibid, p.2.
[5] Trechsel, Stefan, *Human Rights in criminal Proceedings*, Vol.XII/3, Oxford University press Inc., New York, USA, 2009, p.341. [Hereinafter Trechsel].

human rights instruments. They are also found in the domestic laws of many countries of the world. It is self-evident that they lie at the heart of the concept of a fair procedure in criminal proceedings. Consequently, they give safeguards to many other rights of individuals whenever they are confronted with public authorities.

The rights are grand constitutional rights to be protected during criminal proceedings in Ethiopia. The 1995 Federal Democratic Republic of Ethiopian (FDRE) Constitution and some other domestic laws, as well, have provided for these two rights. A critical appraisal of such laws dealing with these rights will be made in section three of the article. Despite the clear acceptance of the rights in Ethiopia, there are many debatable and unsettled issues relating to the right of silence and the privilege against self-incrimination. One such issue is the FDRE Constitution, in Art.19 (2), does not clearly impose an obligation on public authorities to warn a suspect (or an accused) of his right of silence. The Constitution merely requires the authorities to inform a suspect (or the accused) the consequence of making of statements ―police are only obligated to explain that any statement to be made by an arrested person may be used as evidence against him in court of law. But, warning a suspect or an accused about the consequences of his statements is not sufficient to protect the right of silence. It is also necessary to warn him, from the outset, that he has the right to remain silent. This right may be fully exercised if it is additionally accompanied by warning. Without this

additional warning, any confession or admission by a suspect or an accused is likely to be made under compulsion. Had a suspect or an accused been informed that he could remain silent, he might avoid confession or admission of guilt. An awareness of the consequences of making statements cannot be an assurance of real understanding and intelligent exercise of the right of silence. That is, a suspect or an accused may make statements without being aware of his right to remain silent.

Another dilemma with respect to the right of silence is that the Constitution does not explicitly give the right to accused persons. Unlike for arrested persons, there is no counter provision mentioning this same right in Art.20 of the Constitution which deals with accused persons. Does this mean that accused persons would not be entitled to the right to remain silent? This question will be scrutinized in section three of this article. Another issue on the subject of the right of silence is in relation to its scope. Art.19 (2) of the Constitution talks only about statements ―evidences having testimonial nature. Is the protection against compulsion through this right limited to statements? This is also a problem in case of the privilege against self-incrimination. Can a suspect or an accused person be protected against compulsion to produce real or physical evidence?

There may be also many doubts relating to the privilege against self-incrimination in Ethiopia. For instance, can threats, promises, inducements or

even tricks be considered as coercion within the meaning of Art.19 (5) of the Constitution so that individuals would be protected against such improper methods (of obtaining evidence) by the privilege against self-incrimination? Can there be an exception to the privilege against self-incrimination in Ethiopia in case of public interest like for terrorism cases? The 2009 Ethiopian Anti- Terrorism Proclamation No.652, in Art.23 (1), provides that "…intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered," shall be admissible in court. By virtue of this provision, any evidence gathered in whatever method, be it through torture, threat, promise, inducement or coercion, seems to be admissible before court of law in case of crimes of terrorism. Can public safety or interest justify torture which is one of the very few absolute rights? Should a suspect or the accused not always be protected against torture through the privilege against self-incrimination even when the case would involve public interest?

The aim of this article is, therefore, to appraise the Ethiopian legal framework relating to the right of silence and the privilege against self-incrimination in light of some most important international and regional human rights instruments. In order to shed light on issues about which the FDRE Constitution is not clear, an attempt has been made, where appropriate, to cite the experiences of foreign jurisdictions that may, at least in the opinion of the author, contribute to an understanding of the right of silence and privilege

against self-incrimination in the Ethiopian criminal justice system. The primary objective of this article would be to initiate a debate within the academic circle whose concerted effort could no doubt facilitate the enhancement of understanding and proper application of the right of silence and the privilege against self-incrimination in Ethiopia during criminal proceedings.

1. Right of Silence and The Privilege against Self-Incrimination in Criminal Proceedings

1.1. Right of Silence

1.1.1. Definition

The right of silence, also called the right to remain silent, can be defined as "…the absence of an obligation to speak… [or the right] … to withhold information from … authorities… [and thus it is] …the absence of any legal obligation to help … authorities" in producing evidence during criminal proceedings.[6] It is most often the "…right of the accused or the defendant to refuse to comment or provide an answer when questioned, either prior to or during legal proceedings in a court of law."[7] The right of silence is, hence, the right of any individual, mainly the right of a suspect or an accused (and also a

[6] Nyeap, S., 'Curtailment of Right to Silence: Pre-trial Disclosure of Defence', 2005, p.2, retrieved from <http://www.isrcl.org/Papers/van%20Dijkhorst.pdf> [Accessed on 14 May, 2012]. [Hereinafter Nyeap].

[7] Right to Remain Silent,
retrieved from < http://www.mirandarights.org/righttoremainsilent.html> [Accessed on 14 May, 2012].

witness), in a criminal proceeding, not to speak. Widely, "[t]he right to remain silent includes the right to refrain from making both oral and written statements."[8] However, a suspect or one accused of a crime is not always entitled to withhold all types of information. Points relating to the limits or scope of right of silence will be further discussed in sub-section 1.1.4.

The right of silence is a combination of a number of rights and privileges recognized by a law. Some people claim that there is no such particular or single right to be called "right of silence" and thus, "… there is no single entitlement that can be pointed to."[9] They argue that the "right to silence", in fact, "…is really a right not to 'self-incriminate', or privilege against self-incrimination, i.e. not to provide … evidence that can later be used against the suspect in court."[10] But, though they might seem similar, there exists a distinction between the right of silence and privilege against self-incrimination.

> *The right of silence refers to a disparate number of immunities, including a specific immunity from having adverse comment made on failure to give evidence at trial. Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to*

[8] Hails, J., *Criminal Procedure*, 3rd ed., Copper House Publishing Company, USA, 2003, p.97. [Hereinafter Hails].
[9] Boyce, P., 'Privilege against Self-incrimination', 2001, p.5, retrieved from <http://www.qlrc.qld.gov.au/reports/r59.pdf-for> [Accessed on 19 May, 2012].
[10] Nyeap, *supra* note 6, p.5.

assume that they are all different ways of expressing the same principle, whereas in fact they are not.[11]

The author will try to bring to light the distinction or similarity between the right of silence and privilege against self-incrimination later in this article. The above quotation shows that the right of silence covers several immunities, like the immunity from being adversely commented for failing to give evidence or immunity against the drawing of an adverse inference from silence. Therefore, the right of silence "describes a group of rights which arise at different points in the criminal justice system".[12] Generally, the right is a protection given to a person during criminal proceedings from coercion and adverse consequences of not speaking or remaining silent. The right protects individuals against both the executive and judicial arms of governments not to be forced to speak and against adverse inference from their silence (against implied assumption of guilt).[13] However, right of silence is not the right not to be questioned rather it is a right not to be compelled to answer questions.[14] Persons suspected or accused of a crime are supposed to be confronted with state authorities and thus may be questioned as to an alleged crime. But, one cannot be compelled to answer any question which might be self-incriminatory. Why? This question will be answered while dealing with the rationales of the right as well as

[11] *Id*, pp.2-3.
[12] Asche *et al*, *supra* note 1.
[13] Hails, *supra* note 8.
[14] Dijkhorst, V., 'The Right of Silence: Is the Game Worth the Candle?, 2000, p.7, retrieved from <http://www.isrcl.org/Papers/van%20Dijkhorst.pd> [Accessed on 14 May, 2012]. [Hereinafter Dijkhorst].

may incidentally be answered in discussing any point relating to the right.

1.1.2. Origin and Historical Development

The origin of right of silence is not clearly known. Some literature indicates that the idea of the right can be traced back to the Roman times. As Skinnider and Gordon indicated, "[t]he Latin phrase *'nemo tenetur prodere seipsum'*, meaning that no person should be compelled to betray himself in public, dates back to Roman times."[15] Nonetheless, during the Roman times, the idea of the right of silence was used to prevent the abuse of power by officials and thus it was not considered as a substantive right of anyone who was suspected or accused of a crime.[16] The right was well established in common law legal tradition, particularly in England. The right of silence was not totally available to accused persons in courts during trial until 1898, the year when England adopted the Criminal Evidence Act allowing the accused to be a competent but not compellable witness.[17] That is, the accused had the right to testify under oath but not the obligation. But, the right of a suspect, in England, to refuse to answer official questions during police interrogations was clearly accepted in 1912.[18] Then, by the (late) 19th century, "[m]ost

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[15] Skinnider, E. and Gordon, F., 'The Right to Silence – International Norms and Domestic Realities', 2001, p.7, retrieved from <http://www.icclr.law.ubc.ca/Publications/Reports/Silence-BeijingfinalOct15.PDF> [Accessed on 19 May, 2012]. [Hereinafter Skinnider and Gordon].

[16] *Ibid*.

[17] *Ibid.*

[18] *Supra* note 7.

former English colonies [including USA] adopted the right to remain silent during pre-trial interviews and at trial as part of their system of criminal procedure [and]… all continue to adhere to it, though subject to some modification."[19]

It is now clear that the right of silence was developed in the adversarial common law country, England, and spread to other common law countries. Due to the increased emphasis on due process protection in international law, the right of silence also spread across continental Europe ―though initially the right was unfamiliar to inquisitorial system ―throughout the late 20th century.[20] Consequently, today, the right is recognized in major international human rights instruments and thus is adhered by many countries of various legal traditions.

1.1.3. The Right of Silence in Adversarial and Inquisitorial Systems

Under the adversarial system ―which is based on the due process model of criminal justice―the right of silence is given to every person, including persons who are suspected or accused of having committed/omitted a crime. The right is, indeed, well rooted in common law legal system and connected to the adversarial nature of the system. An adversarial system of justice greatly emphasizes on rights of individuals suspected or accused of a crime not to contribute to a case against them. Accordingly, the right of silence

[19] *Ibid.*
[20] *Ibid.*

prohibits the state/prosecution from compelling of such individuals to speak as to any evidence which might be used to determine a case at issue. That is because, in an adversarial system, suspects or accused persons "…should not contribute to their own conviction by being forced to speak."[21] Rather, it is the state which is supposed to collect evidence legally and without looking from the suspect or accused. Because, "[t]he state has…all the resources necessary to investigate a matter" and thus "[t]here is little [or no] need to interfere with the right to silence…."[22] In adversarial system, the justification for the right of silence is on the basis that the "…burden of proof…lies with the prosecution… [that]…must prove its case against the defendant beyond reasonable doubt."[23] More interestingly, the suspect or accused "…could not be called to make his defense until the prosecution has ascertained a *prima facie* case against him."[24] Besides not to be forced to speak, suspected or accused persons, in most adversarial jurisdictions, have the right not to have adverse inference drawn against them from their refusal to supply information.[25] While a suspected or an accused person, in an adversarial

[21] "Advantages and Disadvantages of the Adversarial System in Criminal proceedings" retrieved from <http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-3crimadvers.pdf> [Accessed on 19 May, 2012].
[22] *Ibid*.
[23] *Ibid*; consequently, the state or prosecution bears the legal burden to prove beyond reasonable doubt that the suspect or accused has committed/omitted the crime. That is, the suspect or accused is not obliged to assist the prosecution in any way to establish his own guilt.
[24] Nyeap, *supra* note 6.
[25] *Ibid*.

system, cannot be questioned by a police, prosecutor or judge unless he chooses to do so, he may, however, freely decide to testify, in which case he would be subjected to undertaking of oath and cross-examination and thus could be found guilty of perjury.[26] Since high emphasis is given to procedural rights in adversarial system, including the safeguard of exclusionary rule, the right of silence of suspected or accused persons has an important place in criminal proceedings.

In an inquisitorial system―which is mainly based on crime control model of criminal justice ―since all the component of criminal justice system, i.e. the police, the prosecutor, the defense lawyer, the court and the suspect or accused must help to secure justice, the right to silence of a suspect or an accused is compromised.[27] In inquisitorial system, the responsibility of finding the truth lies with an official body that acts with (judicial) authority and collects evidence that would be used both for and against a suspected or accused person.[28] Accordingly, suspected or accused persons are forced to cooperate in doing justice. As a result, there is undermining of the right of silence and reversal/shifting of burden of proof. As often as not, there is

[26] "Inquisitorial System" retrieved from < http://www.answers.com/topic/inquisitorial-system> [Accessed on 19 May, 2012].

[27] Acharya, M., 'The Adversarial v. Inquisitorial Models of Justice', *Kathmandu School of Law*, Vol.1, p.1, retrieved from < http://www.nylslawreview.com/wordpress/wp-content/uploads/2012/02/Findley-article.pdf> [Accessed on 20 May, 2012]. [Hereinafter Acharya].

[28] Nyeap, *supra* note 8.

"…greater pressure on an accused to explain away certain evidence gathered against him, irrespective of how probative that evidence may be, subtly shifting the onus [burden of proof] away from the prosecution."[29] Thus, an accused person may be convicted if he fails to defend himself without the prosecution being required to prove the case beyond reasonable doubt. Usually, "[s]ilence does not make a good impression."[30] As the process is supervised by a judge/court, the refusal of a suspect or an accused, though has the right to silence, to cooperate may entail adverse inference.[31] Moreover, suspected or accused persons can be compelled to give a statement albeit the statement is not subject to cross-examination by the prosecutor and not given under oath.[32] Since they are compelled to give a statement, "…almost all continental defendants choose to testify" and also their silence influences their detention.[33]

1.1.4. Scope and Cognate Rights

The scope of the right of silence is also contentious. In fact, in most cases, the right is not an absolute right to which individuals are always entitled. A suspect or an accused has no right to withhold all types of information. For instance, he has to provide his name and some other details to the police. In this regard, "[t]here is no right to remain anonymous and therefore a person

[29] *Ibid*.
[30] Acharya, *supra* note 27, p.25.
[31] *Id*, p.8.
[32] *Supra* note 26.
[33]Dijkhorst, *supra* note 14, p.23.

can legitimately be compelled to reveal his or her identity."[34] Does the right to silence extend to the right to be warned? Since the right is not necessarily known by every suspect or accused (and witness), it imposes a duty on authorities to give a formal warning to such persons. The right to silence is one of the Miranda rights, well known in the U.S. legal system, in which a police officer is required to tell a suspect as he has the right to remain silent and that anything that the suspect says could be used against him in a court of law.[35] To reiterate, the right to silence protects suspected or accused persons throughout the entire criminal process, which includes interrogation, trial and sentencing hearings.[36] So, the right applies to every phase of the criminal process, either prior to or during legal proceedings in a court.

However, the right of silence is only limited to testimonial or oral evidence. It "…only protects defendants from compelled production of ―testimonial evidence. The right does not extend to physical evidence…."[37] So, a suspect or an accused may be required/compelled to generate physical or real evidence. Like the privilege against self-incrimination, the right of silence

[34] Trechsel, *supra* note 5, pp.354-55.
[35] *Id*, p.352.
[36] Stein, A., 'Self-incrimination', 2011, p. 5, retrieved from <http://www.flpdinsyria.com/docs/human.pdf> [Accessed on 19 May, 2012]. [Hereinafter Stein].
[37] *Id*, p.7; The common law draws a distinction between information, which an individual is asked to communicate in the context of an inquiry or an investigation, and "real" evidence provided by the individual, which has an actual physical existence apart from the individual's act of communication. The right of silence protects the former because of its "testimonial" nature.

applies to self-incriminating information of a testimonial kind; it will not protect individuals from the obligation to provide certain other kinds of real or physical evidence.[38] Real evidence is already in existence; it exists as a physical fact, and is not susceptible of misrepresentation in any relevant sense.[39] The right of silence is "designed not to provide a shield against conviction but to provide a shield against conviction by testimony wrung out of the mouth of the offender."[40] Therefore, the right of silence is limited to information, the provision of which depends on an act of communication on the part of the individual from whom the information is sought. Yet, the right is controversial with regard to documentary evidence. If a suspect or an accused is required to testify about the document's nature and contents, it may be violation of the right of silence as that may lead to self-incriminating statements.[41]

The right of silence is only confined to criminal trials. Hence, "[t]he rule against adverse inference from the defendant's silence only applies in criminal trials."[42] It follows that, in civil cases and other non-criminal proceedings, there is no right of silence and thus adverse inferences are generally allowed. Why the right does not exist in civil and other non-

[38] *Ibid*.
[39] Atkinson, *supra* note 3, p.36.
[40] *Id*, p.35.
[41] Stein, *supra* note 36, p.8.
[42] *Ibid*.

criminal proceedings is "…because those proceedings do not involve innocents who face the possibility of wrongful conviction and punishment by incriminating themselves."[43] Also, the right to silence is most often not applicable during public emergency in many countries. In view of that, "[u]nder the emergency exception to the right to silence, a self-incriminating statement that the police obtain from a suspect while attending an ongoing crime-related emergency is admissible as evidence at the suspect's subsequent trial regardless of whether the suspect received the Miranda warnings."[44]

Still more on scope, the right of silence is given only to natural persons—not to corporate entities. It also does not extend to a corporate agent or employee who is required by law to provide documents or other information tending to incriminate the corporation.[45]

> *A corporate agent or employee can only claim the right in his personal capacity; and even this personal entitlement is qualified by the 'collective entity' rule. Under this rule, a person's assumption of a corporate job entails a duty to produce corporate documents regardless of the self-incriminating consequences to the person.*[46]
>
> Obviously, the collective entity rule seems to be a serious departure from the right to silence. It can still be justified as a means of increasing the law enforcers' access to corporate documents so as to

[43] *Ibid.*
[44] *Id*, p.9.
[45] *Id*, p.10.
[46] *Ibid.*

ensure corporate liability for fraud and other illegal activities that often go undetected.[47]

It can be recalled that the right to silence is not a single right but consists of a number of many substantive and procedural rights. As a result, it is linked to several rights. The right is fundamentally linked to the principle of presumption of innocence in criminal matters. How the right of silence is connected to presumption of innocence is that "…silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent."[48] Hence, both right of silence and the presumption of innocence require that the accused may not be compelled to testify against himself to prove his innocence (or his own guilt). No adverse inference should also be drawn from his silence as that would be against the principle of presumption of innocence.

The right of silence is also related to the privilege against self-incrimination. The underlying reason for granting the right of silence is to avoid any statements or "testimonial" communications that would incriminate oneself.[49] It consists of different immunities that protect one against self-incrimination. If statements of a suspected or an accused person would not result in subjecting himself to a criminal prosecution

[47] *Ibid*.

[48] Skinnider and Gordon, *supra* note 15, p.5. The right/principle of presumption of innocence imposes "...the burden of proof during trial on the prosecution and that all public officials shall maintain a presumption of innocence, including judges, prosecutors and the police" *(Ibid*). So, "[t]he corollary of the presumption of innocence is that the accused has the right to remain silent both before and during his trial" (*Id*, p.10). Thus, presumption of innocence requires that all public authorities when carrying out their duties should not start with the predetermined idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and even any reasonable doubt should benefit the accused.

[49] Hails, *supra* note 8, p.93.

(self-incrimination), he has no right to remain silent, to refuse to answer questions.[50] To all intents and purposes, "[t]he privilege against self-incrimination confers an immunity from an obligation to provide information tending to prove one's own guilt."[51] Thus, when a person exercises his right to silence, he is indirectly entitled to the privilege against self-incrimination.

The right of silence is also much related to the freedom of expression. The right to freedom of expression may not necessarily need to be understood as a "positive right" that allows individuals, among others, to speak. The "…right to freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself, i.e. to remain silent."[52] As a consequence, if a person is compelled to speak or to answer questions, it is not only his right of silence that would be violated but also his right to freedom of expression would be violated.

1.1.5. Justifications

There are many rationales justifying the right of silence. One justification is to prevent an abuse of power of a state.[53] Public authorities may use their power to oppress a suspect or an accused or a witness and compel that person to provide evidence against himself. Hence, "…there is considerable potential for internal corruption and misuse of … powers if they are not strictly regulated and controlled."[54] Since a conviction based on an abuse of a

[50] *Ibid*.
[51] Atkinson, *supra* note 3, p.7.
[52] Trechsel, *supra* note 5, p.343.
[53] Dijkhorst, *supra* note 14, p.16.
[54] Atkinson, *supra* note 4, p.24.

criminal proceeding, be it by a police, prosecution or court, would be miscarriage of justice, any room for abusive tactics of questioning of suspects of crime by zealous questioners should be regulated. In this regard, the right of silence prevents any risk of considerable physical and psychological pressure being applied to suspected or accused persons to cooperate by making incriminating statements.

Another justification is the principle of fairness. As Jackson notes, "... it is in principle unfair to require accused persons to do anything that might incriminate themselves…."[55] So, when a person is required to incriminate himself by his own mouth, apart from being an intrusion on the individual's dignity, it would be against the principle of fairness. The right to silence is designed to give protection to individuals against improper compulsion by public authorities. It is not only limited to duress, it is all about fair procedure.[56] Hence, the right gives protection to witnesses and suspected or accused persons against any improper compulsion by authorities thereby contributing to the avoidance of miscarriages of justice. The other justification is related to burden of proof in criminal proceedings. The right not to incriminate one's self, through exercising one's right of silence, presupposes that the prosecution in a criminal proceeding must prove the case

[55] Jackson, J., 'Re-conceptualizing the Right of Silence as an Effective Fair Trial Standard', *International and Comparative Law Quarterly*, Vol.58, pp.835–861, 2009, p.842, retrieved from<http://www.cslr.org.uk/index.php?option=com_journal&task=article&mode=pdf&format=raw&id=60> [Accessed on 19 May, 2012]. [Hereinafter Jackson].

[56] Trechsel, *supra* note 5, p.348.

against the accused without resorting to evidence obtained through methods of coercion or oppression.[57] In this sense, as noted previously, the right of silence is closely linked to the presumption of innocence.

The right is also justified on the basis of respect for the autonomy or free will of an individual. Pretty well, "[t]he right not to incriminate oneself is primarily concerned …with respecting the will of an accused person to remain silent."[58] And so, individuals should be granted the freedom to choose whether to speak or not in criminal proceedings. That is, "…any positive participation by the accused in the criminal process must be on a voluntary basis."[59] However, most of the time, "…persons facing criminal allegations are placed in a position where their freedom to choose whether to speak or not is extremely limited, all the more so when they are being questioned by the police in custody."[60] As a result, there would obviously be a difficulty in determining whether participation is made on the basis of voluntariness or not.

1.1.6. Limitations and Applications

Even though the right of silence can be justified for the above reasons, it operates within a set of limitations. The right suffers from the following strong criticisms. Jeremy Bentham stalwartly argued that the right of silence is only advantageous to suspects who are factually guilty while he claimed

[57] Jackson, *supra* note 55.
[58] Trechsel, *supra* note 5, p.348.
[59] Jackson, *supra* note 55.
[60] *Ibid*.

that innocent suspects do not exercise the right for a suspect can only gain advantage from the right if he exercises it.[61] He argued that "[i]nnocence [sic] claims the right of speaking, as guilt invokes the privilege of silence."[62] But, Bentham's idea is opposed by proponents of the right who have typically argued that "… it provides a safe haven for some innocent suspects, who would otherwise make false confessions."[63] There are also some proponents who hold that the right protects the interests of both factually guilty and innocent persons by protecting social interests other than accurate adjudication, such as rights to privacy and not to be subject to oppressive and abusive powers of public authorities.[64] Some people also argue that "…there is no value in protecting a guilty person from self-incrimination."[65] Nevertheless, as discussed above, since the right of silence prevents undue intrusion of government on one's personal autonomy—despite the fact that one may be factually guilty or innocent—any attempt of overstating or undermining the value of the right to such categories of suspects seems implausible.

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[61] Seidmann, D., 'The Effects of a Right to Silence', *The Review of Economic Studies*, Vol. 72, No. 2, pp. 593-614, 2005, p.593, retrieved from <http://www.jstor.org/stable/3700664> [Accessed on 20 May, 2012]. [Hereinafter Seidmann].
[62] *Supra* note 21.
[63] Seidmann, *supra* note 61, p.594.
[64] *Ibid*.
[65] Jackson, *supra* note 55, p.843.

Some critics against the right also indicate that "…it reduces the aggregate conviction rate by offering criminals a better alternative than confession."[66] This argument is justified on the premise that the right of silence does not encourage confession. Much sturdily, such critics have argued that "… a significant proportion of those who currently evade conviction by exercising the right would confess and then be convicted if the right were abolished."[67] However, there is no strong empirical evidence that shows "…reliance on the right to silence increases the chance of acquittal."[68]

Instead, "[t]he right to silence provides a safeguard for the vulnerable suspects against police misconduct as well as wrongful conviction."[69] An argument to support this assertion is that people of different backgrounds, having difficulty in understanding of a certain language or culture, may use their right to silence as an important protection against being misunderstood or misrepresented.[70] Thus, the right of silence may avoid an innocent person's conviction rather than solely increasing the acquittal of guilty suspects. Critics of the right to silence have further argued that "… it impedes truth-seeking to the exclusive benefit of criminals…."[71] In this sense, the right is seen as an unnecessary barrier to the findings of truth in criminal proceedings. That is

[66] Seidmann, *supra* note 61, p.607.
[67] *Id*, p.594.
[68] *Supra* note 21.
[69] Nyeap, *supra* note 6, pp.1-2.
[70] *Supra* note 21.
[71] Seidmann, *supra* note 61, p.607.

because it prevents law enforcement officers and courts or juries from using potentially informative evidence that could have been important to determine a given case earlier thereby promoting efficiency in administration of criminal justice.

The practical application of the right of silence greatly varies from jurisdiction to jurisdiction notwithstanding the right is recognized in both common law adversarial and continental inquisitorial systems. There is even a difference in the application of the right among common law countries. For instance, in England, though a suspected person has the right to be informed about his right to remain silent[72], the court or the jury can draw an adverse inference from the suspect's silence.[73] In England, several legislations provide for permissive adverse inference from an accused's silence. For example, the Criminal Justice and Public Order Act of 1994 provides that "…a court may draw adverse inference from a failure to mention any fact relied on in a defence, if that matter could reasonably have been mentioned to the investigating police officer."[74] Art.3 of the Criminal Evidence Order of 1988 also allows courts or juries, in determining whether an accused is guilty of a crime charged or not, to draw negative/adverse inferences from the

[72] Trechsel, *supra* note 5, pp.357-58.
[73] Seidmann, *supra* note 61, pp.594-96.
[74] Lambert, R., 'The Right to Silence: Exceptions Relevant to a Criminal Practitioner', 2010, p.13, retrieved from < http://www.criminalcle.net.au/attachments/Right_To_Silence_paper.pdf > [Accessed on 20 May, 2012].

silence of the accused.[75] Thus, in England, remaining silent may entail conviction upon adverse inference by a court or jury.

In the USA, under the Fifth Amendment to the Constitution, the Miranda warnings,[76] among which the right of silence is one type, are strictly required to be given to every criminal suspect prior to interrogation.[77] As a result, police is obligated to inform suspects that they are entitled to the right to remain silent. In the USA, "[b]ecause interrogation of a suspect carries with it a risk of coercion; confessions obtained by police are subject to constitutional attack under the Self-Incrimination Clause of the Fifth Amendment."[78] To avoid such a risk of coercion, suspects are guaranteed with legal counsel/attorney, which is also one of the Miranda rights.

However, the right to remain silent may exceptionally and "legitimately" be violated for reason of "public safety". In *New York v. Quarles* (1984)

[75] Trechsel, *supra* note 5, pp.356-57.

[76] Carmen, R., *Criminal procedure: Law and Practice*, 7th ed., Thomson Wadsworth, Belmont, USA, 2007, p.399. Miranda rights are well known in the U.S. legal system. These are rights that law enforcement officers must inform to suspects whenever there are interrogations. They must warn the suspects before any interrogation saying as follows: (1) you have a right to remain silent; (2) Anything you say can be used against you in a court of law;(3) You have a right to the presence of an attorney; (4) if you cannot afford an attorney, one will be appointed for you prior to questioning; (5) you may terminate this interview at any time (*Ibid*).

[77] Bradley, C., *Criminal Procedure: A Worldwide Study*, 2nd ed., Carolina Academic Press, Durham, North Carolina, USA, 2007, p.533 [Hereinafter Bradley].

[78] Scheb,J. and Scheb II, J., *Criminal Procedure*, 4th ed., Thomson Wadsworth, Belmont, USA, 2006, p.91.

case[79], a rape suspect, who was believed to be armed, was caught and asked by police to tell where he put the gun. The gun was finally found. The police asked the suspect without telling his right of silence. Both the statement of the suspect and the gun were admissible before the court though the suspect was not informed of his right of silence. The court, in accepting the statement of the suspect and the gun, stated that there is a "public safety" exception to Miranda rights in case of weapons or destructive devices.[80]

A suspected or accused person is not entitled to invoke his right of silence once he has waived it. In this respect, a suspected or accused person does not necessarily need to sign a written waiver and does not even need to specifically state that he wishes to waive. Thus, unless a suspected person expressly states that he wants to remain silent, merely answering of police questions after being informed of his right of silence is a sufficient warning of right of silence.[81] But, in the USA, courts or juries are prohibited from adversely inferring from an accused's silence.[82] Particularly, the prosecution's attempt to comment on the defendant's silence or testimony is strictly evaluated and then prohibited if that would mislead the juries and is found

[79] Bradley, *supra* note 77, p.535.
[80] *Ibid.*
[81] *Ibid.*
[82] Dijkhorst, *supra* note 14, p.12. Accordingly, "[t]he prosecution must prove all the essential elements of the crime. The accused may remain silent and offer no defense, relying wholly on the presumption of innocence for acquittal. No adverse inference of guilt may be drawn from his failure to testify… neither the judge nor the prosecutor may comment on such failure" (*Ibid*).

violating an accused's Fifth guarantees of right of silence and the privilege against self-incrimination.[83]

In France, in contrast, during a preliminary investigation, the police may question suspected persons but there are no formal rules governing questioning at this stage.[84] As a result, the right to silence appears to be not well protected during police interrogation at such early stage. Moreover, though a suspected or accused person has the right to remain silent, adverse inference from silence is permissible.[85]

In connection to permissible adverse inferences, some argue that "…any inferences from silence operate as a means of compulsion, shifting the burden of proof from prosecution to the accused."[86] Indeed, the right of silence would be useless if adverse inference is permitted. If there is permission of adverse inference from one's silence, the law cannot grant a right of silence rather penalizes a person who chooses to exercise it.

1.2. The Privilege against Self-Incrimination

1.2.1. Definition and Nature

The privilege against self-incrimination is "…the right not to be compelled to incriminate oneself, to be protected against any pressure to make a statement

[83] Ruebner, R., *Illinois Criminal Procedure*, 4th ed., Matthew Bender, USA, 2004, pp.193-202.
[84] Bradley, *supra* note 77, pp.216-17.
[85] Dijkhorst, *supra* note 14, p.22.
[86] Skinnider and Gordon, *supra* note 15, p.4.

[or produce document]."[87] The term "privilege against self-incrimination" "…refers to the situation of someone who enjoys enhanced protection."[88] So, this privilege gives individuals immunity against any self-incriminatory statements or evidences which could subject them to criminal prosecution. Literally, "[s]elf-incrimination means subjecting oneself to criminal prosecution."[89] Simply stated, the privilege against self-incrimination is "…an immunity against compulsion to give evidence or to supply information that would tend to prove one's own guilt."[90] Does the privilege protect individuals from direct incrimination only or it also protects from indirect incrimination? Unsurprisingly, "[t]he privilege against self-incrimination protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature."[91] Generally speaking, the privilege against self-incrimination can be described as a guarantee that no person "shall be compelled in any criminal case to be a witness against himself."[92] So, the privilege is an essential right that protects one from incriminating himself by being forced to be a witness to testify against himself.

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[87] Trechsel, *supra* note 5.
[88] *Ibid*.
[89] Hails, *supra* note 8, p.93.
[90] Atkinson, *supra* note 3.
[91] *Ibid*.
[92] Langbein, J., 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law', *Michigan Law Review*, Vol. 92, pp. 1047-1085 , 1994, p.1047, retrieved from <http://digitalcommons.law.yale.edu/fss_papers/550 > [Accessed on 20 May, 2012].

Are the right to silence and the privilege against self-incrimination one and the same thing? Earlier in this article, it has been noted that the right of silence is not a single right but the one that is composed of several immunities. There is similarity between the two rights since the right of silence is aimed at, *inter alia*, avoiding of self-incrimination. Yet, "…the privilege against self-incrimination and the right to silence are not co-extensive…the privilege [against self-incrimination] protects the right of witnesses not to incriminate themselves, not their right to remain silent."[93] One notable difference between the two rights is also that "... [t]he right to silence is narrower in that it refers to acoustic communication alone, the right not to speak. [But], [t]he privilege [against self-incrimination] clearly [includes] further in that it is not limited to verbal expression. …it also protects against pressure to produce documents."[94] However, as mentioned above, the right of silence may also protect one against the pressure to produce documents, particularly if one is required to testify about the content and nature of the document which could subject him to self-incrimination. More precisely, the privilege against self-incrimination can be defined as the "…right not to be obliged to produce evidence against oneself, [thus the privilege against self-incrimination is] …the broader right encompassing the right to silence."[95] Regarding their area of interface, albeit blurred, "[t]he

[93] Atkinson, *supra* note 3.
[94] Trechsel, *supra* note 5, p.342.
[95] *Ibid.*

right of silence is closely related to the privilege against self-incrimination—the latter concerns the threat of coercion in order to make an accused yield certain information, whereas the former concerns the drawing of adverse inferences when an accused fails to testify or to answer questions…."[96]

The privilege against self-incrimination, currently, embodies the nature of human rights. In modern democratic societies, it has come to be considered as a significant factor in the protection of individual liberties. To further illustrate, "[t]he privilege [against self-incrimination] in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them."[97] As a result, "…it is now considered as not merely a rule of evidence but rather as a substantive right."[98] Thus, the privilege against self-incrimination is one of the substantive rights in the field of human rights law.

1.2.2. Origin and Historical Development

Like the right of silence, there is uncertainty about the historical origin of the privilege against self-incrimination. Some scholars maintain that the privilege against self-incrimination can be traced back to Talmudic law. In ancient Talmudic or Judaic law, there was a maxim, having relevance to the privilege

[96] Ashworth, A., 'Self-incrimination in European Human Rights Law—a Pregnant Pragmatism?', 2008, p.754, retrieved from <http://www.nylslawreview.com/wordpress/wp-content/uploads/2012/02/Findley-article.pdf> [Accessed on 17 May, 2012]. [Hereinafter Ashworth].

[97] Atkinson, *supra* note 3.

[98] *Ibid.*

against self-incrimination, that "a man cannot represent himself as guilty, or as a transgressor…."[99] But, some people claim that tracing the modern guarantee of the privilege against self-incrimination back to such ancient time is difficult. Much literature rather agrees that the privilege, having its origin in the common law, can clearly be traced back to the beginning of the second half of the 17th century, specifically in 1641, when the Star Chamber and High Commission in England were abolished and the courts' *ex officio oath* procedure was prohibited.[100] By the second half of the seventeenth century, the privilege was well established at common law, which affirmed the principle *nemo tenetur accusare seipsum* ―Latin to mean "no man is bound to accuse himself."[101] Currently, as pointed out before, the privilege against self-incrimination is often referred to as a substantive right and is recognized under international and regional human rights instruments.

1.2.3. Privilege against Self-Incrimination in Adversarial and Inquisitorial Systems

As has been discussed, unlike in an inquisitorial system, a suspect or an accused has no obligation to cooperate in evidence gathering/investigation in adversarial system. In an adversarial system, "…truth is found by contest

[99] Ciardiello, D., 'Seeking Refuge in the Fifth Amendment: The Applicability of the Privilege Against Self-Incrimination to Individuals who Risk Incrimination Outside the United States', *Fordham International Law Journal,* Vol. 15, No. 3, pp.722-70, 1991, pp.724-25, retrieved from < http://ir.lawnet.fordham.edu/ilj > [Accessed on 23 May, 2012].
[100] Trechsel, *supra* note 5.
[101] Atkinson, *supra* note 3, p.9.

rather than cooperation between the suspect and the prosecution."[102] Cooperation between prosecution and suspect or accused is in theory unknown to an adversarial procedure. In essence, adversarial system is "…reluctant to allow one party to use its adversary as a source of evidence, as this would disturb the balance and theoretical equality between the parties."[103] As a result, a suspect or an accused cannot be compelled in any way to testify against himself in a way that would potentially incriminate himself and thus it is the government/prosecution that has always the burden of proof. However, in an inquisitorial system a suspect or an accused can be compelled to give a statement that might incriminate himself.[104] Moreover, "…the adversarial system places greater emphasis on the process than on simple truth-finding."[105] Justice is done when there is procedural fairness. Therefore, any evidence obtained through improper means, like through compulsion, is susceptible to exclusion. Hence, self incriminatory evidence of a suspect or an accused person given under pressure/compulsion is most of the time intolerable. Nevertheless, in an inquisitorial system, justice can be done even

[102] Ringnalda, A., 'Inquisitorial or adversarial? The role of the Scottish Prosecutor and Special Defenses', *Utrecht Law Review*, Vol. 6, No. 1, pp.119-1140, 2010, p.136, retrieved from < http://www.utrechtlawreview.org/> [Accessed on 14 May, 2012].
[103] *Id*, p.120.
[104] Acharya, *supra* note 27, p.25.
[105] Findley, K., 'Adversarial Inquisitions: Rethinking the Search for the Truth', *New York Law School Law Review*, Vol. 56, pp.911-41, 2011/12, p.929, retrieved from <http://www.nylslawreview.com/wordpress/wp-content/uploads/2012/02/Findley-article.pdf> [Accessed on 23 May, 2012].

by compelling a suspect or an accused so long as the truth can be ascertained in that way.

In a nutshell, the adversarial system places emphasis on the individual rights of a suspect or an accused, whereas the inquisitorial system places the rights of a suspect or an accused secondary to the search for truth.[106] Consequently, an individual's right to the privilege against self-incrimination may be violated in an inquisitorial system while that does not work in an adversarial system.

1.2.4. Scope and Related Rights

The points to be said in relation to the scope and cognate rights to the privilege against self-incrimination are very similar to that of the right of silence discussed at length so far. For this reason, opening a wide discussion here on the scope and cognate rights to the privilege against self-incrimination would be repetition of what has been said. Thus, the author would like to remind readers to apply the scope and related rights to the right of silence, discussed previously, to the privilege against self-incrimination *mutatis mutandis*. For emphasis, however, some points about the scope and related rights to the privilege against self-incrimination follow: Like the right of silence, the privilege against self-incrimination is limited to the context of criminal proceedings. It does not apply outside of criminal proceedings as it is

[106] *Supra* note 26.

self-evident from the term "self-incrimination".[107] It does not prohibit the use of compulsory questioning powers in the course of non-criminal proceedings. However, the privilege may exist even in non-criminal proceedings whenever a circumstance seems to give rise to self-incrimination in any future criminal proceedings. The privilege "… enables a defendant to refuse to testify at a criminal trial and privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[108] The further point that needs to be mentioned is that the privilege against self-incrimination is usually limited to oral or testimonial evidence as opposed to real or physical evidence.[109]

> *The right not to incriminate oneself is primarily concerned…with respecting the will of an accused person to remain silent. As commonly understood …. it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*[110]

The reference, in the above quotation, to materials that have an existence "independent of the will of the suspect" suggests evidence that can be found

[107] Trechsel, *supra* note 5, p.349.
[108] *Supra* note 7.
[109] Ashworth, *supra* note 96, p.758.
[110] *Id*, pp.758-59.

without the cooperation of a suspect. What is protected by the privilege against self-incrimination is compulsory securing of those evidences that require the cooperation of the suspect. Hence, the privilege against self-incrimination should be seen as applying to "…a certain means of obtaining information, a means that requires co-operation, and not to a particular type of information—answers to questions as opposed to physical material."[111] From this view, since bodily samples can be obtained without the cooperation of the individual, i.e., by using force to take them, they can therefore be differentiated from attempts to force someone to speak or to hand over documents. However, some documents such as diaries, though materially exist independent of a suspect, are protected by the privilege against self-incrimination since they contain statements which could incriminate a person who wrote them.[112]

The privilege against self-incrimination is also limited to a person required to testify or speak. That is to say, "[i]t applies only to statements that would result in criminal liability for the person making them and cannot be used to refuse to give answers [or testify] that would incriminate a friend."[113]

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[111] *Id*, p.759; generally, a suspected or accused person is protected by the privilege against self-incrimination for testimonial evidence and thus cannot refuse to cooperate in obtaining non-testimonial evidence even though it may be incriminating.
[112] Hails, *supra* note 8, p.93.
[113] *Ibid*.

A suspected or accused person is not entitled to invoke his right of privilege against self-incrimination once he has waived it. As a general rule, a suspect or an accused can waive any of his rights under the privilege against self-incrimination. The waiver, however, "…must be voluntary and informed in order to be considered effective."[114] Based on the waiver, the prosecution can use the suspect's or the accused's admissions to discredit his testimony and other evidence contradicting those admissions so long as the suspect or accused waived, without any compulsion, knowingly and voluntarily.[115]

With regard to those rights that are related to the privilege against self-incrimination, the rights that are closely related to the right of silence, highlighted previously, are also similarly linked to the privilege against self-incrimination. Therefore, the right not to incriminate oneself is closely linked to the presumption of innocence, free will of individuals, freedom of expression, liberty, privacy, etc. As noted above, the privilege against self-incrimination, apart from being one type of substantive human right, gives safeguards to many other rights of individuals whenever they are confronted with public authorities.

1.2.5. Justifications

A number of different rationales ―both historical and modern ―can justify the privilege against self-incrimination. Many, if not all, of the rationales for

[114] Stein, *supra* note 36, p.18.
[115] *Ibid*.

the right to silence can justify the privilege against self-incrimination. Generally, the rationales that have most often been put forward for the privilege against self-incrimination can be divided into two main categories ―systemic and individual. While systemic rationales "…are related to the criminal justice system and view the privilege as a means of achieving goals within that system, rather than as an end in itself, [individual rationales,] which are based on notions of human rights and respect for human dignity and individuality, are concerned with the privilege's intrinsic value."[116]

One of the commonly accepted systemic rationales for the privilege is to curb state power. That is because, "[t]he right against self-incrimination forbids the government from compelling any person to give testimonial evidence that would likely incriminate him during a subsequent criminal case."[117] Thus, the privilege enables individuals to protect themselves against oppressive governmental power by refusing to testify or to answer official questions where that might incriminate themselves in future criminal proceedings. Another systemic rationale is to prevent conviction founded on a false confession. Basically, "[t]his rationale is related to the principle that evidence of a confession is inadmissible unless it can be shown that the confession was made voluntarily. It is based on the premise that a confession made under

[116] Atkinson, *supra* note 3, p.23.
[117] *Supra* note 7.

duress is likely to be unreliable."[118] So, the privilege against self-incrimination —by forbidding public authorities from compelling an individual to confess or testify against himself —is used to avoid a false confession which is mostly a basis for conviction.

An added systemic rationale that justifies the privilege against self-incrimination is to protect the quality of evidence as well as the integrity or credibility of the judiciary.

> *…someone who is compelled to give self-incriminating evidence is likely to be tempted to lie in order to protect his or her own interests…without the privilege, there would therefore be a risk that unreliable evidence would adversely affect the ability of a court or jury to determine the facts of a particular case and that the credibility of the trial system would be compromised.*[119]

Consequently, the privilege against self-incrimination is necessary to ensure the reliability of evidence during criminal verdicts thereby protecting the reputation of the court system.

The second category of rationales is related to individual rationales. These categories of rationales are the privilege's intrinsic values that are based on notions of human rights and respect for human dignity. Generally, each of these rationales "…underpins the concept of the privilege against self

[118] Atkinson, *supra* note 3, p.25.
[119] *Id*, p.27.

incrimination as a human right rather than as merely a rule of evidence."[120] One such rationale is to protect human dignity and privacy. In dealing with the dignity of an individual, "…the desire to protect the human dignity of an accused person is a separate and important justification for the privilege, since it ensures that the prosecution must treat the accused as an innocent human being whose rights must be respected."[121] Kessel, in connection with this, has shown that "…[t]o leave a person with no way out-to force him to inflict injury upon himself, to be an instrument of his own destruction-is cruel." [122]

A propos the privacy aspect, it can be argued that "…compelled self-incrimination constitutes a serious intrusion into the right of privacy of an individual who is required to provide information."[123] Innately, "…freedom rests upon a fundamental right to privacy and human dignity. Central to…conception of privacy is the need for men and women to be custodians of their own consciences, thoughts, feelings, and sensations."[124] In view of that, forcing one to reveal these things, making him confess without his consent,

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[120] *Id*, p.30.
[121] *Ibid*.
[122] Kessel, G., 'Prosecutorial Discovery and the Privilege against Self-incrimination: Accommodation or Capitulation,' *Hastings Constitutional Law Quarterly*, Vol.4, pp.855-900, 1962, p.875, retrieved from <http://hastingsconlawquarterly.org/archives/V4/I4/van_kessel.pdf> [Accessed on 23 May, 2012].
[123] Atkinson, *supra* note 3, p.30.
[124] The Privilege against Self-Incrimination, retrieved from <http://legaldictionary.thefreedictionary.com/Self-Incrimination > [Accessed on 19 May, 2012].

deprives him of the things that make him individual.[125] It is patent that almost all the justifications for the right of silence can be applicable to the privilege against self-incrimination. So, those justifications related to the autonomy of an individual, presumption of innocence and burden of proof can also be justifications for the privilege against self-incrimination.

1.2.6. Limitations and Applications

Despite the above justifications and its widespread acceptance, the privilege against self-incrimination suffers from some criticisms. One of the limitations is it frustrates the truth-seeking functions of the trial by giving shelter to the guilty.[126] Hence, it has been strongly criticized for entailing the loss of the most reliable evidence, perhaps the only available evidence, of guilt. The following quotation helps elaborate this point.

> *The privilege has been subject to the criticism that it has the capacity to defeat the purpose of the criminal justice system by denying it access to a valuable source of cogent evidence about the commission of an offence. An individual who has committed an offence will be uniquely placed because of his or her knowledge of events. This is particularly so in relation to offences which occur in*

[125] *Ibid*.

[126] Green , M., 'The Paradox of Auxiliary Rights: The Privilege against Self-incrimination and the Right to Keep and Bear Arms', *Duke Law Journal*, Vol.52, pp.114-78, 2002, pp.143-44, retrieved from <http://www.flpdinsyria.com/docs/human.pdf> [Accessed on 23 May, 2012].

> *private and which may leave little or no tangible trace of their occurrence.*[127]

The privilege against self-incrimination may also be criticized for giving priority to offenders over victims of crime. Victims of crime may perceive that where an offence has been committed that has resulted in harm to them, the rights of the perpetrator are given priority over them.[128] Thus, the privilege against self-incrimination may come to have negative effect on victims' rights at least in the perception of the victims concerned.

One question that may arise at this juncture is regarding the application of the privilege against self-incrimination, within such limitations, in different countries. Is the privilege subject to exceptions? On the whole, the privilege against self-incrimination has relatively better applicability in adversarial (common law) countries than in inquisitorial (civil law) countries. This is because in adversarial common law countries, a suspect or an accused cannot be forced to assist the prosecution in proving his case against himself by providing testimonial evidence either at the investigation stage or at the trial. Needless to state, it is the prosecution alone that should prove the case beyond

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[127] Atkinson, *supra* note 3, pp.31-32. Consequently, the privilege against self-incrimination has been criticized for its negative effect on the prosecution's ability to collect evidence which ultimately produces an adverse impact on the criminal justice system.

[128] *Id*, p.32. It is argued that "…it is extremely hard to see how the state can justify giving priority to the interests of guilty suspects over those of their victims. From the perspective of the victim there is a double wrong perpetrated if the state refuses to vindicate the victim by placing evidential pressure on the offender to admit the offence" (*Ibid*).

a reasonable doubt. However, in inquisitorial civil law countries, as has been described above, a suspect or an accused should cooperate and thus can be forced to testify against himself. Is the privilege against self-incrimination an absolute right or is it subject to certain qualifications in order to provide balance between individual rights and public interest? Whether it is in adversarial or inquisitorial system, there are always competing interests in criminal proceedings between individual rights and public interest. Most of the time, where the public interest by far outweighs the individual right of the privilege against self-incrimination, the privilege may be subjected to limitation/qualification. It may, therefore, be "…in the overall public interest for an investigator to be able to compel an individual who might have relevant information … to disclose that information, even though, by so doing, the individual might incriminate himself or herself…."[129] Qualifications to the privilege against self-incrimination may be justified where there is an immediate need for information to avoid risks such as danger to human life, serious danger to human health, generally where there is a compelling circumstance that the information is necessary to prevent further harm from occurring.[130]

However, any interference with the privilege against self-incrimination must always be strongly justified. It is generally agreed that "…the privilege

[129] *Id*, p.50.
[130] *Id*, p.54.

against self-incrimination is a substantive human right. Governments should be extremely cautious about removing or tampering with a human right, in whatever context that might occur."[131] For instance, the privilege cannot be violated for a justification that it hinders truth-finding or investigation. That is, "[t]he fact that a body is charged with the obligation to investigate potential offences, and that investigation may be hampered by reliance on the privilege against self-incrimination, cannot and should not, justify the abrogation of that privilege."[132] Therefore, "[w]hilst it is important that the public interest issue be appropriately recognized and addressed, the rights of the individual should not be unnecessarily minimized, diminished or displaced."[133] It is when "…general public interest … [is] to justify a conclusion that the public interest in determining the truth of the alleged conduct outweighs the individual's privilege against self-incrimination" that it can be violated or limited.[134] Thus, for the purpose of protecting or advancing public interest, a suspect or an accused may be compelled in case he has relevant information even though, by so doing, he might incriminate himself. However, a suspect or an accused cannot in any way be tortured. Compulsion is allowed as long as it is short of torture. This is because freedom from

[131] *Id*, p.50.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.

torture is absolute right and thus nothing can justify it.[135] Consequently, though countries may compel suspected or accused persons to testify against themselves during criminal proceeding for public interest, torture cannot and should not in any way be administered.

2. Right of Silence and Privilege against Self-Incrimination in Major Human Rights Instruments

In this section, the author provides information about the place/recognition of the right of silence and the privilege against self-incrimination at the international and regional arenas by having a look at the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR).

2.1. Right of Silence and Privilege against Self-incrimination under UDHR

The right to remain silent, though not expressly mentioned under the UDHR, can arguably be considered to be one of the rights of a suspect or an accused during criminal proceedings. UDHR, in Art.10, provides for the protection of an accused's right to fair trial during criminal proceedings. That is, it protects the right to a fair trial of an accused. The right to fair trial has become legally

[135] Chapter 4: Rights of the Suspect and the Accused retrieved from <http://www.usip.org/files/MC2/MC2-7-Ch4.pdf> [Accessed on 14 May, 2012].

binding on all states as part of customary international law.[136] The right has actually found recognition in numerous international human rights instruments. It is an important right "… to preserving the suspect's physical and mental integrity not only during investigation, but also to enable the accused to benefit, to the fullest extent possible, from the fair trial rights guaranteed at the trial, if he is charged with the offence for which he is being investigated."[137] Without a shred of doubt, the right to remain silent is the most important right in ensuring the right to fair trial. In general, "[s]ilence and self-incrimination rights before trial are intimately bound up with the right to a fair trial and difficult to separate from the perspective of the accused at trial."[138]

It can also be argued that the right of silence under UDHR is protected as part of presumption of innocence. UDHR, in Art.11 (1), states "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." By virtue of this provision, guilt cannot be presumed before the prosecution proves a charge beyond reasonable doubt and this principle applies until the judgment is made final. One of the ways in

[136] Jegede, S., "Right to a Fair Trial in International Criminal Law" retrieved from <http://www.nigerianlawguru.com/articles/international%20law/RIGHT%20TO%20A%20FAIR%20TRIAL%20IN%20INTERNATIONAL%20CRIMINAL%20LAW.pdf> [Accessed on 14 May, 2012]. [Hereinafter Jegede].
[137] *Ibid*.
[138] *Ibid*.

which presumption of innocence can be protected is by proscribing the drawing of adverse inference from a suspect's or accused's silence. The right to silence, in avoiding any implied guilt, gives protection against adverse inferences from one's silence. That is, it is the right not to confess guilt. In this sense, the right of silence can be understood as implicitly protected under UDHR as part of presumption of innocence.

The privilege against self-incrimination, like the right of silence, is not explicitly provided for under UDHR. Nevertheless, the right not to be compelled to testify against oneself and not to confess guilt (the privilege against self-incrimination) seems to be an implicitly recognized guarantee as it is part of the right to fair trial set out in Art.10 of the Declaration.[139] The privilege against self-incrimination is also implied under Art.5 of the Declaration. This provision reads as: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." It is generally agreed that torture is not necessarily limited to physical acts or sufferings. Any form of compulsion or coercion, be it physical or mental, may constitute torture. It follows that the violation of the right not to be compelled to testify against oneself (the privilege against self-incrimination) would possibly be a violation of Art.5 of UDHR. This is because any form of compulsion, like through requiring a suspect or an accused to cooperate during interrogation or

[139] *Supra* note 135.

trial, can constitute a form of direct pressure or coercion and thus would be violation of the Declaration.

More to the point, "[a]s well as being related to the presumption of innocence, the right to silence and freedom from self-incrimination are also related to the right to freedom from coercion, torture, or cruel, inhuman or degrading treatment…because the freedom from self-incrimination and the right to silence prohibit the use of these techniques to compel testimony." [140] For instance, an actual or a threat of adverse inferences being drawn against a suspect or an accused for remaining silent is coercion or compulsion that can constitute a form of direct pressure exercised against the suspect or accused to obtain evidence. In such a situation, a suspect or an accused would unfairly be forced either to testify or, if he chooses to remain silent, he has to risk the consequences (of adverse inference from his silence), thereby automatically losing his protection against self-incrimination.[141] Therefore, though the right of silence and the privilege against self-incrimination are not expressly provided in the UDHR, they are implicit in the right to fair trial, presumption of innocence and freedom from torture, cruel, inhuman or degrading treatment or punishment set out in Arts.10, 11 and 5 of the Declaration respectively.

2.2. Right of Silence and Privilege against Self-incrimination under ICCPR

[140] *Ibid*.
[141] Jegede, *supra* note 136.

The right to remain silent is not explicitly guaranteed under ICCPR. The absence of clearly expressed provision as to the right in this binding instrument may arise some questions. The obvious questions that may arise include: Can states, under ICCPR, compel a suspect or an accused to answer questions during interrogations and testify at trial? Does this mean that if a suspect or an accused person chooses to remain silent, his silence can be used against him in the determination of guilt?

To determine the legal status of the right of silence under ICCPR, and state obligations thereof, it is necessary to look at other rights explicitly described in the Covenant, namely the right to fair trial, the presumption of innocence and the right not to be compelled to testify against oneself (privilege against self-incrimination) which are closely related to the right to remain silent. As has been discussed above, the right of silence is an essential element of fair trial, which is stipulated under Art.14 (1) of ICCPR. The right of presumption of innocence is also clearly enshrined in the Covenant in Art.14 (2). To this effect, the Covenant has ensured that the prosecution bears the burden of proof throughout the trial. Intertwined with the presumption of innocence is the right not to be compelled to testify against oneself or confess guilt, which is clearly outlined in Art.14 (3) (g) of the Covenant. This provision states that no one shall be compelled to testify against himself or to confess guilt. Art.7 of this same Covenant has also clearly prohibited torture or cruel, inhumane or degrading treatment or punishment. As indicated above, violating of the

right of silence, either by compelling a suspect to speak or by drawing an adverse inference, is a direct or indirect coercion or compulsion of a suspect or an accused to testify against himself which ultimately be a violation of Arts.7 and 14 (1) and (3) (g) of ICCPR specifically.

The Human Rights Committee (HRC) ―a treaty body established to monitor State Parties' compliance with the ICCPR ―in its Concluding Observations on Romania, stated that statements made by accused persons in violation of Art.7 of ICCPR should be inadmissible evidences.[142] More interestingly, the Committee has recommended that states should enact legislation that places "…the burden on the State to prove that statements made by accused persons in a criminal case have been given of their free will…"[143] The HRC, in its General Comment 13, also calls on States Parties to pass legislation to ensure that evidence obtained by means of methods that compel a suspect or an accused to confess or to testify against himself or any other form of compulsion is wholly unacceptable.[144] The HRC, in 1995, while reviewing the fourth periodic report of the United Kingdom (UK), has further indicated that UK violates the various provisions of Article 14 of ICCPR in allowing the judges and juries to draw adverse inferences from the silence of a suspect

[142] Joseph, S. *et al*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed., Oxford University Press Inc., New York, 2004, p.450 [Hereinafter Joseph *et al*].
[143] *Ibid*.
[144] Skinnider and Gordon, *supra* note 15, p.5.

or an accused.[145] The HRC's comments on the UK have shown that "...a crucial aspect of one's right to silence is to be free from adverse inferences drawn from one's silence."[146] This indicates that any measure which may have the effect of pressuring suspected and accused persons into speaking against their will violates ICCPR. As a result, the right of silence seems to be strictly protected under ICCPR.

The privilege against self-incrimination is clearly recognized under ICCPR in Art.14 (3) (g). This provision forbids the compelling of suspected or accused persons to testify or confess guilt. Hence, any statements obtained through any form of compulsion, including torture, are inadmissible and cannot be used as evidence against the suspect or accused since they violate many provisions of ICCPR, including the privilege against self-incrimination.

2.3. Right of Silence and Privilege against Self-incrimination under African Charter on Human and Peoples' Rights (ACHPR)

Both the right of silence and the privilege against self-incrimination are not explicitly mentioned under the ACHPR. Yet, it can be convincingly argued that both rights are implicitly recognized in the Charter. One of the arguments can be made based on Art. 7 (1) (b) of the Charter which deals with the principle/right of presumption of innocence. As discussed already at length, it

[145] *Ibid*.
[146] Joseph *et al*, *supra* note 142.

can be argued that the right of silence and the privilege against self-incrimination under the charter are implicitly protected as part of presumption of innocence. Since we have seen previously in detail about how presumption of innocence is (necessarily) closely related to the right of silence and the privilege against self-incrimination, it is unnecessary here to spend time to show the conceptual relationship between such rights.

Another argument for the implicit recognition of the rights under the ACHPR is based on Art.5 of the Charter which deals with the prohibition of torture, cruel, inhuman or degrading punishment or treatment. As noted earlier, the rights of silence and freedom from self-incrimination are closely related to the right to freedom from torture, or cruel, inhuman or degrading treatment or punishment and thus the rights prohibit the use of these techniques to compel testimony.[147]

Torture, or cruel, inhuman or degrading treatment or punishment may be either physical or mental. It does not only involve physical acts. The HRC, in its General Comment 20, has stated that torture, or cruel, inhuman or degrading treatment or punishment "…relates not only to acts that cause physical pain but also to acts that cause mental suffering…."[148] It is clear that compelling a suspect or an accused either to speak or to testify against himself

[147] *Supra* note 135.
[148] *Ibid*.

would possibly constitute torture, or cruel, inhuman or degrading treatment or punishment, be it either physical or mental. And in effect, that would be violation of Art.5 of the ACHPR which deals with the prohibition of torture, cruel, inhuman or degrading punishment or treatment. Therefore, it can be safely concluded that the right of silence and the privilege against self-incrimination, despite the Charter's silence, are implicitly recognized under ACHPR.

2. The Right of Silence and Privilege against Self-Incrimination under the Ethiopian Criminal Justice System

In the previous sections, the right of silence and the privilege against self-incrimination by having seen the laws and practices of some jurisdictions of different legal traditions have been discussed. We have also examined that these rights have received greater emphasis in the different international and regional human rights instruments especially as essential ingredients of fair trial in criminal proceedings. Now, an appraisal of the Ethiopian legal framework with respect to the right of silence and the privilege against self-incrimination is forwarded.

3.1. The Right of Silence: An Appraisal of the Ethiopian Legal Framework

In relation to the right of silence, it is important to look first at Art.19 (2) of the FDRE Constitution. This provision reads: "Persons arrested have the right to remain silent. Upon arrest, they have the right to be informed

promptly, in a language they understand, that any statement they make may be used as evidence against them in court." That is, the right of an arrested person to refuse to answer official questions during police interrogations is clearly accepted. Thus, the right of silence is recognized under the FDRE Constitution as one type of human right for it is mentioned in the human rights part of chapter three of the Constitution. However, the above provision is not clear as to whether or not a police, upon arresting, should give a formal warning to the arrested person that he has the right to remain silent. The provision does not clearly provide that the police should tell to the arrested person his right of silence. It simply seems to impose an obligation on the police to inform the arrested person about the consequence of any statement that he might make. In connection with this, the previous sections have shown that the right of silence extends to the right to be warned.

> *Since the right to silent [sic] is not necessarily known by every suspect or accused, it imposes a duty on authorities to give a formal warning to such persons. The right to silence is one of the Miranda rights in which a police officer is required that he should tell to a suspect as he has the right to remain silent and as anything that the suspect says could be used against him in a court of law.*[149]

So, should the Constitution be criticized that it does not explicitly enshrine a "formal warning" that a police must give to a suspect? The argument as to "formal warning" that should have been added under

[149] Trechsel, *supra* note 5, p.352.

Art.19 (2) of the Constitution should be well considered in light of the comprehensive or general nature of a constitution. One of the basic features of constitutions is that they are considered to be "general laws as opposed to detailed ones."[150] That is, constitutions stipulate a little bit of everything in, *inter alia*, legal sphere. Hence, it can logically be argued that Art.19 (2) of the Constitution should be understood as intrinsically requiring "formal warning" while recognizing the right to remain silent. The 1961 Ethiopian Criminal Procedure is compatible with the spirit of the Constitution on this issue. Art.27 (2) of the Criminal Procedure Code provides that any arrested person "… shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence." In this provision, the phrase "shall be informed that he has the right not to answer" can be interpreted to mean "the right to remain silent". That is, "the right to remain silent" is negatively provided as "the right not to answer". Therefore, police, in Ethiopia, should tell to arrested persons not only the consequence of a statement that may be made but also should (first) tell them as they have the right to remain silent.

Yet another controversial issue in Art.19 (2) of the FDRE Constitution is that the right to remain silent seems to be limited to arrested persons. There is no

[150] Getachew Assefa, *Ethiopian Constitutional Law, With Comparative Notes and Materials*, American Bar Association, 321 North Clark Street, Chicago, USA, 2012, p.17.

counter provision mentioning this same right in Art.20 of the Constitution which deals with accused persons. Despite the absence of clear provision to that effect, the right also appears to be exercised by accused persons. One ground to think in that way is Art.20 (3) of the Constitution which provides for presumption of innocence. This provision stipulates that "[d]uring proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves." As has been repeatedly pointed out, presumption of innocence imposes the burden of proof on the prosecution. Accordingly, the accused person can remain silent without being required to prove his innocence. Thus, the right to remain silent can be considered as implicitly recognized in Art.20 (3) of the Constitution as part of presumption of innocence. Of course, the phrase "not to be compelled to testify against themselves" indisputably shows that accused persons can also have the right to remain silent.

As indicated in the previous section, the right of silence can also be considered as implicitly recognized as part of the prohibition of torture, cruel, inhuman or degrading punishment or treatment which is set out in Art.18 of the Constitution. The prohibition against cruel, inhuman or degrading punishment or treatment is one of the very few non-derogable human rights in the Constitution.[151] The Constitution, in Art.18 (1), provides that "[e]veryone

[151] Article 18 is found under rights that cannot be derogated in emergency situations. See Art.93 (4) (c) of the Constitution.

has the right to protection against cruel, inhuman or degrading treatment or punishment." A cautious reading of this provision reveals that the Constitution does not use the word "torture". Does that mean individuals are not constitutionally protected from torture? For two convincing reasons, the prohibition of torture can be considered to have been included in the prohibition of "cruel, inhuman or degrading treatment or punishment". The first reason is *a fortiori* argument. Since acts of cruel, inhuman or degrading treatment or punishment, all of which are acts less severe in pain than torture, are prohibited, *a fortiori* (for a stronger reason) torture should be prohibited.[152] The second reason is on the basis of international human rights instruments to which Ethiopia is a party. Freedom from torture is expressly guaranteed under Art. 7 of the ICCPR which stipulates that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Torture is also exclusively prohibited by the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT). Since the interpretation of human rights provisions of the Constitution, according to Art.13 (2), is required to be conforming to international human rights instruments ratified by Ethiopia, ICCPR and CAT should be taken into account in understanding of the constitutional prohibition of cruel, inhuman or degrading treatment or punishment to include torture.

[152] Girmachew Alemu *et al*, *Ethiopian Human Rights Handbook*, American Bar Association, 321 North Clark Street, Chicago, USA, 2013, p.61.

At this juncture, it is necessary to indicate what exactly torture is and what is its relationship with the right to remain silent in Ethiopia. Since no definition is provided in the Constitution, it is appropriate to adapt the definition of torture and the purpose of its prohibition under the CAT for Ethiopia is a party to the Convention. The Convention, in Art.1 (1), defines torture as "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession…." According to this provision, no one can administer torture for the purpose of obtaining evidence during criminal proceedings. So, causing any infliction or suffering, whether physical or psychological, on individuals in gathering evidence during criminal proceedings is not allowed. Consequently, the right of silence is highly linked to the prohibition of torture for the former gives protection to individuals during criminal proceedings against any coercion to make a statement or provide some information. Having established the legal recognition of the right of silence in Ethiopia, let us now determine the scope of the same.

3.1.1. Scope

The scope of the right of silence in Ethiopia, as in many other countries, seems to be limited only to testimonial evidence. It was previously noted that many jurisdictions restrict it only to information communicated orally or in writing. It does not include real or physical evidence like blood test, etc. The

same seems to hold true in Ethiopia. Art.19 (2) of the FDRE Constitution provides that arrested persons should be informed about the consequence of any statement they make. The Constitution talks about statements that may be made by arrested persons. Accordingly, the type of information that is protected through the right of silence is of testimonial nature. It does not seem to include physical evidence. The same is true under Art.27 of the 1961 Ethiopian Criminal Procedure Code. The Criminal procedure Code protects only testimonial evidence through the right of silence. This is evident from Art.34 of the Criminal procedure Code which allows for physical examination such as a blood test.

Art.21 of the Ethiopian Anti- Terrorism Proclamation No.652/2009 has also provided that police may order a person suspected of acts of terrorism to give samples such as his fingerprint, photograph, blood, saliva and other body fluids, for investigation. Moreover, he may order the suspect to undergo a medical test. The suspect can be compelled to give samples. As a result, in Ethiopia, the right of silence is limited only to communicative information or information having testimonial nature. It does not extend to physical or real evidence that can be found independently of a suspect or an accused ―without the cooperation of a suspect or an accused.

The right of silence is also limited to criminal proceedings. It does not apply to civil proceedings. The 1960 Ethiopian Civil Code provides that "[w]here a

person refuses to submit himself to a medical examination not involving any serious danger for the human body, the court may consider as established the facts which the examination had the object of ascertaining."[153] That is, a court is allowed to draw adverse inference from a person's silence whenever the person appears to refuse to supply any information relevant to the determination of a (civil) case.

3.1.2. Limitations and Applications

One of the limitations of the right of silence in Ethiopia is that the FDRE Constitution, though it expressly guarantees the right, does not clearly impose obligation on public authorities to warn a suspect or an accused his right of silence. For public authorities not to abuse the right, the Constitution had to make clear that they should tell to persons suspected (or accused) of crime their right to remain silent. It simply seems to require the authorities to inform a suspect (or an accused) the consequence of making of statements. In regard to the right of silence, it is necessary to warn a suspect or an accused not only the effects of making statements but also it is necessary to warn him that he has the right to remain silent. As noted beforehand, the right of silence includes that warning. Without this additional warning, any confession or admission by a suspect or an accused is likely to be made under compulsion. Yet, as noted before, based on the general nature of the Constitution, it can be

[153] Civil Code of the Empire of Ethiopia, 1960, Art.22, Proc. No. 165/1960, *Negarit Gazeta* (Extraordinary Issue), Year 19, No. 2.

said that the FDRE Constitution, in Art.19 (2), has envisaged the "formal warning" while recognizing the right to remain silent.

Concerning the application of the right of silence, in the Ethiopian law, adverse inference from an accused's silence does not seem allowed in criminal proceeding. Under Art.140 of the Criminal procedure Code, it is provided that "[f]ailure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party." Thus, if an accused had not cross-examined the witnesses of the public prosecutor or remained silent while the public prosecutor examined his witnesses in chief, no guilt would be inferred. That is, the court is not allowed to draw adverse inference from the accused's silence. Furthermore, the Criminal Procedure Code, in Art.133 (1), stipulates that "[w]here the accused says nothing in answer to the charge …a plea of not guilty shall be entered". Even after an accused has formally entered a plea of guilty, the court may change into a plea of not guilty.[154] Consequently, no adverse inference from an accused's silence is permissible. This is also guaranteed by the FDRE Constitution. The Constitution, in Art.20 (3), guarantees accused persons that they have the right to be presumed innocent until proved guilty. This provision indirectly prohibits the court from inferring guilt from an accused's silence. Guilt is established upon the proof of the public prosecutor, not from the silence of the accused.

[154] Criminal Procedure Code of Ethiopia, 1961, Art.135 (1), Proc. No.185/1961, *Negarit Gazeta*, Year 32 [Hereinafter Criminal Procedure Code of Ethiopia] .

But, what if an accused keeps silent after the public prosecutor proved his case beyond reasonable doubt or to the extent required? Can the accused be compelled to speak? In connection to this, the Criminal Procedure Code, in Art.142 (1), provides that "[w]here the court finds that a case against the accused has been made out … it shall call on the accused to enter upon his defence and shall inform him that he may make a statement in answer to the charge and may call witnesses in his defence." As per this provision, an accused can be required to prove his case only after the public prosecutor had proved to the extent that the accused has committed or omitted the crime alleged. Once the public prosecutor had proved to that extent, the court may order the accused to defend himself. However, still the accused may insist on to exercise his right to remain silent and thus may not say anything to defend himself. That can be inferred from the phrase "shall inform him that he may make a statement in answer to the charge" in the above provision. That is, the accused cannot be compelled to speak even at this stage. What would be the consequence of the accused's failure to speak at this stage of the criminal proceeding? It is obvious that the court may pass conviction against him. Then, would that be violation of the right to remain silent? Absolutely not! That is because the court established guilt of the accused based on the proof of the public prosecutor. It would have been violation of the right of silence of the accused had the court established guilt by inferring from the accused's silence.

3.2. Privilege against Self- Incrimination

To start with the FDRE Constitution, the privilege against self-incrimination is one of the main constitutional rights to be protected during criminal proceedings. The Constitution, in Art.19 (5), clearly outlaws any evidence acquired through coercion. This provision provides that "[p]ersons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them" and, in showing the fate of evidences of such type, confirms that "[a]ny evidence obtained under coercion shall not be admissible." That is, arrested persons cannot be compelled to testify against themselves and thus they have the right to the privilege against self-incrimination.

Accused persons are also constitutionally entitled to the privilege against self-incrimination. The Constitution, in Art.20 (3), states that "… accused persons have the right … not to be compelled to testify against themselves." Therefore, the FDRE constitution has recognized the right of suspected and accused persons to the privilege against self-incrimination. The privilege against self-incrimination can also be considered as implicitly recognized in Art.18 of the Constitution for the former is substantially connected to prohibition against torture and other cruel, inhuman or degrading treatment or punishment in terms of objective.

The Criminal Procedure Code has also recognized the privilege against self-incrimination, by default, while recognizing the right of silence as the latter

protects suspected or accused persons against self-incrimination. Interestingly, the Criminal Procedure Code gives protection to witnesses against self-incrimination. The Procedure Code, in Art.30 (1), provides that any person (witness) coming before an investigating police officer to testify about an alleged crime "…may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge." What is the extent of this privilege? This will be discussed in the following section.

3.2.1. Scope

The scope of the privilege against self-incrimination, similar to the right of silence, seems to be limited only to testimonial evidence. As it has been dealt with at length thus far in this article, almost all jurisdictions restrict the privilege against self-incrimination only to testimonial evidence. Since we have touched upon this issue while dealing with the scope of the right of silence, it is not necessary here to elaborately discuss the scope of the privilege against self-incrimination under Ethiopian law. However, to substantiate the argument that the privilege against self-incrimination does not include real or physical evidence, let us consider some provisions dealing with the same. According to Art.34 of the Criminal Procedure Code, an accused person may be compelled to undergo physical examination such as a blood test which is physical evidence. The 2009 Ethiopian Anti- Terrorism Proclamation No.652, in Art.21, has also provided that police may order a

person suspected of acts of terrorism to give samples such as his fingerprint, photograph, blood, saliva and other body fluids and to undergo medical test.

The privilege against self-incrimination also seems to be limited only to natural persons. It does not seem to extend to juridical persons. The Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No.433/2005 provides that "[a]ny investigator who has the power to investigate corruption offences may require the production or examination of relevant documents or information from any Federal or Regional Public Office and Public Enterprise."[155] Such corporate bodies may be mandatorily required to deliver any relevant document whenever required. Even any public official or public employee working in such institutions may be required to produce a document relevant to an alleged corruption offence though that might be incriminating.[156] As we have seen so far, this is consistent with the practice of other countries where the privilege against self-incrimination does not extend to juridical persons.

3.2.2. Limitations and Applications

The FDRE Constitution, in Art.19 (5), clearly proscribes any evidence acquired through coercion.

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[155] The Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation, 2005, Art.26 (4), No.433/2005.
[156] *Ibid*.

In this regard, the Criminal Procedure Code has also provided that "[n]o police officer or person in authority shall offer or use or make or cause to be offered, made or used any inducement, threat, promise or any other improper method to any person examined by the police."[157] Which of these improper methods of obtaining of evidence is/are likely subject to inadmissibility in light of Art.19 (5) of the FDRE Constitution? That is, which of these improper methods is/are considered to be found under coercion within the meaning of the Constitution? Obviously, any evidence to be gathered under torture is absolutely prohibited under the Constitution for it is absolute right even during the time of public emergency.[158] So, every individual is protected through the privilege against self-incrimination in case of evidence found under the administration of torture.

There is also a little doubt that with respect to the other improper methods of evidence gathering such as threat, inducement, or promise, one can be protected through the privilege against self-incrimination. The words "[a]ny evidence…" in Art. 19 (5) of the Constitution shows that evidence obtained through compulsion of 'any degree of influence'[159] must be excluded from

[157] Criminal Procedure Code of Ethiopia, *supra* note 154, Art.31 (1).
[158] Constitution of Federal Democratic Republic of Ethiopia, 1995, Art.93 (4) (C), *Federal Negarit Gazeta*, Proc. No.1/1995, 1st year, No.1.
[159] Coercion under Art.19 (5) of the Constitution can be committed when 'any degree of influence', such as torture, threat or promise, is exerted against a suspect. See generally Wondwossen Demissie, *Ethiopian Criminal Procedure*, American Bar Association, 321 North Clark Street, Chicago, USA , 2012, pp.89-126.

evidence. It follows that since the right to the privilege against self-incrimination is a firmly guaranteed constitutional right to be protected during criminal proceedings, any evidence would not be admissible in court unless it is obtained without any coercion from a person in authority.

However, it may be debatable whether or not there can be an exception to the privilege against self-incrimination in Ethiopia in case of crimes of terrorism. The 2009 Ethiopian Anti- Terrorism Proclamation No.652 provides that "…intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered," shall be admissible in court.[160] Does this mean that any evidence gathered in whatever method, be it through torture, threat, promise, inducement or coercion is admissible before court of law? The admissibility is mandatorily required by the term "shall" in the proclamation; and thus an accused does not seem to be successful to challenge the admissibility of any evidences gathered relating to terrorism cases. However, it can be argued that a suspect or an accused is always constitutionally entitled to the privilege against self-incrimination even in case of crimes of terrorism. In accordance with sub-Articles 2 and 5 of Article 19 and sub-Article 3 of Article 20 of the Constitution, if a forced confession or admission happens, the immediate effect of such compulsion, as provided in Article 19 (5) of the Constitution, is the inadmissibility of the evidence so obtained. As noted before, the Constitution, in Art.19, makes no exception to

[160] Ethiopian Anti- Terrorism Proclamation, 2009, Art.23 (1), No.652/2009.

the exclusion or inadmissibility of evidence obtained through coercion notwithstanding that public safety or interest may so require. In that sense, the Anti- Terrorism Proclamation is unconstitutional when it appears to allow evidence obtained through whatever method to be admissible.

Finally, the type of system, adversarial or inquisitorial, that Ethiopia follows and its relation to the right to silence and the privilege against self-incrimination needs to be considered. As Robert Allen Sedler noted, while the substantive codes in Ethiopia are based on the continental model, Ethiopia follows the common-law approach to procedure.[161] Accordingly, the 1961 Criminal Procedure Code is primarily "a common-law type code."[162] Under the Criminal Procedure Code, the "prosecution is adversary rather than inquisitorial, and the traditional guarantees of the criminal accused which form an integral part of common- law criminal procedure exist in Ethiopia."[163] That is, the Criminal Procedure Code manifests the features of common-law procedure. The right of silence and privilege against self-incrimination, as has been pointed out earlier, are rooted in common law countries which adopt adversarial system that does not require a suspect or an

[161] Sedler, R., 'The Development of Legal Systems: The Ethiopian Experience', *IOWA Law Review*, Vol. 53, pp.562-635, 1967, p.576, retrieved from < www.abyssinialaw.com > [Accessed on 23 January, 2015]. [Hereinafter Sedler]. See also the reasons why Ethiopia has adopted the common-law approach towards procedures despite the fact the substantive laws are anchored in the continental model *(Id, pp.576-586).*

[162] *See* Fisher, *Some Aspects of Ethiopian Arrest Law,* 3 J. ErTH. L. 463, 464 n.6, 1966 cited in Sedler, *supra note* 161, p.624.

[163] Sedler, *supra note* 161, p.622.

accused person to assist in finding the truth which is not true in inquisitorial system. In view of that, since Ethiopia follows the adversarial system of criminal proceedings, these internationally guaranteed and fundamental rights should be respected duly.

Concluding Remarks

The right of silence is a cluster of rights and privileges recognized by a law. It gives protection to individuals to refuse to answer official questions during police interrogations or to produce some evidences having testimonial nature. It also gives immunity against the drawing of an adverse inference from silence during trial. On the other hand, the privilege against self-incrimination is the right not to be compelled to incriminate oneself. Though their historical origin is disputable, the right of silence and the privilege against self-incrimination are generally understood to be well established in the common law legal tradition, particularly in England and then spread to the rest of the world as time went on. Currently, the rights are recognized under the various human rights instruments and thus are one of the rights in the field of human rights law. The rights are relatively better respected in adversarial system than its inquisitorial counterpart. Unlike in inquisitorial system, in adversarial system, there is greater emphasis given to rights of individuals and suspected or accused persons are not obligated to contribute to a case against them.

Both rights are closely related to each other though the privilege against self-incrimination sometimes appears to be broader than the right of silence. In regard to the scope of the rights, both of them are limited to the context of criminal proceedings, testimonial evidences and natural persons. There are a number of rights to which these rights are linked. They are linked to the presumption of innocence, free will of individuals, freedom of expression, liberty, privacy, etc. There are many rationales justifying such rights which include, *inter alia*, for curbing state power, for fairness and for respecting human dignity. Additionally, there are also many limitations attributed to the rights. The most serious limitations are that they are seen as barriers to the search of truth in a criminal justice system and are also criticized for ignoring victims' rights by giving priority to a suspect or an accused.

The right of silence and the privilege against self-incrimination are recognized under the FDRE Constitution as types of human rights. Though the Constitution does not clearly provide that police should tell to an arrested person his right of silence, from the perspective of the general nature of the Constitution, it should be understood as requiring "formal warning" while recognizing the right to remain silent. Since the Constitution clearly outlaws any evidence acquired through coercion, individuals are constitutionally protected through the privilege against self-incrimination during criminal proceedings and thus any evidence would not be admissible in court unless it is obtained without any coercion.

The author forwards the following recommendations to better implement the right of silence and privilege against self-incrimination in the Ethiopian criminal justice administration. Even though the FDRE Constitution, in Art.19 (2), does not clearly impose an obligation on police to tell an arrested person as he has the right to remain silent, it should be understood, in tandem with Art. 27 of the 1961 Ethiopian Criminal Procedure, in light of the general feature of the Constitution and interpreted as imposing an obligation on police to warn that right of the arrested person in addition to telling the consequence of making statements.

The 2009 Ethiopian Anti- Terrorism Proclamation No.652 which appears to violate individuals' right of privilege against self-incrimination should be amended in order for it not to acknowledge coercion, which may include administration of torture, in obtaining evidence in case of crimes of terrorism. No one argues or disagrees as to the seriousness of terrorism which justifies most violation of rights of individuals for the sake of the public at large. But, the use of torture to combat terrorism must also not be tolerated. The prohibition of torture is supremely absolute. The FDRE Constitution has also made it absolute right that cannot be violated even at time of public emergence. Ironically, the anti-terrorism law violates freedom from torture which is in effect a violation of the supreme law ―the Constitution. Even with respect to the other improper methods of evidence gathering such as threat, inducement, or promise, individuals are firmly protected against any

coercion. The words "[a]ny evidence…" in Art. 19 (5) of the Constitution connotes that evidence obtained through compulsion of 'any degree of influence' must be excluded from evidence irrespective of case of crimes of terrorism.

Confession or admission of a suspect before police without being warned or informed of his right to remain silent should be rejected. The explanation that anything the arrested person may say will be used as evidence against him in court should be accompanied by the warning of the right to remain silent. This warning is needed in order to make the arrested person aware of both the right of silence and the consequences of forgoing. An arrested person's confession of guilt which has been procured through physical violence, psychological intimidation, or improper inducements or promises should not be considered in evidence against him at trial. Confessions made under such pressures or through such improper methods are more likely unreliable as suspects may have admitted the alleged crime of which they may be innocent. They may admit simply to escape the pain of the physical and mental sufferings.

The author further recommends that there has to be sufficient safeguards to admit police interrogations as evidence before court of law. For example, arrested or suspected persons should be given the opportunity to have access to legal advice. Any expectation that a suspect should disclose his defense to

police at the time of questioning or interrogation should be based on proper safeguards that would avoid self-incrimination. For a suspect to give any information or evidence to police, he needs to have a clear understanding of the charges and relevant law which may call for legal advice. Guaranteeing suspects with access to legal advice at this early stage of the criminal proceeding is used to avoid the possibility of improper police interrogation. As noted before, in the USA, suspects are guaranteed with legal representation right during police interrogation. Thus, in order to better enable suspected persons to exercise their right of silence and privilege against self-incrimination plus to avoid miscarriage of justice, suspects in Ethiopia should be guaranteed with access to legal advice including government appointed legal counsel to those suspects who cannot afford the service.

In the absence of this safeguard, the author ardently recommends that police interrogation should be accepted as evidence before trial only if it is made in accordance with Art.35 of the 1961 Ethiopian Criminal Procedure Code. That is, the confession of a suspect should be used as evidence before trial if it was administered before any court. So, any confession by a suspect at police station without legal advice, when that was requested by the suspect, should be inadmissible before the trial court if persons suspected or accused of crime are to be entitled to the minimum basic guarantees of the right of silence and privilege against self-incrimination during criminal proceedings.

The Role of International Human Rights Law in Improving the Law of Internal Armed Conflict

Seid Demeke Mekonnen[♣]

> *Both human rights law and international humanitarian law stem from the general principle of respect for human dignity and is the very raison d'être of human rights law and international humanitarian law; indeed in modern times this principle has become of such paramount importance as to permeate the whole body of international law.*[1]

Abstract

Sometimes international humanitarian law (IHL) seems incompatible, if not contrary to internal war because rules designed for international conflict may not be applied straightforwardly to internal armed conflicts. To rectify this legal problem, international and regional tribunals have recently decided various cases concerning internal conflicts by applying international human rights law (IHRL). This implies that we should reconsider the role of human rights in improving the law of internal armed conflict. In some regions, including much of Europe, routine compliance with IHRL has been achieved. Parallel to this global trend, commentators such as the International Committee of the Red Cross (ICRC) are strongly advocating that human rights law have a role in filling gaps in the law concerning internal armed conflict.

Key Terms: Armed conflict, Geneva Conventions, Protocol II, Human rights, Humanitarian law

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♣ LL.B (Mekelle University), LL.M (Bahr Dar University), Lecturer at Jig Jiga University. The author can be reached at: seid1429@gmail.com Tel. No. +251-0924436319.

[1]International Criminal Court for Yugoslavia (ICTY), *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on jurisdiction, IT-94-1-AR72, 2 Oct. 2005, Para. 127.

Introduction

Arguments about the application of international human rights law have often focused on the question of whether this body of law applies during armed conflict, and if so, how the two bodies of law, i.e. IHL and IHRL can complement each other? While some states did not acknowledge the application of human rights to conduct of internal conflict, different practices indicate that human rights law is broadly accepted as a legitimate basis on which the international community can supervise and respond to interaction between a state and its citizens.[2]

This article takes the increasing applicability of human rights law as a starting point and proceeds to lay out some of the challenges and obstacles encountered during the application of IHRL, as these still need to be addressed. Despite the challenges, this article supports the role of IHRL in improving the law of internal conflict. The first section of the article will introduce the definition of internal armed conflict and explain the existing applicable laws. This section also discusses the challenges of these laws in regulating internal conflict and their gaps. The second section will examine the interplay between IHL and IHRL. The third and fourth sections will

[2]T. Meron, 'The Humanization of Humanitarian Law,' *American Journal of International Law , Vol. 94,* 2000, p. 272. The UK acceded to the Geneva Conventions of 1949 on 23 Sept.1957 and to Protocols I and II on 28 Jan. 1998 (but with a reservation undercutting Protocol I's application to national liberation movements). See http://www. icrc.org/ihl; M Jenks, *The Conflict of Law-Making Treaties*, 1953, p . 450.

discuss the general application and court enforcement of human rights law in internal armed conflict. The article will end with concluding notes.

1. General Overview of the Conceptual and Legal Framework of Internal Armed Conflict

1.1. Internal Armed Conflict: An Overview of the Concept

There are many definitions of internal conflict and civil war.[3] Protocol II addition to the four Geneva conventions provides that to constitute an internal armed conflict:

> *[The conflict] must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement.*[4]

[3] The characterization of the situation in Croatia was dealt with in the judgments of both Trial Chamber and the Appeal Chamber in the *Kunarac* case. The ruling of the Trial Chamber on the status of the situation as one of armed conflict was upheld by the Appeal Chamber. Both chambers refer to the *Tadic* definition of non-international armed conflict in discussions relating to the applicability of Article 3 of the ICTY Statute. See ICTR, *Prosecutor* v. *Kunarac , Kovac and Vukovic* , Trial Chamber Judgment, 22 February 2001, Case No. IT-96-23. Para. 402. The status of the situation in Croatia was also dealt with in the *Furundzija* case. Here, the *Tadic* definition of non-international armed conflict was applied in determining the existence of armed conflict between the Croatian Defense Council and the Army of Bosnia and Herzegovina during May 1993. See Anto Furundzija, *Prosecutor* v. *Furundzija* , Trial Chamber Judgment, 10 December 1998, Case No. IT-95-17/1, para. 59.

[4] Protocol II Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, article 1 (1), Dec. 12, 1977, art. 1(1),1125 U.N.T.S. 609 (entered into force Dec. 7, 1978)

The ICTY Appeals Chamber has further refined this definition, *inter alia*, in its landmark decision, Prosecutor v. Dusko Tadic a/k/a "Dule".[5] Among other things, the ICTY Appeals Chamber provided useful clarifications regarding the appropriate geographic and temporal frames of reference for internal armed conflicts. Moreover, one widely accepted definition comes from the Peace Research Institute, Oslo and its research partner, the Uppsala Conflict Data Program. They define internal conflict as contested incompatibility between a state and internal opposition concerning government or territory, where the use of armed force between the parties results in at least 25 battle-related deaths per year, civilian and military.[6] Internal wars or civil wars, by contrast, are larger intrastate conflicts with at least 1,000 battle-related deaths per year.[7] Therefore, the term internal armed conflict refers to all armed conflicts that cannot be characterized as either international armed conflicts Or Internationalized Internal Armed Conflicts or wars of national liberations.

[5] *Prosecutor v. Dusko Tadic*, supra note 1, paras. 66-70 (2 Oct. 1995).

[6]Nicholas Sambanis, What is Civil War?: Conceptual and Empirical Complexities of an Operational Definition, *Law Journal*, Vol. 48, 2004, P. 814.

[7] Nils Petter Gleditsch, Armed Conflict 1946-2001: A New Dataset, *Law Journal*, Vol. 39, 2002, P. 619. The research institute expressed that "In our survey, we include studies of civil war, and we also consider some research on large-scale political violence, which is measured by deaths (in the context of political action), but with no requirement of an organized opposition group. Different definitions matter enormously in statistical studies, often yielding very different findings." See, *ibid*, Nicholas Sambanis,

1.2. The Legal Framework Governing Internal Armed Conflicts

Generally, international laws applicable to internal armed conflicts include:

- Article 3 common to the Geneva Conventions of 1949 as basic principles of internal humanitarian law;[8]
- Protocol II and all other conventions applicable to non-international armed conflicts;[9]
- Customary principles and rules of international humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts;[10]

[8] The International Court of Justice held that "article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'." See ICJ, Nicaragua v. United States of America, Merits, Judgment, *1986*, Para. 218.

[9] Protocol II to the Geneva Conventions, pertaining to internal armed conflict, arguably resolved much of the controversy surrounding the definition of armed conflict in Common Article 3. Because of clear deficiencies in the international legal machinery regulating internal armed conflict, the ICRC and many states party to the Geneva Conventions undertook efforts to reaffirm and develop the scope and substance of humanitarian law. These efforts culminated in two additional protocols to the Geneva Conventions. Protocol I expanded the definition of international armed conflict to include internal wars of national liberation; and clarified many important substantive provisions of the Geneva Conventions. In an effort to develop and supplement Common Article 3, Protocol II expanded the rules applicable in internal armed conflicts. See supra note 2.

[10] Customary international law is one of the main sources of international legal obligations. As indicated in the Statute of the International Court of Justice, international custom is defined as evidence of a general practice accepted as law. Thus, the two components in

- The principles and rules of international law guaranteeing fundamental human rights;[11]
- The principles and rules of international law applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes ;[12] and
- The principles of international law "derived from established custom, from the principles of humanity and from dictates of public

customary law are State practice as evidence of generally accepted practice, and the belief, also known as *opinio iuris,* that such practice is obligatory. See in this respect the decision of the International Court of Justice on the *North Sea Continental Shelf Cases, Federal Republic of Germany v. Denmark; Federal Republic of Germany v.The Netherlands, Reports 1969*, p. 3. For a detailed analysis of customary rules of international humanitarian law, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge University Press, 2005, pp. 244-256.

[11] Ian Brownlie, for instance, explains that a subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims". Ian Brownlie, *Principles of Public International Law*, 6th ed. ,Oxford, Oxford University Press, 2003, p. 57. See also ICJ, *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, Reports 1949, p. 174.

[12] See, for example, resolution 1894, 2009, in which the Security Council, while recognizing that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, reaffirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law. Certain gross or serious violations of international human rights and humanitarian law have been considered of such gravity by the international community that they have been regulated under international criminal law, establishing individual criminal responsibility for such acts. International criminal law is a body of international rules designed to proscribe certain categories of conduct and to make those persons who engage in such conduct criminally liable. See Antonio Cassese, *International Criminal Law*, 2nd ed. Oxford, Oxford University Press, 2008, p. 3.

conscience. [13]

As a reflection of a historical bias in IHL towards the regulation of inter-state warfare, the1949 Geneva Convections and the 1977 Protocols contain close to 600 articles, of which only Article 3 common to the 1949 Geneva Convections and the 28 articles of Protocol II apply to internal conflicts.[14]

1.2.1. Common Article 3 of the Geneva Conventions

Common article 3 requires parties to the Conventions to respect the integrity of persons who are not directly involved in the hostilities. The Article is virtually a convention within a convention. It imposes fixed legal obligations on the parties to an internal conflict for the protection of persons not, or no longer, taking an active part in the hostilities.[15]

Unlike human rights law**,** which restrains violations inflicted by a government and its agents, the obligatory provisions of article 3 expressly bind both parties to the conflict, i.e., government and dissident forces.[16] Moreover, the

[13]The Special Rapporteur indicated that it is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights. See E/CN.4/2006/53/Add.5, Paras. 25–27.

[14] Henckaerts and Doswald-Beck, *supra* note 10.

[15] T Junod, Additional Protocol II: History and Scope, *American University Law Review*, Vol. 29, 1983, p.30

[16] M Lysaght, The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments, *American University. Law.*

obligation to apply article 3 is absolute for both parties and independent of the obligation of the other party.[17] Although article 3 automatically applies when a situation of internal armed conflict objectively exists, the International Committee of the Red Cross (ICRC) is not legally empowered to compel the warring parties to acknowledge the article's applicability.[18]

Significantly, article 3 is the only provision of the four Geneva Conventions that directly applies to internal armed conflicts. Here, the conflicting parties have no legal obligation to enforce, or comply with the well developed protections of the other articles of the Conventions that apply exclusively to international armed conflicts.[19]

1.2.2. Additional Protocol II

The prevalence of internal conflicts in place of international ones made more apparent the need for an adequate body of law governing such conflicts. In

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Review. Vol. 29/12, 1983, p. 33. The generic term "dissidents" is used in this article to designate the party opposing governmental authorities in an internal conflict.

[17] Junod, *supra* note 15.

[18] Although the expression an armed conflict of a non-international character is not defined in the Geneva Conventions, Pictet states that "[t]he conflicts referred to in Article **3** are armed conflicts, with armed forces on either side engaged in hostilities conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." See J. Pictet, Commentary on the Geneva Conventions, Geneva Convention Relative to the Treatment of Prisoners of War, article 3, Vol. 111, Aug. 12, 1949.

[19] Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, P. 89.

1974 the ICRC convened a diplomatic convention to develop additional, more detailed rules for internal and international armed conflict.[20]

Protocol II develops and supplements article 3 without modifying the article's existing conditions of application. Thus, in those conflicts satisfying the conditions for its application, Protocol II applies cumulatively and simultaneously with article 3 because the scope of Protocol II is included in the broader scope of article 3.[21] Protocol II's threshold of application, however, is different and clear from that of article 3**.**[22] Protocol II introduces objective qualifications not found in article 3, such as the requirements that a state party's armed forces must participate in the conflict and dissident armed forces or other organized armed groups must exercise control over a part of its territory.[23] Hence, the objective situation that ought to be fulfilled to trigger Protocol II's application regard as a situation of civil war essentially akin to a state of belligerency under customary international law.[24]

[20] *Ibid*
[21] ICRC, Commentary on the Two 1977 Additional Protocols, para. 1. New Rules, the qualifications of the armed conflict, contained in the last part of the sentence
[22] Junod, *supra* note 15 , pp. 35-38 (discussing the scope of Protocol **11** in relation to article 3)
[23] G Fleck, *The Law of Non- International Armed Conflict*, Cambridge university press, Cambridge, p2003, P. 612
[24] *Ibid*

1.3. Contemporary Challenges Facing the Law of Internal Armed Conflict

1.3.1. Common Article 3 of the Geneva Conventions

Much of the Geneva Conventions simply cannot be applied in civil conflicts because their operation turns on the notion of belligerent occupation of territory and enemy nationality, concepts that are alien to civil conflicts. The problematic issue of defining internal armed conflict was circumvented by negative definition that rendered common article 3 applicable in armed conflict not of an international character.[25] Even if one of the most assured thing that may be said about the words ' not of international characters' is that no one can say with assurance precisely what they were intended to express.[26] Although the substance of common article 3 defines principles of the conventions and stipulates certain imperative rules, the article doesn't contain specific provisions. The article 3 contains no rules regulating the means and methods of warfare. The methods employed may be closer to counterterrorism, or riot control than what is considered the means and

[25]In contrast to Protocol II, Common Article 3 to the Geneva Conventions does not provide a definition of internal armed conflicts, but simply refers to them as armed conflict(s) not of an international character occurring in the territory of one of the High Contracting Parties. Thus, Common Article 3 appears to establish a threshold for application that is lower than that found in Protocol II. For an analysis of the conditions of application of Common Article 3, see Nicaragua case, supra note 8, paras. 215-220.

[26]Sonja Boelaert-Suominen, 'The ICRC commentary to Common Article 3, and especially the criteria suggested by the ICRC for its application, do not cater for the hypothesis of conflicts between non-State entities,' 'Yugoslav Tribunal', 2005, p. 633.

methods envisaged by IHL.[27] In addition, the terms "civilian" and "combatant" do not appear in any of the provisions of article 3.[28]

Many countries have continuously resisted the application of Common Article 3 to internal conflicts, arguing that extending IHL to internal conflicts lends unjustified legitimacy to insurgent groups and interferes with sovereign authority.[29] Especially in the face of such criticism, the ICRC recognized that Common Article 3 inadequately regulated internal armed conflict. This is largely due to the Article's ambiguity, incomplete protections, and lack of strong use and enforcement.[30]

The American Court of Human Rights expressed the problem under article 3 that the most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating especially violent situation of internal disturbances from the lowest level Article 3 armed conflict may sometimes be

[27]Arturo Carillo, Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict, *American University International Law Review*. Vol. 15, No.1, 2008, pp. 69.

[28] Pictet, *supra* note 18 at p. 48.

[29] Aslan Abashidze, The Relevance from the Perspective of Actors in Non-International Armed Conflicts, Address Before the Euro-Atlantic Partnership Council-Partnership for Peace Workshop on Customary International Humanitarian Law , March 9-10, 2006, *available at* http://pforum.isn.ethz.ch/events/ index.cfm?action=detail&eventID=258 ("The inclusion of the Art 3 in all the four Geneva Conventions of 1949 was the decisive move towards the legal intrusion of international humanitarian law into the traditional sphere of internal affairs of sovereign states. . .").

[30] Schneider, Jr., Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law, The American Society of International Law. Newsletter, Nov. 1995.

blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.[31]

1.3.2. Additional Protocol II

A more limited development concerning the applicable law in the non-international armed conflicts was continued by additional protocol II, which sought to develop and supplement article 3 common to the Geneva Convention of 1949.[32] While providing greater clarity to the broad principles identified in common article 3, Additional protocol II sets a significantly threshold for its own application [33]

The Additional Protocol II did not receive as widespread support as the Geneva Conventions of 1949.[34] Like Common Article 3, many developing

[31]American Court of Human Rights, *Juan Carlos Abella v. Argentina,* Report No. 55/97 Case 11.137, November 18, 1997, Para. 153. at www.cidh.oas.org/annualrep/97eng/Argentina11137.htm.

[32]Additional protocol II to the Geneva Conventions, supra note 2, article 1; ICRC, Commentary on the Additional Protocols, supra note 21, Para. 4461. In this context ICRC has indicated that Protocol II 'develops and supplements' common article 3 'without modifying its existing conditions of application'. This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of [non-international armed conflicts] in general; cited in http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf

[33] W. Abresch, A Human Right Law of Internal Conflict :ECtHR's, in Chechnya, *The European Journal of International Law,* Vol. 16, No.4, 2005, p. 28; J Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts, *American Journal of International Law,* Vol. 98, No. 1, 2004, pp. 32–33.

[34] One hundred and ninety-two countries are parties to the Conventions of 1949, but only 162 and 159 states are parties to Additional Protocols I and II, respectively. ICRC, States party to

states opposed the Additional Protocols. [35] This is because of a view that the protocols granted too much legal legitimacy to non-state belligerents and to the use of guerilla warfare.[36]

Moreover, the Second Protocol[37] recognizes the sovereign authority of a state to put down insurrection as an internal matter.[38] Instead of prohibiting the prosecution of insurgents, this body of law establishes minimum protections for insurgents facing criminal prosecution.[39] As a result, states have long

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the Geneva Convention and their additional protocols, Apr. 12, 2005, *at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList492/

[35] One hundred and ninety-two countries are parties to the Conventions of 1949, but only 162 and 159 states are parties to Additional Protocols I and II, respectively. ICRC, State party to the Geneva Conventions and their Additional Protocols, Apr. 12 , 2005.

[36] Nathan A. Canestaro, Small Wars and the Law: Options for Prosecuting the Insurgents in Iraq, *COLUM. J. TRANSNAT'L L.,* Vol.73, 2004, pp. 90-91.

[37] Additional protocol II, supra note 4, articles 1-6.

[38] ICRC Commentary on the Additional Protocols, supra note 21, Para. 1332 (Combatant status for insurgents would be incompatible, first, with respect for the principle of sovereignty of States, and secondly, with national legislation which makes rebellion a crime).

[39] L. Moir, *International Armed Conflict*, Cambridge university press, Cambridge, 2000, p. 89; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, pp. 73–74. Meron argues that other features of Protocol II 'strengthen the proposition that beyond the express provisions of Protocol II, regulation of internal armed conflicts is relegated to the domestic law of states'. Meron points in particular to the failure of Protocol II, Art. 13(1) to include the reference to 'other applicable rules of international law' in contrast to Protocol I, Art. 51(1), the absence of an obligation for other states to 'ensure respect' for Protocol II in contrast to Protocol I, Art. 1(1)), and the 'especially strong prohibition of intervention in the affairs of the state in whose territory the conflict occurs' in Protocol II, Art. 3.

opposed this interference with affairs they perceive to be wholly of domestic concern. [40]

To improve these problems facing the law of internal conflict; therefore, it is strongly suggested by different commentators that applying human rights law is possible solution in addition to the existing legal framework. In view of that, the next sections will examine the role of international human rights law in improving and filling the gap of law of internal armed conflict.

2. The Interplay between International Humanitarian Law and International Human Rights Law

Fostered by respect for human dignity, IHRL and IHL enjoy a symbiotic relationship.[41] Although the two bodies are distinct fields of law which are governed by distinct rules, they are both concerned with humanity and thus it is argued that both human rights law and humanitarian law should have application in conflict situations.

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[40]*Ibid*, P.1325. *See also* ICRC, *The Relevance of IHL in the Context of Terrorism*, http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/8C4F3170C0C25CDDC1257045002CD4A2 ("In non-international armed conflict combatant status does not exist. Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply. Members of organized armed groups are entitled to no special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal law if they have taken part in hostilities.").

[41] Michael Howard, *The Laws of War: Constraints on Warfare in the Western World*, eds., 1994, pp. 35-38. Contradictory provisions should be regulated according to the principle of *lex specialis.* As international humanitarian law was specially designed to be applied in armed conflicts it represents the specific law that should prevail over certain other general rules.

A convergence of the two bodies of law can also be seen at an institutional level.[42] The United Nations clearly signaled the applicability of human rights and humanitarian law during the conduct of hostilities at the Tehran International Conference on Human Rights when it called on Israel to respect the Universal Declaration of Human Rights and the Geneva Conventions.[43] It is also now common for some treaties to embody both principles of human rights as well as humanitarian law in a single instrument.[44]

In relation to the protections afforded by IHRL in the context of internal armed conflicts, there is a much wider variety of relevant and applicable sources to draw from. The primary IHRL instruments are the UN Charter, and

[42] Violations of Human Rights was the focus of the United Nations debates on certain situations such as the Korean Conflict (1953), the invasion of Hungary by the Soviet Union (1956) and the SiDay War (1967).

[43]It should be noted that the 1993 Vienna World Conference on Human Rights recommended that "the United Nations assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in all situations of armed conflict," A/CONF.157/23, Para. 96. For example, the transfer of an individual out of occupied territory would appear to be a "grave breach" of Geneva Conventions art. 47 and 49 (1949). Nevertheless, it does not appear ever to have been contemplated to bring proceedings against Israeli officials, including Ministers, who ordered or implemented such transfers. There was, however, a legal obligation to do so.

[44] For example, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force March 23, 1976, article . 4/2 (No derogation from articles 6, 7, 8 (para. 1 and 2), 11, 15, 16 and 18 may be made under this Article). It should also be noted that all such derogation clauses, including Article 4 of the ICCPR, stipulate that that the derogating states may not adopt measures that would be "inconsistent with their other obligations under international law". Some have argued that this stipulation means that states that have ratified IHL treaties such as the Geneva Conventions would be precluded in circumstances of armed conflict from suspending rights whose enjoyment is guaranteed by such IHL treaties. Although this reasoning is persuasive, state practice does not appear to support this interpretation.

the consolidated corpus of IHRL known as the International Bill of Human Rights, which encompasses the Universal Declaration, the ICESCR, the ICCPR, and the Optional Protocol to the ICCPR.[45]

Furthermore, various approaches have been taken by international bodies to show the interaction between these two bodies of international law. Accordingly, three major theories have developed. The leading theory is that humanitarian law is *lex specialis*[46] to human rights law in situations of armed conflict. The most influential statement of this doctrine was given by the International Court of Justice (ICJ) in its 1996 Advisory Opinion.[47]

[45]In addition to these instruments, there are many other relevant instruments including, *inter alia*, the Genocide Convention, the Slavery Convention, the Torture Convention, the CRC, the CEDAW, the CERD and the Refugee Convention. There are also a variety of relevant regional instruments including, *inter alia*, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter of Human and Peoples' Rights.

[46]In the report to the Human Rights Council on the outcome of the expert consultation on the human rights of civilians in armed conflict, some experts explained that bodies of law as such did not function as *lex specialis*. It was recalled that the *lex specialis* principle meant simply that, in situations of conflicts of norms, the most detailed and specific rule should be chosen over the more general rule, on the basis of a case-by-case analysis, irrespective of whether it was a human rights or a humanitarian law norm (A/ HRC/11/31, Para. 13) ; *Yearbook of the International Law Commission, 2004*, vol. II, Part II (United Nations publication, forthcoming), Para. 304.

[47]Dale Stephens, Human Rights and Armed Conflict-The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case, *YALE HUM. RTS. & DEV. L.J*. Vol.4, No. 1, 2001, p. 1 (suggesting that "the Advisory Opinion is a significant statement on the convergence of humanitarian principles between the law of armed conflict and international human rights law").

As of the International Court of Justice, there are three situations that indicate the relationship between international humanitarian law and international human rights law and it states:

> *As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.*[48]

Thus, contradictory provisions should be regulated according to the principle of *lex specialis.* As international humanitarian law was specially designed to be applied in armed conflicts, it represents the specific law that should prevail over certain other general rules.

A second approach, known as the complementary and harmonious approach**,** is identified by the UN Human Rights Committee in General Comment No. 31, which states:

> The *Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While,*

[48]ICJ, *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion*, Reports 106, 9 Jul. 2004.

> *in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.*[49]

The Human Rights Committee does not use the term *lex specialis* but refers to the more specific norms of IHL. By avoiding the *lex specialis* approach the Human Rights Committee seems to indicate that there is no need to choose one branch of law over the other, but rather to look for their simultaneous and harmonizing application.

A third approach, called interpretive approach, is also proposed by Professor Marco Sassòli. This approach is proposed as an alternative to the *lex specialis* and the complimentarily approaches mentioned above. Sassòli states that the relationship between human rights law and humanitarian law "must be solved by reference to the principle lex specialis derogat legi general… The reasons for preferring the more special rule are that the special rule is closer to the particular subject matter and takes better account of the uniqueness of the context."[50] However, Sassòli points out that using the *lex specialis* paradigm

[49] UN Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at § 11.

[50] Marco Sassòli and Laura Loson, *The legal relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non international armed conflict,* International Review of the Red Cross, Vol. 870, September 2008, p.24.

does not necessarily result in humanitarian law prevailing over human rights law.

3. The Application of Human Rights Law in Internal Armed Conflict

The applicability of human rights law to armed conflict has been the subject of extensive discussion over the past few decades.[51] During the 1970s the UN General Assembly adopted a series of resolutions in which it reaffirmed the need to secure the full observance of human rights in armed conflicts.[52] The fact that IHL treaty law dealing with non-international armed conflicts is comparatively sparse also points towards use of human rights law to assist in the regulation of conduct during such conflicts. Indeed, the few existing treaty

[51]Amongst others, see G.I.A.D. Draper, The relationship between the human rights regime and the laws of armed confl ict, *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 191; L. Doswald-Beck and S. Vité, International humanitarian law and human rights law, *International Review of the Red Cross*, No. 293, March-April 1993, p. 94; R.E. Vinuesa, Interface, correspondence and convergence of human rights and international humanitarian law, *Yearbook of International Humanitarian Law*, Vol. 1, T.M.C. Asser Press, the Hague, 1998, pp.69–110; R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002; H. Heintze, On the relationship between human
rights law protection and international humanitarian law, *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, p. 798.

[52] See resolutions 2597 (XXIV), 2675 (XXV), 2676 (XXV), 2852 (XXVI), 2853 (XXVI), 3032 (XXVII), 3102 (XXVIII), 3319 (XXIX), 3500 (XXX), 31/19 and 32/44. It should be noted that since the 1990s the Security Council has considered that human rights and humanitarian law obligations are to be observed in armed conflicts. For example, in its resolution 1019 (1995) on violations committed in the former Yugoslavia, it "condemn[ed] in the strongest possible terms all violations of international humanitarian law and of human rights in the territory of the former Yugoslavia and demand[ed] that all concerned comply fully with their obligations in this regard". See also its resolution 1034 (1995).

rules can be compared and likened to non-derogable human rights, and where IHL treaties are silent, human rights law might be offered as an answer.[53]

Rather than seeking to simply apply IHL to all armed conflicts, it has been argued that the application of IHRL would be more appropriate in some circumstances.[54] In contrast to IHL which generally regulates conduct between states, IHRL is a system that regulates the relationship between the state and its citizens. For example, a party to the conflict may take part in violations that are unrelated to the conflict and to which IHRL applies because they are simply not governed by IHL. Similarly, even in a country affected by an armed conflict, law enforcement is always governed by IHRL.[55]

During internal war, the sate maintains its right to fight those who challenge state authority, but the way in which it does so is regulated by IHRL. It is no coincidence that efforts to control the power of the state and its impact on

[53] L. Moir, *supra* note 39, pp. 193–231;C. Greenwood, *Rights at the Fontier: Protecting the Individual in Time of War*, Law at the Centre: The Institute of Advanced Legal Studies at Fifty, Kluwer, Dordrecht, 1999, p. 288

[54] Abresch , *supra* note 33, p. 18

[55] For example, the Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, 23 January 2009, dealing with the killing and injuring of civilians on 25 August 2008 by Government security forces in the Kalma camp for internally displaced persons (IDPs) in South Darfur, Sudan. Despite the fact that at the time Darfur was in a situation of internal armed conflict and that the alleged violations were carried out by Sudanese security forces, it was found that the Government of the Sudan had failed to respect its obligations under international human rights law, at www.ohchr.org/Documents/Countries/11thOHCHR22jan09.pdf.

individual citizens spawned human rights norms. Human rights are generally "concerned with the organization of State power vis-à-vis the individual" and, as such, "found their natural expression in domestic constitutional law."[56] Besides, by applying IHRL, there is less of a concern that it will confer States up on internal rivals as there is with IHL.[57]

With respect to the provisions on humane treatment, humanitarian law and human rights law are consistent, often redundant. However, Common article 3 does not regulate the conduct of hostilities at all,[58] and Protocol II only does so with respect to civilians, and then only in general terms.[59] Neither instrument, for example, provides any guidance on the legality of attacks that are likely to unintentionally kill persons not taking part in hostilities.[60] As ICRC has recognized, there are circumstances in which provisions of IHRL,

[56]Robert Kolb, The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, *International Review RED CROSS*, Vol. 38, 1998, p. 410.
[57]M. Dennis, ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of human rights treaties extraterritorially in times of armed conflict and military occupation, *American Journal of International Law*, Vol. 99, 2005, p. 119.
[58] ICRC, Commentary on the Additional Protocol of 8 June CHRGJ, Working Paper No .4, 2005.
[59] Antonio Cassese , *Means of Warfare : The Traditional and the New Law* , In Cassese (ed) the Humanitarian Law in Armed Conflict, 1979, 195.
[60] *Ibid*

such as Common article 3 of the Geneva Conventions, "must […] be given specific content by application of other bodies of law in practice."[61]

However, some argues that it is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible.[62] Gasser notes the substantial overlap between the humane treatment provisions of the ICCPR and Protocol II, but suggests that it is Protocol II that fills the conduct of hostilities gap in the ICCPR.[63] Matheson assert that the import of applying operative peacetime human rights concepts, such as the right to life, would undermine the integrity of the existing rules and only promote numerous reservations and declarations to current and future law of armed conflict regimes.[64]

Further they argue that although there is a good argument to apply IHRL to some internal conflicts, there are some apparent problems with the application. Firstly, although it has been argued that IHRL equally applies to non – state actors such as rebel groups as it does to states, it has proved

[61]Jakob Kellenberger, President of the International Committee of the Red Cross, International humanitarian law and other legal regimes: interplay in situations of violence, statement to the 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4–6 September 2003. Available from www.icrc.org.
[62]Robert Kolb, *Supra* note 56.
[63] Gasser, International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion, *German YIL, Vol. 45*, 2002, p. 149.
[64]Michael J. Matheson, The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons, *American Journal of International Law*, Vol. 91, 1997, pp. 417-420.

difficult to apply the IHRL to non – state groups. This is in contrast to IHL, which establishes right and duties up on both sides.[65] Secondly, arguments in support of the first assertion are also touted as realistic by recognizing the ease from which States may derogate obligations contained within human rights treaties.[66] IHRL is capable of derogation in times of public emergency and war,[67] whereas IHL only applies in times of war, and can, therefore, be seen as a specialized form of IHRL that applies during armed conflict as *lex specialis*[68].

These arguments may become less of a concern since there is a growing view among experts that IHL and IHRL are able to co –exist but are not mutually exclusive areas of law. Many of the views supporting the applicability of IHRL are focused primarily upon explaining how in the situation of internal conflict the two bodies of law can work concurrently, complement (or perhaps even converge with) each other in times of need. In certain areas, it is clear how and why IHL and human rights law could complement and

[65]N. Tomuschat, *The Applicability of Human Right Law to Insurgent Movement, In Crisis Management and Humanitarian*, Berliner Wissenschafts – Verlag, 2004. Pp. 581-588.

[66]G.I.A.D. Draper, The Relationship Between The Human Rights Regime and the Law of Armed Conflicts, *ISR. Y.B. on human rights,* Vol. 1, 1971, pp. 194-197.

[67]Derogation clauses found not only in international human rights laws but also in regional treaties, for instance, in the American Convention on Human Rights, article 27 and in the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 15.

[68]Human Rights Watch and Amnesty International have increasingly applied humanitarian law rather than human rights law in reports on armed conflicts. See Bennoune, Toward a Human Rights Approach to Armed Conflict: Iraq 2003, *UC Davis J Int'l L & Pol'y* , Vol. 11, 2004, pp. 216–219.

reinforce each other — most notably where the issues of deprivation of liberty and judicial guarantees are concerned.[69]

The challenge is to apply the broad principles of human rights law to the conduct of hostilities in a manner that is persuasive and realistic.[70] Human rights law must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve at once.[71] These realistic rules must be persuasively derived from the legal standard of human rights law.[72]

Despite the difficulties**,** IHRL is appropriate for the regulation of many internal conflicts simply because states routinely dismiss the application of IHL to their internal conflicts. For instance, United Kingdom,[73] Turkey and

[69]See the Fundamental guarantees chapter in ICRC study, *op. cit*. (note 1), Vol. 1 pp. 299–383. For an example of a comprehensive publication devoted to this subject, see F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, 2004.

[70] See Interim Resolution DH 105 concerning the Judgment of the European Court of Human Rights of 28 July
1998 in the case of Louizidou against Turkey, adopted by the Committee of Ministers on 24 July 2000 at the
716th Meeting of the Ministers` Deputies, at http://www.coe.int/T/CM/WCD/humanrights_en.asp#.

[71] B.G. Ramcharin, 'The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts', *American University Law Review*, Vol. 33, 1983, p. 103.

[72] Abresch, *supra* note 33, p. 19.

[73]Meron, *supra* note 39. The UK acceded to the Geneva Conventions of 1949 on 23 Sept.1957 and to Protocols I and II on 28 Jan. 1998 (but with a reservation undercutting Protocol I's application to national liberation movements). See http://www. icrc.org/ihl.

Russia – have denied the application of IHL, but IHRL was still able to regulate the conflicts through applications to the European Court of Human Right. [74]

The human rights framework does operate in accordance with certain traditional limits that may bear on the role it can play in governing armed conflict. For example, the fact that human rights law is designed to function in peacetime, contains no rules governing the methods and means of warfare, and applies only to one party to a conflict has led at least one human rights non-governmental organization to look to IHL to provide a methodological basis for dealing with the problematic issue of civilian casualties and to judge objectively the conduct of military operations by the respective parties.

4. The Application of International Human Rights Law in Internal Armed Conflict by International and Regional Courts

4.1. The International Court of Justice

Since the ICJ held that humanitarian law is *lex specialis* to human rights law in 1996, it has been widely accepted that 'human rights in armed conflict' refers to humanitarian law.[75] While the ICJ in its Nuclear Weapons Advisory

[74] ECtHR, *McCann and Other's V. United Kingdom,* App. No. 18984/91, Sept. 27, 1995; .*Isayeva, Yususpova and Bazayeva v. Russia*, App. No. 21593/93, Jul. 27, 1998. See McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs*, 1998, p. 378.

[75] The Wall Advisory Opinion, *supra* note 48, paras. 102-103.

Opinion[76]did state the applicability of human rights law, the use of the term *lex specialis* might have been construed as support for a claim that whereas human rights law then does not disappear, it nevertheless is in effect displaced by IHL.

The more recent Advisory Opinion in the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory[77] together with the views of UN human rights bodies,[78] have clarified that human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict.[79] Here, the trend is for human rights to give precedence to IHL, in the context of armed conflict. It is pertinent to note that the ICJ recognized the applicable law in situations of armed conflict clearly extends beyond IHL. Thus, in the Wall case it stated:

> *More generally, the Court considers that the protection offered by Human Rights Conventions does not cease in case of armed conflicts save through the effect of provisions for derogation of the*

[76]ICJ, Legality *of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, Reports 1996, Para. 25.
[77] The Wall Advisory Opinion, *supra* note 48, Para. 163.
[78]*Ibid*; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) Para. 3; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69.
[79] In the words of the Court "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." See Wall Advisory Opinion, supra note 48, para.106.

> *kind to be found in Article 4 of the International Covenant on Civil and Political Rights.*[80]

Arbitrarily depriving of one's life is wrongful act under humanitarian law as civilians are a protected class of people during hostilities and it is a violation of human rights to deprive a person of their life arbitrarily.[81] However, under IHL, combatants who are directly participating in hostilities may be lawfully targeted and killed.[82]After noting that the "right not to be arbitrarily deprived of one's life" is non-derogable, the ICJ explained:

> *The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [ICCPR], can only be decided by reference to the law*

[80] The Wall Advisory Opinion, *supra* note 48, Para. 106.

[81] D. Nsereko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, *in The Right To Life In International Law*, ed., 1985, p. 85; Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, *in* The International Bill of Rights: The Covenant on Civil And Political Rights, ed., 1981, p. 114; D. Weissbrodt, *Protecting the Right to Life: International Measures Against Arbitrary or Summary Killings by Governments*, in The Right to Life, 2000, pp. 297- 298.

[82]"Targeted Killings," IHL Premier Series - Issue 3, International Humanitarian Law Research Initiative, Programme on Humanitarian Policy and Conflict Research, Harvard University, at < www.IHLresearch.org>

> *applicable in armed conflict and not deduced from the terms of the Covenant itself.*[83]

Thus, the jurisprudence of the ICJ reflects an approach of cautious assimilation of principles of human rights law into situations of armed conflicts.

4.2. The International Criminal Tribunals: ICTR and ICTY

The International Criminal Tribunal for Rwanda (ICTR) has relied on human rights instruments and norms to interpret and lend greater specificity to the prohibitions contained in IHL. As the Trial Chamber noted in *Kunarac case*, because of the paucity of precedent in the field of IHL, the tribunals have often resorted to human rights norms to determine the content of customary IHL.[84] In the *Furundzija case*, the Trial Chamber of International Criminal Tribunal for the former Yugoslavia (ICTY) drew on human rights norms, such as human dignity and physical integrity, in its discussion – demonstrating just how important human rights have become to the development of humanitarian law.[85]

In *Krnojelac case*, the Trial Chamber of ICTR considered the requirements of imprisonment as a crime against humanity. Although the right of an

[83] The Wall Advisory Opinion, *supra* note 48, Para. 25.
[84] Kunarac case, *supra* note 3, Para. 467.
[85] Furundzija case, supra note 3, paras. 168-183. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized that the general principle of respect for human dignity was the "basic underpinning" of both human rights law and international humanitarian law.

individual not to be deprived of his or her liberty arbitrarily is enshrined in a number of human rights instruments, the relevant instruments do not adopt a common approach to the question of when a deprivation of liberty become arbitrary.[86] After consideration of the different approaches taken in the Universal Declaration of Human Rights, the ICCPR, and the Convention on the Rights of the Child, among others, the ICTR Trial Chamber concluded that a deprivation of an individuals' liberty will be arbitrary and unlawful if no legal basis can be called upon to justify the initial deprivation of liberty.[87]

4.3. The European Court of Human Rights

The ECtHR has directly applied human rights law to the conduct of hostilities in internal armed conflicts. The rules it has applied may be controversial, but humanitarian law's limited substantive scope and poor record of achieving compliance in internal armed conflicts suggest the importance of this new approach. Abresch makes the convincing argument that in certain situations, IHRL may be more capable of applying to an internal conflict than IHL**,** giving the example of the ECtHR's use of the 'right to life' article in case of

[86]ICTR, *Prosecutor v. Krnojelac,* Trial Judgment, 1998, paras. 110-114; Marco Sassòli and Laura M. Olson, The relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflict, *International Review of the Red Cross*, vol. 90, No. 871, September 2008, pp. 613–615. The authors asserted that: The delicate interplay between international human rights and international humanitarian law can also be seen in the Tribunals' elucidation of crimes against humanity. Crimes against humanity are inhumane acts of a very serious nature – such as willful killing, torture or rape – which are committed as part of a widespread or systematic attack against a civilian population.

[87]*Ibid*, *Prosecutor v. Krnojelac,*

armed conflict within the Council of Europe:

> *The ECtHR's approach has the potential to induce greater compliance. It applies the same rules to fight with common criminals, bandits, and terrorists as to fight with rebels, insurgents and liberation movements. To apply human rights law does not entail admitting that the situation is 'out of control' or even out of the ordinary.*[88]

In contrast to humanitarian law's principle of distinction, the ECtHR's permits the use of lethal force only where capture is too risky, regardless of whether the target is a 'combatant' or a 'civilian'.[89] These rules are not perfect, but given the resistance States have shown to applying humanitarian law to internal armed conflicts, the ECtHR's adaptation of human right law to this end may prove to be the most promising basis for the international community to supervise and respond to violent interactions between the states and its citizens.[90]

Moreover, the specific aspects of the interchangeability of international human rights law and international humanitarian law at the example of the right to life is demonstrated by the judgments of the ECtHR related to armed

[88]Abresch, *supra* note 33, P. 2

[89] N. Heintze, The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts, *German Yearbook Int'l L, Vol. 45,* 2002, p. 60.

[90]L. Reidy, The Approach of the European Commission and Court of Human Rights to International Humanitarian Law, 80 *IRRC,*1998, p. 513.

conflicts, notably in the Chechen Republic of the Russian Federation.[91] Accordingly, the case of *Khashiyev v Russia* has dealt with the claims of unlawful deprivation of life in the context of the non-international armed conflict.[92] The Court found that the part of Grozny where the relevant persons were killed had been under the control of Russian forces, that is, there were no actual hostilities going on in that area. The Court asserted that the case could be governed presumably by human rights law only, as the hostilities were over in the relevant area and the application of humanitarian law was not strictly necessary despite the general context of an armed conflict.[93]

The human rights organizations and different commentators intervening in *Isayeva* cases suggested that the stricter standard of human rights law should

[91] Russia acceded to the Geneva Conventions of 1949 on 10 May 1954; Protocols I and II on 29 Sept. 1989. See http://www.icrc.org/ihl. In 2000 the Russian Minister of Justice informed the then UN High Commissioner for Human Rights, Mary Robinson, that Russia regards 'the events in Chechnya not as an armed conflict but as a counter-terrorist operation. And in 2004 Russia succeeded in getting a report of the UN Secretary-General amended to state that Chechnya 'is not an armed conflict within the meaning of the Geneva Conventions' and to refer to 'Chechen illegal armed groups' rather than 'Chechen insurgency groups': Lederer, 'U.N. Seeks to Stop Use of Child Soldiers', *Associated Press*, 23 Apr. 2004. During the First Chechen War, in 1995, the Russian Constitutional Court indicated that the conflict was governed by Protocol II; however, inasmuch as the Court found that it lacked competence to apply Protocol II, the view of the executive is here more important than that of the judiciary. See Gaeta, The Armed Conflict in Chechnya before the Russian Constitutional Court, *European journal of international law, Vol. 7,* 1996, p. 563; cited in Abresch, *supra* note 33, foot note 44.

[92]ECtHR, *Khashiyev and Akayeva v Russia*, Judgment, Nos. 57942/00 & 57945/00, 2005, Para. 16ff.

[93] However, the standard of the right to life applied in this case in terms of human rights law confirms at least the same degree of protection that would have to be afforded to civilians under humanitarian law, had it been applicable. See *Ibid.*

apply. Standards of IHL, among them the principle of proportionality, should be interpreted in the light of the stricter human rights requirements.[94]

4.4. The Inter- American Court of Human Rights

As shown above, despite the theoretical possibility of joint application, there are also instances in case law demonstrating that the parallel application of human rights law and humanitarian law can face procedural impediments. In *Juan Carlos Abella* v. *Argentina* the Inter-American Commission on Human Rights stated that its authority to apply IHL could be derived from the overlap between norms of the American Convention on Human Rights and the 1949 Geneva Conventions. The Commission stated that the "provisions of common article 3 are pure human rights law […] Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention."[95]

The *Las Palmeras* case before the Inter-American Court of Human Rights involved a situation of internal conflict; while the applicant requested the Court to rule that the respondent state had breached both the 1969 American Convention and Common Article 3 of the 1949 Geneva Conventions, the respondent state objected that the Court was not competent to apply humanitarian law, because its competence was limited to the American

[94] *Isayeva case*, *supra* note 74.
[95] *Juan Carlos Abella v. Argentina*, supra note 30, Para. 161, at www.cidh.oas.org/annualrep/97eng/Argentina11137.htm

Convention.[96] At the same time, the respondent did not contest that the internal conflict was the subject-matter of the case and that conflict was covered by Common Article 3. The Inter-American Commission called upon the Court to adopt pro-active methods of interpretation enabling it to examine Article 4 of the American Convention regarding the right to life in conjunction with Common Article 3.[97] The latter provision was instrumental in interpreting the former.[98] The Court found that the American Convention has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.[99]

Generally, it can be said that despite the existence of some challenges in the

[96]Inter-Am CtHR, Las Palmeras, Judgment, Series C, No. 67, 2000, para. 28. Besides, According to the decision of the Inter-American Commission on Human Rights in the *La Tablada* case(*Juan Carlos Abella v. Argentina),* Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. See *Ibid*, Para. 152.

[97]Inter-American Commission on Human Rights, Case No. 11.137, Report No.55/97, 30 October 1997, Annual Report of 1997, paras. 157.

[98] That means, the American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123.

[99] The Inter-American Court of Human Rights has thus far rejected the *lex specialis* application of humanitarian law on jurisdictional grounds, but continues to refer to and consider humanitarian law provisions: Las Palmeras case, supra note 95, para. 33. However, The Commission continues to apply humanitarian law as *lex specialis*: see the letter from Juan E. Méndez, President of the Commission, to attorneys for those requesting provisional measures (13 Mar. 2002) (quoting letter notifying the US of the imposition of provisional measures), at http://www.ccr-ny.org/v2/ legal/september_11th/docs/3-13-02%20IACHRAdoptionofPrecautionaryMeasures.pdf. See also Zegvel, The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case', *IRRC,* Vol. 80, 1998, p. 505.

joint application of IHL and IHRL, the innovations of both international and regional courts fill the gap in humanitarian law by beginning to develop a human rights law of the conduct of hostilities in internal armed conflicts.[100]

Concluding Notes

As discussed throughout this article, certain aspects of internal armed conflicts may not be covered by IHL, yet individuals remain under the protection of international law guaranteeing fundamental human rights. IHRL is appropriate in regulating many internal conflicts simply because states routinely dismiss the application of IHL to their internal conflicts.[101] Hence, applying human rights is an alternative solution to promote compliance with a set of legal norms during armed conflict, whether states and rebels have determined that they are bound by IHL or not**.**

For the better protection of civilians, prisoners and combatants in internal armed conflicts in which non-state entities are parties, states and pertinent international bodies of a humanitarian character shall cooperate in order to take measures to verify and oversee the application of IHRL in internal armed conflicts. Particularly, the state which faces internal conflict shall cooperate and accept any authorization given to the United Nations or any other

[100] Helfin and Slaughter, Toward a Theory of Effective Supranational Adjudication, *Yale Law Journal,* Vol. 107, 1997, p. 273
[101] Abresch, *supra* note 33.

competent regional or international organization to establish impartially whether IHRL is applicable.

Moreover, as proposed by various commentators and ICRC studies, the 1949 Geneva Conventions and Additional Protocol II are not sufficiently broad in scope to cover all armed conflicts.[102] Thus, the world needs additional international humanitarian conventions, or possible revision of the existing conventions, providing a clear reference for the application of human rights law in cases when gaps are created, particularly in the law of internal conflicts.

[102] Kellenberger, *supra* note 61.

CASE COMMENT

የገጠር መሬት አስተዳደርና አጠቃቀም ሕግ የተፈፃሚነት ወሰን ከጊዜ አንፃር፡- በፍርዶች ላይ የቀረበ ትችት

በሪሁን አዱኛ ምህረቱ*

መግቢያ

ከፍትሐ ብሔር ሕጉ ድንጋጌዎች ጀምሮ በተለያዩ ጊዚያት በሀገራችን በርካታ የገጠር መሬት ሕጎች ታውጀዋል።[1] እነዚህ ሕጎች በየዘመናቸው ለመሬት ባለቤቶች በጎላም ባለይዞታዎች የሚሰጡት መብት ወጥነት አልነበረውም፤ አሁንም የለውም።[2] ለምሳሌ በአዋጅ ቁጥር 89/1989 መሰረት የመሬት ባለይዞታው መሬቱን ለቤተሰብ አባሉ ብቻ ማውረስ እንደሚችል ተደንግጎ ነበር።[3] በአማራ ክልል ከአዋጅ ቁጥር 46/1992 አንፃር ባለይዞታው መሬቱን በኑዛዜ የሚያስተላልፈው ለቤተሰብ አባሉ ወይም ለሚጠረው ሰው ብቻ ነበር።[4] በዚህ አዋጅ መሰረት መሬትን ያለ ኑዛዜ በውርስ ማስተላለፍ የሚቻለው ለባለይዞታው የቤተሰብ አባል ብቻ ነበር።[5] ክልሉ በአዋጅ ቁጥር 133/1998 መሰረት ግን የመሬቱ ባለይዞታ አካለ መጠን ያላደረሰ ልጁን ወይም የቤተሰብ አባሉን ከውርስ ካልነቀለ በስተቀር መሬቱን በግብርና ስራ ለሚተዳደር ማንኛውም አርሶአደር በኑዛዜ ማስተላለፍ

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*ኤልኤልቢ፣ ኤልኤልኤልም፣ ቀደም ሲል የከፍተኛ ፍርድ ቤት ዳኛ እና በአማራ ክልል የፍትሕ አካላት ባለሙዎች ማሰልጠኛና የሕግ ምርምር ኢንስቲትዩት አሰልጣኝ ሆኖ ሠርቷል። በአሁኑ ጊዜ የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ዳኛ በመሆን እየሠራ ይገኛል። የባህር ዳር ዩኒቨርሲቲ የሕግ መጽሔት ዋና አርታኢ አቶ አለባቸው ብርሀኑን እና ሁለቱን የጽሑፉን ገምጋሚዎች (anonymous reviewers) በረቂቁ ላይ ለሰጡት ገንቢ አስተያየት ፀሐፊው ከፍ ያለ ምስጋና ያቀርባል። እንዲሁም የፍርድ ትችቱን እንዲያዘጋጅ ያበረታታውን እና ጠቃሚ ሀሳቦችን የሰጠውን አቶ ወርቁ ያዜን (ረ/ፕሮፌሰር፣ በባህር ዳር ዩኒቨርሲቲ የሕግ ት/ቤት መምህር) ከፍ ባለ አክብሮት ያመሰግናል።

[1]በአፄ ኃይለስላሴ ዘመነ መንግስት የፍትሐ ብሔር ሕግ አዋጅ ቁጥር 1/1952፤ በደርግ ዘመን የገጠር መሬትን የሕዝብ ሀብት ለማድረግ የወጣው አዋጅ ቁጥር 31/67፤ ቀጥሎም አሁን ባለው ስርዓት በፌዴራል ደረጃ የፌደራል መንግስት የገጠር መሬት አዋጅ ቁጥር 89/1989 እና አሁን በሥራ ላይ ያለው የፌደራል የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 456/1997 ወጥተዋል። በአማራ ክልልም የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 46/1992፣ በስራ ላይ ያለው የተሻሻለው የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 133/1998 እና ማስፈፀሚያ ደንቡ ቁጥር 51/1999 ወጥተዋል። ሌሎች ክልሎችም የራሳቸው የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ አላቸው።

[2]ለምሳሌ አዋጅ ቁጥር 133/1998 ከአዋጅ ቁጥር 46/1992 የተሻለ እና የሰፋ መብት ለባለይዞታዎች እና ለወራሾቻቸው ይሰጣል።

[3]አንቀጽ 2(3) ስለይዞታ መብት በተሰጠው ትርጓሜ ላይ ለቤተሰብ አባል ማውረስ የሚቻል መሆኑን ይገልጻል። በአንቀጽ 2(5) መሰረት *የቤተሰብ አባል ማለት የባለይታውን ገቢ በመጋራት በቋሚነት አብሮ የሚኖር ማንኛውም ሰው ነው።* ይኸውም በቋሚነት ገቢ እየተጋራ የሚኖር የባለይዞታውን ልጅ ወይም ሌላ ጥገኛ የሆነን ሰው በሙሉ ያካትታል።

[4]አንቀጽ 6(5) እና 5(2) በውርስ ማስተላለፍ ሲባል አንዱ በኑዛዜ ማስተላለፍ ነው። በኑዛዜ ሊተላለፍለት የሚገባው ሰው ደግሞ በአንቀጽ 6(5) መሰረት ባለይዞታውን እያረሰ የሚጦር ሰው ብቻ ነው።

[5]አንቀጽ 5(2) እና 2(7)

ይችላል።።[6] ውርሱ ያለ ኑዛዜ የሚተላለፍ ከሆነም ሌሎች ቅድሚያ የሚሰጣቸው ወራሾች ከሌሉ በስተቀር መሬት ላላቸው ልጆች ብሎም መሬት ላላቸው ወላጆች ሊተላለፍ ይችላል።።[7]

በተለይ ከውርስ አንጻር በቀድሞዎቹ የገጠር መሬት ሕጎች እና አሁን በስራ ላይ ባሉት ሕጎች መካከል ሰፊ ልዩነቶች አሉ።። ከዚህ የተነሳ የቀድሞዎቹ ሕጎች (ለምሳሌ አዋጅ ቁጥር 89/1989 ወይም አዋጅ ቁጥር 46/1992) ስራ ላይ በነበሩበት ወቅት ሳይናዘዝ የሞተ ሰው የገጠር መሬት ይዞታ በውርስ ሊተላለፍ የሚችለው እንዴት ነው? ወራሾች በወቅቱ ውርሱን ያልጠየቁ ሆኖ ነገር ግን አዋጆቹ ከተሻሩ በኋላ አሁን ስራ ላይ ባለው አዋጅ ቁጥር 133/1998 እና ደንብ ቁጥር 51/1999 መሠረት ክስ ቢያቀርቡ ፍርድ ቤቶች ጉዳዩን እልባት መስጠት ያለባቸው በየትኛው ሕግ መሰረት ነው? የሚሉ ጥያቄዎች አዘውትረው ይነሳሉ።። በዚህ ረገድ በአማራ ክልል ፍርድ ቤቶች ከፍትሐብሔር ሕጉ የውርስ መከፈት ጽንሰ ሀሳብ በመነሳት የገጠር መሬት ውርስ የሚጠይቅ ሰው ባለይዞታው በሞተበት ዘመን ከሚኖረው አጠቃላይ የማውረስ መብት አንፃር እየታየ ሲሰራ ቆይቷል።።[8] ሆኖም የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በቅርቡ *በሁለት ጉዳዮች*[9] ላይ የመሬት ባለይዞታው የሞተበት ጊዜ ግምት ውስጥ ሳይገባ ክርክሩ መታየት ያለበት አሁን ስራ ላይ ባሉት ሕጎች መሠረት ነው የሚል አስገዳጅ ትርጉምና ውሳኔ ሰጥቷል።። ይህ ትርጉም ከሕጎች ተፈጻሚነት ወሰን አንፃር አከራካሪ ሆኗል።።

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[6]አንቀጽ 16(1)(3)

[7]አንቀጽ 16(5)(6)፤ አዋጁን ለማስፈፀም የወጣው ደንብ ቁጥር 51/1999፣ አንቀጽ 11(7)

[8]ለምሳሌ *አዲሱ አዝመራዉ እና እነ አብነህ ከልካይ (2 ሰዎች)፣ የአማራ ብሔራዊ ክልላዊ መንግስት (አብክመ) ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ/ቁ 07219፣ ጥቅምት 16/2004 ዓ/ም፤ የአዳም ሞላ እና ታምራት ሞላ፣ ምዕራብ ጎጃም ዞን ከፍተኛ ፍርድ ቤት፣ መ/ቁ 48893፣ መጋቢት 21/2004 ዓ/ም፤ ሙሉ ንጋቱ እና አገር አባተ፣ የአብክመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ/ቁ 25210፣ ጥቅምት 27/2005 ዓ/ም።* ለምሳሌ *በአዲሱ አዝመራው* ጉዳይ የክልሉ ሰበር ሰሚ ችሎት የመሬቱ ባለይዞታ የሞቱት በ1992 ዓ/ም መሆኑ የተረጋገጠ ስለሆነ በጊዜው ስራ ላይ በነበረው አዋጅ ቁጥር 46/1992 አንቀጽ 5(2) እና 6(5) መሰረት ሳይናዘዝ የሞተ ሰው መሬት ውርስ የሚተላለፈው ለሚች የቤተሰብ አባል በመሆኑ እና ተጠሪዎች የሚች የቤተሰብ አባል ያልነበሩ መሆኑ ስለተረጋገጠ የሚች ልጆች በመሆናቸው ብቻ መሬቱን ሊወርሱ አይችሉም በማለት ወስኗል።

[9]*የመሀመድ በላይ እና የፉሲካ ሰጠኝ ጉዳይ* ከፊት ቁጥር 67 እና 74 በቅደም ተከተል

የዚህ ትችት ዓላማም የዚህን ትርጉም ተገቢነት መመርመር ነው። ለመሆኑ በፍትሐብሔር ጉዳይ ሕጎች ወደኋላ ተመልሰው (retroactively) ተፈጻሚ ሊሆኑ የሚችሉበት አግባብ አለ ወይ? ካለስ በምን ሁኔታ ነው? የሚሉት ነጥቦችም ይፈተሻሉ። የትችቱ የመጀመሪያ ክፍል ከጊዜ አንፃር በፍትሐ ብሔር ጉዳይ የሕጎችን (legislation) እና አስገዳጅ ውሳኔዎችን (precedent) የተፈፃሚነት ወሰን ከመርሆዎችና ልምዶች አኳያ ለመዳሰስ ይሞክራል። ሁለተኛው ክፍል የገጠር መሬት አስተዳደርና አጠቃቀም ሕጎችን ይዘት ከውርስ አንጻር እና ለትችት የቀረቡትን ጉዳዮች የተጨመቀ ሀሳብ ይይዛል። ሶስተኛው እና የመጨረሻው ክፍል ለትችት በተመረጡት ሁለት ጉዳዮች ላይ በሰበር ሰሚ ችሎቱ የተሰውን ትርጓሜ እና የውሳኔዎቹን አወንታዊ እና አሉታዊ ገጽታዎች በማንሳት የችሎቱ አቋም ተገቢነት ያለው መሆን አለመሆኑን ለማሳየት ይሞክራል።

1. የፍትሐ ብሔር ሕጎች የተፈፃሚነት ወሰን ከጊዜ አንፃር፡- በሌሎች ሀገሮች ያለው ተሞክሮ

በዚህ ክፍል በሕግ አውጭው አካል የወጡ የፍትሐ ብሔር ሕጎች (legislation) ወይም አስገዳጅነት ያላቸው የበላይ ፍ/ቤት ትርጓሜዎችን የያዙ (precedent) ከታወጁበት ወይም ከተወሰኑበት ጊዜ በፊት ለተገኘ መብት ወይም ለተደረገ ድርጊት ወደ ኋላ ተመልሰው (retroactively) ተፈፃሚ ሊሆኑ ይችላሉ ወይ? የሚለውንና ተያያዥነት ያላቸውን ነጥቦች እንመለከታለን።[10]

የሕጎች ወደኋላ ተመልሶ ተፈፃሚ መሆን ወይም አለመሆን ጉዳይ በጣም ውስብስብ እና በተለይም ከሰዎች የንብረት መብት መጥበብና መስፋት ጋር ቀጥተኛ ቁርኝት ያለው ነው።[11] የአንድ ሕግ ከታወጀበት ጊዜ ጀምሮ ተፈፃሚ መሆን (prospective)፣ ቀድሞ የሚታወቅ (knowability) እና ግልጽነት ያለው (openness and clarity) መሆን የሕግ የበላይነት መገለጫዎች መሆናቸውን የሕግ

[10]በሕግ አውጭ አካል የወጡ ሕጎችም ሆነ በበላይ ፍ/ቤቶች የሚሰጡ አስገዳጅ ትርጓሜዎች ሁለቱም ሕግ በመሆናቸው ሕግ ወይም ሕጎች እያልን ወጥነት ባለው ሁኔታ እንጠቀማለን። (Black's Law Dictionary (7th ed) 1999 defines a retroactive law as a legislative act that looks backward or contemplates the past affecting acts or facts that existed before the act come in to effect.)

[11]Jakie, M., Mc Creary, Retroactivity of Laws: An Illustration of Intertemporal Conflicts of Law Issues through the Revised Civil Code Articles on Disinhersion, *Louisiana Law Review*, Vol. 62, No. 4, 2002, p.1322

ሙህራን የሚስማሙበት ነው።።[12] የሕጎች ወደኋላ ተመልሶ (retroactively) ተፈፃሚ መሆን የሕግ የበላይነት መርህን የሚጋፋ፣ በረጋ ሕግ መሠረት የሚመራ ዲሞክራሲያዊ ህብረተሰብ ኑሮ ላይ መናጋትን የሚፈጥር፣ ሰዎች ተግባራቸውን በሚያከናውኑበት ወይም መብት በሚያገኙበት የወቅቱ ሕግ ላይ መተማመን (reliance) እንዳይኖራቸው የሚያደርግ፣ እና የፍትህ መዛባት (injustice) የሚያስከትል ነው የሚሉ ትችቶች ይቀርባሉ።።[13]

የሕጎች ተፈፃሚነት ወሰንን በተመለከተ ሁለት ዓይነት ደንቦች አሉ - *መሠረታዊ* ደንቦች (Basic Rules) እና *ህገ-መንግስታዊ* ደንቦች (Constitutional Rules)።።[14] *መሠረታዊ* ደንቦች የሚባሉት ሕግ አውጭው አዲስ የሚያወጣውን ወይም የሚያሻሽለውን ሕግ ወደኋላ ተመልሶ ተፈፃሚ እንዲሆን ለማድረግ ፈልጓል ወይስ አልፈለገም የሚለውን ጥያቄ የሚመልስ ነው።።[15] *ህገ-መንግስታዊ* ደንቦች የሚባሉት ደግሞ ሕግ አውጭው ወደ ኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ እንዳያወጣ የሚከለክሉ ገደቦችን በህገ-መንግስት ላይ የሚያስቀምጥ ነው።።[16] በህገ-መንግስት ካልተከለከለ በስተቀር በፍትሐ ብሔር ጉዳዮች አንድ የተለየ አላማ ለማሳካት ሕግ አውጭው የሚያወጣውን ወይም የሚያሻሽለውን ሕግ ወደኋላ ለነበሩ ወይም ለተከናወኑ ድርጊቶችና ሁኔታዎች ተፈፃሚ እንዲሆን ሊደነግግ ይችላል።።[17] ስለሕጉ ተፈፃሚነት በግልጽ ካላመለከተ (በዝምታ ካለፈው) ግን

[12]Benjamin Alarie, Retroactivity and the General Anti-Avoidance Rule: Symposium: the Supreme Court of Canada and the General Anti-Avoidance Rule, *University of Toronto, Faculty of Law*, (November 18, 2005), p. 6

[13]Ibid; see also Jackie & Creary, supra note 11; W. David Slawson, Constitutional and Legislative Considerations in Retroactive Law Making, *California Law Review*, Vol. 48, Iss. 2, Art.3, 1960, p· 219

[14]Jackie & Creary, supra note 11, p. 1323

[15]Ibid

[16]Ibid; በሕግ አውጭው ላይ ህገ-መንግስታዊ ክልከላ የሚኖረው በአብዛኛው በወንጀል ጉዳዮች ነው። በብዙ ሀገሮች በወንጀል ጉዳይ ተከሳሽን የሚጠቅም ካልሆነ በስተቀር የወንጀል ሕግ ወደ ኋላ ተመልሶ ተፈፃሚ እንዳይሆን በህገ-መንግስት ይደነገጋል።። ለምሳሌ የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ ህገ-መንግስት አንቀጽ 22 ይህንን ሁኔታ በግልጽ ይደነግጋል። እኤአ በ1995 ዓ/ም የወጣው የደቡብ አፍሪካ ህገ መንግስት በአንቀጽ 35(3)(ሸ) ላይ ተመሳሳይ ድንጋጌ አስቀምጧል።

[17]Ibid

መርሁ ሕጉ ወደ ኋላ ተመልሶ ተፈፃሚ አይሆንም የሚል ነው::[18] ለዚህ መርህ ልዩ ሁኔታዎች የሚሆኑት የሚወጣው ወይም የሚሻሻለው ሕግ የስነ-ስርዓት (procedural) እና ተርጓሚ ወይም አራሚ (interpretative or currative) ሲሆን ነው::[19]

ሕግ አውጭው በግልጽ ባይደነግግም *የስነ-ሰርዓት ሕግ* ወደኋላ ተመልሶ ተፈፃሚ ሊሆን ይችላል:: የስነ-ስርዓት ሕግ በአብዛኛው ለሰዎች መሰረታዊ መብትና ግዴታ የሚሰጥ ሳይሆን ሰዎች በመሠረታዊ ሕግ የተሰጣቸውን መብትና ግዴታ ለመተግበር ወይም ለማስፈፀም የሚመሩበት ሕግ ስለሆነ ቀድሞ የወጣንም ሆነ በኋላ የወጣን ሕግ (ከስነ-ስርዓት ሕጉ አንፃር) ለማስፈፀም ወደፊትም ሆነ ወደኋላ ተፈፃሚ ማድረግ ይቻላል።[20] *ተርጓሚ ሕግም* አዲስ መብትና ግዴታ የሚዘረዝር ሳይሆን ቀደሞ የወጣን ሕግ በዝርዝር የሚያብራራ በመሆኑ የዋና ሕግን ትርጉም በማብራራት ረገድ ወደኋላ ተመልሶ ተፈፃሚ መሆን ይችላል::[21] እንደዚሁም *አራሚ ሕግ* የሚባለው ያለውን ሕግ የሚቀይር ወይም የሚያስፋ ሳይሆን ሕግ አውጭው ያወጣው ሕግ በተግባር ሲውል ችግር ከተፈጠረ ምን ለማለት እንደተፈለገ ግልጽ የሚያደርግና ስህተት ካለ የሚያርም በመሆኑ ከታረመበት ቀን ጀምሮ ተፈፃሚ ይሆናል ሳይባል ወደኋላ ተመልሶ የታረመው ሕግ ከወጣበት ጊዜ ጀምሮ ተፈፃሚ ሊሆን የሚችል ነው::[22]

1.1 የኮመን ሎው ተሞክሮ

[18]Ibid, p. 1323 & 1329; see also Geroffrey C, Weien, Note: Retroactive Rule Making: *Harvard Journal of law and Public Policy,* Vol. 30, No. 2, p. 750; Deborah K. Mc Knight, Retroactivity of Statutes, *Minnesota House of Representatives Research Department,* (June 2005) p. 1; Brandon J. Harrson & Hans J, Hacker, Arkansas's Retroactive Legislation Doctrine, *Arkansas Law Review*, Vol. 64, p. 905 & 906

[19]Jackie & Creary, supra note 11, p. 1323 & 1329; Deborah K. Mc Knight, supra note 18, p. 3; ለምሳሌ በአሜሪካ የሉዛኒያ ግዛት ሲቪል ኮድ አንቀጽ 6 የስነ-ስርዓት እና ተርጓሚ ሕጎች ወደ ኋላ ተመልሰው ተፈፃሚ ሊሆኑ እንደሚችሉ ይደነግጋል::

[20]Jackie & Creary, supra note 11, p. 1328

[21]Ibid, p. 1329; እንደዚህ አይነት ሕጎች የአዋጅን ተፈፃሚነት የሚያብራሩ ደንቦችና *መመሪያዎች* ናቸው:: ደንብ በአዋጅ፣ *መመሪያ* ደግሞ በደንብ ያልተሰጠን መብትና ግዴታ የማይጨምሩና የማያስፈጽሙ መሆኑ ተቀባይነት ያለው መርህ በመሆኑ ደንብና *መመሪያዎች* ዘግይተው ቢወጡም ዋናው ሕግ (parent legislation) ከወጣበት ጊዜ አንስተው ተፈጻሚ ይሆናሉ ማለት ነው::

[22]Deborah K. Mc Knight, supra note 18, p. 5

የሕጎችን የተፈፃሚነት ወሰን በተመለከተ በአሜሪካን ሀገር የዳበረ የሕግ ሳይንስና የፍርድ ቤት ውሳኔዎች እናገኛለን፡፡ ለምሳሌ *በላንድ ግራፍ እና ሪቨርስ ጉዳይ*[23] ባርባራ ላንድግራፍ በሥራ ቦታ ፆታዊ ጥቃት ደርሶብኛል በማለት፣ ሪቨርስ እና ዲቪሶን ደግሞ በዘር መድሎ ያለ አግባብ ከስራ ተሰናብተናል በማለት ተገቢው ካሳ እንዲከፈላቸው በአሠሪ ድርጅቶቻቸው ላይ ክስ መስርተው በከርከር ላይ እንዳሉ የአሜሪካ ኮንግረስ የሲቪል መብቶች ሕግን (Civil Rights Act) አሻሽለው።[24] የተሻሻለው ሕግ ቀደምሲል ከነበረው ሕግ አንጻር ለሠራተኞች ከፆታዊ ጥቃት እና ከህገ-ወጥ አድሎ ጋር በተያያዘ ሰፊ መብትና ተጨማሪ ካሳ የማግኘት መፍትሔዎችን አካቷል፡፡[25] ይሁን እንጅ የተሻሻለው ሕግ ወደ ኋላ ተመልሶ ተፈፃሚ ስለመሆን አለመሆኑ ያስቀመጠው ነገር አልነበረም፡፡[26]

በሁለቱም ጉዳዮች ከሳሾች በተሻሻለው ሕግ መሠረት ተገቢው ካሳ ሊከፈለን ይገባል በማለት ቢከራከሩም ጉዳዮቹን በመጨረሻ የተመለከተው የአሜሪካ የፌደራሉ ጠቅላይ ፍርድ ቤት በከርከር ላይ ላሉ ጉዳዮችም ቢሆን ሕጉ ወደኋላ ተመልሶ ተፈፃሚ ሊሆን አይገባም በማለት በአብላጫ ድምጽ ወስኗል፡፡[27] ይኸውም ፍርድ ቤቱ *በላንድግራፍ ጉዳይ* የደረሰበት መደምደሚያ በሕጉ የተፈጻሚነት ወሰን ላይ የኮንግረሱ ሀሳብ ግልፅ ካልሆነ ሕጉ ተፈጻሚ ሊሆን የሚገባው ወደፊት (prospective) መሆኑን በሚከተለው መልኩ ተጠቃሎ ይገለፃል፡፡

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[23]Landgraf v. USI Film Products, United States Federal Supreme Court (1994) https://supreme.justia.com/cases/federal/us/511/244/case.pdf; and Rivers v. Roadway Express, Inc (1994) https://supreme.justia.com/cases/federal/us/511/298/case. pdf; (both cases last accessed October 12, 2014)

[24]Contino, Linda B., Retroactivity of the Civil Right Act of 1991: Landgraf V. USI Film Products and Rivers V. Roadway Express, Inc," *Hofstra Law Review*, Vol. 24, Iss. 2, Art. 12, 1995, p. 542

[25]Ibid, p. 541

[26]Ibid, በወቅቱ ሕጉ ተሻሽሎ ሲወጣ በአሜሪካ የፌዴራል ፍርድ ቤቶች ዘንድ ነኛ ሕጉ ከመሻሻሉ በፊት ተወስነው በይግባኝ ደረጃ ስለነበሩ ጉዳዮች፣ 2ኛ ክሱ ቀርቦ ገና ውሳኔ ሳይሰጥ የነበሩ ጉዳዮች፣ 3ኛ ድርጊቱ ሕጉ ከመውጣቱ በፊት ተከናውኖ ክሱ ግን ሕጉ ከተሻሻለ በኋላ የቀረቡ ጉዳዮች ላይ የተሻሻለው ሕግ ተፈፃሚነት ምን ይሆናል የሚሉ ጉዳዮች ይነሱ ነበር፡፡ አብዛኛዎቹ ፍርድ ቤቶች በሶስቱም አይነት ጉዳዮች ሕጉ ወደኋላ ተመልሶ ሊሰራ አይገባም በማለት ወስነዋል፤ ገጽ 548 ይመለከቷል።

[27]Ibid, p. 555 - 559; አናሳው ድምጽ ሕጉ ወደኋላ ተመልሶ ተግባራዊ መሆን አለበት በማለት በሀሳብ ተለይቷል፡፡

> *…It was entirely probable that because of Congress's inability to resolve the retroactivity issue, and because there were conflicting judicial precedents concerning the retroactivity of a statute when ambiguous Congressional intent exists, Congress wanted to ensure prospective application.*[28]

ፍርድ ቤቱ *በሪቨርስ ጉዳይም* ስለ ሕጉ የተፈፃሚነት ወሰን ኮንግረሱ በዝምታ ካለፈው የተሻሻለው ድንጋጌ ሕጉ ከመሻሻሉ በፊት ለተፈጸመ ጥፋት ወይም ድርጊት ተፈፃሚ ሊሆን ስለማይገባ ወደኋላ ተመልሶ ተፈፃሚ መሆን የለበትም በሚል መወሰኑን የሚከተለው አገላለጽ ያሳየናል፡፡

> *… Congress's intent to reach conduct preceding ··· amendment must clearly appear. Absent [of] such intent, as in the instance case, and because section 101 creates liabilities that had no legal existence before the act was passed, section 101 does not apply to pre-enactment conduct.*[29]

በአንጻሩ ሕግ አውጭው የሕጉን ወደ ኋላ ተፈፃሚነት በግልጽ ባስቀመጠ ጊዜ የአሜሪካ ፍርድ ቤቶች ይህንኑ የሚወስኑ መሆኑን *ክዩሌሰ እና ኦሊን ኮርፖሬሽንና ክሌሎች ጉዳዮች* በግልጽ መገንዘብ ይቻላል፡፡[30] ይኸውም ሕግ አውጭው (ኮንግረሱ) ቀደም ሲል የነበረው የአካባቢ ጥበቃና መልሶ ማቋቋም ሕግ በአካባቢ ላይ ብክለት የሚፈጥሩ ሰዎችን ካሳ እንዲከፍሉና እንዲያፀዱ ለማድረግ አያስችልም በማለት እ.ኤ.አ ታህሳስ 1980 የተሻሻለ ሕግ ሲያወጣ አዋጁ ተሻሽሎ ከመውጣቱ በፊት የደረሰ ብክለትን ለማስወገድ አጥፊዎች እንደሚጠየቁ በግልጽ ስለደነገገ ኦሊን

[28] Ibid, p. 555; see also *Landgraf Case,* supra note 23, p. 286
[29] Ibid, p. 559
[30]David Seidman, Questioning the Retroactivity of CERIA in Light of Landgraf v. USI Film Products (1994), Journal of Urban and Contemporary Law, Vol. 52, 1997, p. 444 - 447

ኮርፖሬሽን የተባለው ከበካዮች አንዱ ሕጉ ወደ ኋላ ተመልሶ ተግባራዊ ሊሆን አይገባም በማለት *የላንግራፍን ጉዳይ* አንስቶ ቢከራከርም የአሜሪካ ፍርድ ቤቶች ሳይቀበሉት ቀርተዋል፡፡[31]

ከውርስ *ጋር* በተያያዙ ጉዳዮች ላይም የሕጎች ተፈፃሚነት ወሰን የሚያሳዩ በርካታ ጉዳዮች አሉ። በአሊኖይስ ግዛት የውርስ ሕግ ከጋብቻ ውጭ የተወለደ ህፃን (illegitimate child) የአባቱን ውርስ እንዲያገኝ የሚፈቅድ ስላልነበር የአሜሪካ ጠቅላይ ፍርድ ቤት ይህ ሁኔታ በህገ-መንግስቱ የተረጋገጠውን እኩል ጥበቃ የማግኘት መብት (Equal Protection Clause) የሚቃረን ስለሆነ ኢ-ህገ-መንግስታዊ ነው በማለት *በትሪምብል ጉዳይ*[32] ወስኗል፡፡ ይህን አስገዳጅ ውሳኔ (precedent) መሠረት በማድረግ ክርክሮች ሲቀርቡ *የትሪምብል ጉዳይ* የተፈፃሚነት ወሰን በአሜሪካ ፍርድ ቤቶች አከራካሪ ሆኖ ነበር፡፡

ለምሳሌ *በፍራክሰ ጉዳይ*[33] ማሬ ፍራክስ የተባለች የሊን ሀንት ከጋብቻ ውጭ የተወለድኩ ልጅ ስለሆንኩ *በትሪምብል ጉዳይ* ውሳኔ መሠረት የአባቴን መሬት ልወርስ ይገባል በማለት መሬቱን ይዞ በነበረው ሬይ ሀንት በተባለው ወራሽ ላይ ክስ በማቅረቧ ጉዳዩን በይግባኝ የተመለከተው የአርካንሳስ ጠቅላይ ፍርድ ቤት ከጋብቻ ውጭ የተወለዱ ልጆች የአባታቸውን ንብረት እንዳይወርሱ የሚከለክለው ሕግ *በትሪምብል ጉዳይ* ህገ-መንግስታዊ አይደለም የተባለ ቢሆንም *የትሪምብል ጉዳይ* ወደኋላ ተመልሶ ተፈፃሚ ሊሆን አይችልም በማለት በአብላጫ ድምጽ ወስኗል፡፡[34] ፍርድ ቤቱ ለውሳኔው መደምደሚያ ምክንያት ያደረገውም መሬት በወረሱ ወይም በያዙ ሰዎች የባለቤትነት

[31]Comprehensive Environmental Response Compensation Liability Act (CERCLA) 1994; Congress here by declares that CERCLA section 107 applies to the dumping of hazardous waste before December 11, 1980 there by holding all responsible parties irrespective of the date of dumping.

[32]Trimble v. Gordon 430 U.S 762 (1977) as cited by Vance A, Gibbs, the Problematic Application of Succession of Brown, *Louisiana Law Review*, Vol. 41, No. 4, 1981, p. 1316

[33]*Marie Frakes v. Ray Hunt et al,* Arkansas Supreme Court (opinion delivered June 25, 1979) http://opinions.aoc.arkansas.gov/weblink8/0/doc/186149/Page3.aspx p. 172 (last accessed October 12, 2014); ሊን ሀንት ከ160 ሄክታር በላይ መሬት የነበረው ሰው ሲሆን እ.ኤ.አ 1972 ዓ/ም ኑዛዜ ሳይተው ሞቷል። *የትሪምብል ጉዳይ* የተወሰነው እ.ኤ.አ ሚያዝያ 26, 1977ዓ/ም ሲሆን ክሱ የቀረበው መስከረም 26, 1977 ዓ/ም ነው።

[34]Vance A. Gibbs, supra note 32, p. 1322

መብት ላይ አለመረጋጋትን በመፍጠር ችግር የሚያመጣ መሆኑን ሲሆን ይህም በሚከተለው መልኩ ተጠቃሎ ይገለጻል፡፡

> *The court recognized that the Arkansas Statute was invalid under Trimble, but the court denied the plaintiff's demand finding that Trimble should not be applied retroactively. [The] main reasons for denying retroactive application were the adverse effect on the certainty of land titles and the accompanying interference with the development of real property. Such an extended retroactive application would create, in the court's opinion, too much instability in the land titles to real property, alleging that they were the ones who should have inherited the property.*[35]

በአንፃሩ *የትሪምብል ጉዳይ* ገዥ ሕግ በመሆኑ ከውሳኔው ቀን በኋላ የሞቱ ሰዎች ውርስ ያለምንም ችግር ከጋብቻ ውጭ ለተወለዱ ልጆች ጭምር በእኩልነት ተፈፃሚ እንዲሆን ተደርጓል፡፡[36]

1.2 የሲቪል ሎው ተሞክሮ

የሲቪል ሎው ተከታይ በሆኑት የአውሮፓ *ሀገሮች* (Continental Europe) በመርህ ደረጃ ሕግ አውጭው ወደኋላ ተመልሶ ተፈጻሚ የሚሆን ሕግ እንዲያወጣ አይፈቀድለትም።[37] በ18ኛው እና በ19ኛው ክፍለ ዘመን በርካታ የአውሮፓ *ሀገሮች* የፍትሐ ብሔር ሕጋቸውን (Civil Codes)

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[35]Ibid; በተመሳሳይ ሁኔታ በአሜሪካ የኬንታኪ ግዛት ጠቅላይ ፍርድ ቤት *በፐንደሌቶን ጉዳይ* እና የቴነሲ ግዛት ጠቅላይ ፍርድ ቤት *በሌለን ጉዳይ* በቀረበላቸው ከጋብቻ ውጭ የተወለዱ ልጆች የውርስ ክልከላ ድንጋጌ *በትሪምብል ጉዳይ* ውሳኔ መሠረት የየግዛታቸው ሕግ ኢ-ህገ መንግስታዊ በማለት ሲወስኑ *የትሪምብል ጉዳይ* በክርክር ላይ ለነበሩ ጉዳዮች (pending cases) ካልሆነ በስተቀር ወደኋላ ተመልሶ ተፈፃሚ ሊሆን አይችልም በማለት ወስነዋል፡፡ (Ibid, p. 1322 & 1323 footnote 55)

[36]Ibid, p.1314 & 1316 ለምሳሌ ሲድኒ ብራውን እ.ኤ.አ ጥር 1,1978 (ከትሪምብል ውሳኔ በኋላ) በመሞቱ የሉዛኒያ ግዛት ይግባኝ ሰሚው እና ጠቅላይ ፍርድ ቤት ከጋብቻ ውጭ የተወለዱ ልጆችን ውርስ የሚከለክለውን ህግ ህገ-መንግስታዊ አይደለም በማለት የሟች ከጋብቻ ውጭ የተወለዱ ልጆች ጭምር በድርሻቸው ላይ በፍሬ ነገር ክርክር አድርገው እንዲወስኑ ውርሱን ለሚያየው ፍርድ ቤት መልሶለታል፡፡

[37]Maris Onzevs, the Restriction of Retroactive Legislation: Conception and Legal Challenges, Jurisprudence, University of Latvia, Vol. 20, No. 4, 2013, p. 1359

ሲያወጡ ሕጎች ወደኋላ ተመልሰው ተፈፃሚ እንዳይሆኑ የሚከለክሉ ድንጋጌዎችን አስቀምጠዋል።[38] በቅርቡ የወጣው የስፔን የፍትሐ ብሔር ሕግም በግልጽ ካልተደነገገ በስተቀር የፍትሐ ብሔር ሕጎች ወደኋላ ተመልሰው ተፈፃሚ ሊሆኑ አይችሉም (statutes shall not have retroactive effect unless otherwise provided therein) በማለት ይደነግጋል።[39] በእርግጥ በእነዚህ ሀገሮች ሕግ አውጭው ወደኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ እንዳያወጣ የሚከለክለው መርህ ፍጹም (absolute) አይደለም። በልዩ ሁኔታ በአንዳንድ የፍትሐ ብሔር ሕጎች ለህዝብ ጥቅም (public interest) ሲባል ወደኋላ ተመልሶ ተፈጻሚ የሚሆን ሕግ እንዲያወጣ ሊፈቀድ ይችላል።[40] ለምሳሌ በጀርመን ሕግ አውጭው በልዩ ሁኔታ ወደኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ ማውጣት የሚችለው ቀድሞ የወጣው ሕግ ግልጽነት ሲጎድለው ለማብራራት፣ አዲስ የሚወጣው ወይም የሚሻሻለው ሕግ በሰዎች መብት ላይ የሚያመጣው ጉዳት በጣም አናሳ ሲሆን፣ ቀደም ሲል ያሉ ሕጋዊያን ተግባራት (juridical acts) ተቀባይነት በሌለው መርህ (illegitimate norm) የሚመሩ ሆኖ ሲገኝ ስርዓት ማስያዝ ሲያስፈልግ እና በአጠቃላይ የሕጉ ለውጥ እና ወደኋላ ተመልሶ ተፈፃሚ መሆኑ ለህዝብ ጥቅም አስፈላጊ ሲሆን ብቻ መሆኑን ከህገ-መንግስታዊ ፍርድ ቤቱ የሕግ ሳይንስ (jurisprudence) መረዳት ይቻላል።[41] በሌሎች የአውሮፓ ህብረት ሀገሮችም የአባል ሀገሮች ሕግ አውጭ ወደኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ እንዲያወጣ የሚፈቀድለት በጣም አስፈላጊ የህዝብ ጥቅም (significant public interest) ሲኖር ብቻ መሆኑ በሕብረቱ ፍርድ ቤት (European Court of Justice) የዳበረ መርህ ነው።[42]

[38]Ibid, p.1351 & 1352፣ ለምሳሌ የ1794 የፐሩሲያ አጠቃላይ የሕግ ኮድ (General Law Code) አንቀጽ 14፣ የ1804 የፈረንሳይ የፍትሐ ብሔር ሕግ አንቀጽ 2፣ የ1811 የአውስትሪያ የፍትሐ ብሔር ሕግ አንቀጽ 5፣ የጆርጂያ የፍትሐ ብሔር ሕግ አንቀጽ 6፣ በሕግ አውጭው የሚወጡ ሕጎች ወደኋላ ተመልሰው ተፈፃሚ ሊሆኑ የማይገባ መሆኑን ይደነግጋሉ።

[39]Spanish Civil Code, 2009, article 2(3)

[40]Marise Onzevs, supra note 37, p. 1359

[41]Ibid, p. 1360

[42]Ibid, p. 1361

አንዳንድ የአውሮፓ ሀገሮችም በአንዳንድ የፍትሐ ብሔር ጉዳዮች ሕጎች ወደኋላ ተመልሰው ተፈፃሚ እንዳይሆኑ በህገ-መንግስት ላይ ይከለክላሉ፡፡[43] ስዊድን በልዩ ሁኔታ ካልሆነ በስተቀር ሕጎች ወደኋላ ተመልሰው ተፈፃሚ ሊሆኑ አይገባም የሚል አቋም የነበራት ሲሆን በተለይ የአውሮፓ ሕብረት አባል ከሆነችበት ከ1995 ዓ/ም ወዲህ በጉዳዩ ላይ የበለጠ ትኩረት ሰጥታለች፡፡[44] በዚህ ረገድ በክሊፓን ጉዳይ[45] የሀገሪቱ የአስተዳደር ጉዳዮች ጠቅላይ ፍርድ ቤቱ (Supreme Administrative Court) የሰጠውን ትርጉም እንደሚከተለው እንመለከታለን፡፡ እ.ኤ.አ ከ1965 - 1975 ክሊፓን የተባለ የወረቀትና ፐልፕ አምራች ኢንተርፕራይዝ በደቡባዊ ስዊድን ጆርንስጆን ሀይቅ አካባቢ ፈቃድ ተሰጥቶት ወረቀትና ፐልፕ ሲያመርት ከቆየ በኋላ በ1975 ዓ/ም ሞዶኤቢ ለተባለ ካምፓኒ በሽያጭ ተላለፈ፡፡[46] ከጊዜ በኋላ የሀይቁ ውሃ በክሊፓን ኢንተርፕራይዝ ተረፈ ምርት የተበከለ መሆኑ በመረጋገጡ በ1991 ዓ/ም የሀገሪቱ የአካባቢ ጥበቃ ኤጀንሲ አመልካች ሀይቁን ለማፅዳት የሚያስፈልገውን ገንዘብ በካሣ መልክ እንዲከፍል በ1989 ዓ/ም ተሻሽሎ የወጣውን የአካባቢ ጥበቃ ሕግ መሠረት በማድረግ ለአካባቢ ጥበቃ ኮንሴሽን ቦርድ (Concession Board) አቤቱታ አቅርቧል፡፡[47] ቦርዱ ክሊፓን ኢንተርፕራይዝ ለሌላ ካምፓኒ የተሸጠ መሆኑን በመጥቀስ አቤቱታውን ውድቅ ቢያደርገውም ጉዳዩን በይግባኝ የተመለከተው ሚኒስቴር መስሪያ ቤት ክሊፓን የተሸጠ ቢሆንም ቀደም ሲል ላደረሰው ብክለት ካሣ መክፈል አለበት በማለት

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[43]Ulf Bernitz, Retroactive Legislation in a European Perspective - on the Importance of General Principles of Law, Stockholm Institute for Scandinavian Law, 1957 - 2009, p. 45 & 46; ለምሳሌ የኖሮዌይ ህገ-መንግስት አንቀጽ 97 ሕጎች ወደኋላ ተመልሰው ተፈጻሚ ሊሆኑ የማይችሉ (no law may be given retroactive effect) መሆኑን ይደነግጋል። የ1979 ስዊድን ህገ-መንግስት አንቀጽ 10(2) ከታክስና ክፍያ ጋር የተያያዙ ሕጎች ወደኋላ ተመልሰው ተፈፃሚ መሆን የሌለባቸው መሆኑን ይደነግጋል፡፡ ሕግ አውጭው በልዩ ሁኔታ ወደኋላ ተመልሶ ተፈፃሚ የሚሆን የግብር ሕግ ማውጣት የሚቻለው በአስገዳጅ ሁኔታ ወይም አስቸኳይ ጊዜ (እንደ ጦርነትና የኢኮኖሚ ቀውስ ሲያጋጥም) ብቻ ነው፡፡

[44]Ibid, p. 49 - 51

[45]Klippan v. Environmental Protection Agency, Supreme Administrative Court (1996) as cited by Bernlitz

[46]Ulf Bernlitz, supra note 43, p. 56

[47]Ibid, የአካባቢ ጥበቃ ሕጉ አንቀጽ 5 እና 24 ቀደም ሲል ያልነበረ ሀሳብ (responsibility to repair damages remains even after an enterprise has been sold or closed down) በማለት የጨመረ ሲሆን ሕጉ ወደኋላ ተመልሶ ተፈፃሚ ስለመሆን አለመሆኑ የመሸጋገሪያ ድንጋጌ የለውም፡፡

ወስኗል::[48] ጉዳዩን በመጨረሻ የተመለከተው የስዊድን የአስተዳደር ጉዳዮች ጠቅላይ ፍርድ ቤት ግን ክሊፓን ከመሸጡ በፊት ላደረሰው ብክለት ካሳ እንዲከፍል የሚያስገድድ የአካባቢ ጥበቃ ሕግ ከ1989 ዓ/ም በፊት ያልነበረ ስለሆነ እና አዲሱ ሕግ ወደኋላ ተመልሶ ተፈፃሚ ሊሆን የሚችል ስለመሆኑ በሕግ አውጪው አካል የመሸጋገሪያ ድንጋጌ ያልተቀመጠ ስለሆነ ክሊፓን ሊጠየቅ አይገባም በማለት የሚኒስቴር መስሪያ ቤቱን ውሳኔ ሽሮታል::[49]

2. የገጠር መሬት አስተዳደርና አጠቃቀም ሕጎች ይዘት እና ለትችት የቀረቡት ጉዳዮች የተጨመቀ ሀሳብ

2.1 የገጠር መሬት አስተዳደርና አጠቃቀም ሕጎች ይዘት ከውርስ አንፃር

በሀገራችን ቀደም ሲል በነበረው የመሬት ስሪት በርስት ስርዓት ከሚመራው እና በቤተክርስቲያን ይዞታ ሥር ከነበረው መሬት በስትቀር[50] የገጠር መሬት እንደሌሎች ንብረቶች ያለምንም ገደብ በሽያጭ፣ በውርስ፣ በስጦታም ሆነ በሌሎች ሁኔታዎች ከአንድ ሰው ወደ ሌላ ሰው የሚተላለፍ ነበር::[51] ይህንን የመሬት ስሪት የለወጠው የገጠር መሬትን የህዝብ ሀብት ለማድረግ የወጣው አዋጅ ነው::[52] በዚህ አዋጅ ግለሰቦች በመሬት ላይ በጣም የተገደበ የይዞታ መብት ብቻ እንዲኖራቸው ተደንግጓል:: ይኸውም ባለይዞታው መሬቱን የመሸጥ፣ የመለወጥ፣ የማውረስ፣ የማስያዝ፣ በወለድ

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[48]Ibid,

[49]Ibid, ፍ/ቤቱ ከግል ሕጎች (private law) ይልቅ የአስተዳደር ሕግን ወደኋላ ተመልሶ ተፈፃሚ እንዲሆን ለማድረግ ሕግ አውጪው የተሻለ መብት ያለው ቢሆንም በሕጉ የመሸጋገሪያ ድንጋጌ ካልገለጸ በስተቀር ሕጉ ወደኋላ ተመልሶ ተፈፃሚ እንዲሆን ማድረግ የማይቻል መሆኑን ገልጿል::

[50]ሞላ መንግስቱ፣ የገጠር መሬት ስሪት በኢትዮጵያ፡- በሕግ የተደነገጉ መብቶችና በአማራ ብሔራዊ ክልል ያለው አተገባበር፣ የኢትዮጵያ የሕግ መጽሔት፣ 22ኛ ቮልዩም፣ ቁጥር 2፣ 2001 ዓ/ም፣ ገጽ 157 እና 158፤ በሰሜኑና መካከለኛው ኢትዮጵያ በከፊል የነበረው የገጠር መሬት ስሪት የርስት ይዞታ ስለነበር መሬት ከአንዱ ወደ ሌላው ሰው የሚተላለፈው ዘራቹውን ቆጥረው በሚመጡ የጋራ ተወላጆች መካከል ብቻ ነበር። እንደዚህ አይነት ስሪት ባለበት አካባቢ የርስት ተወላጆች መሬታቸውን ለመጠየቅ ምንም ነገር የማያግዳቸው መሆኑን ከፍትሐ ብሔር ሕግ ቁጥር 1168(1) ድንጋጌ ይዘት መረዳት ይቻላል። እንዲሁም በእነዚህ አካባቢዎች ሲሶ መሬት በኢትዮጵያ ኢቶዶክስ ተዋህዶ ቤተክርስቲያን ይዞታ ሥር ሆኖ ለቤተክርስቲያን አገልግሎትና ለካህናት መተዳደሪያ ያገለግል ነበር።

[51]የፍትሐ ብሔር ሕግ፣ ለምሳሌ በቁጥር 2875 እና ተከታይ ድንጋጌዎች መሠረት መሬት በሽያጭ ይተላለፍ ነበር:: በቁጥር 826 እና ተከታይ ድንጋጌዎች መሠረት በውርስ ለወራሾች በተቀመጠው ቅደም ተከተል እና ከቁጥር 2427 እስከ 2470 በተቀመጠው አግባብ በስጦታ ከአንዱ ወደ ሌላው መተላለፍ ይችል ነበር።

[52]አዋጅ ቁጥር 31/1967

አገድ የመስጠት ወይም በሌላ መንገድ የማስተላለፍ መብት አልነበረውም። ይሁን እንጅ ባለይዞታው ሲሞት የሚች ሚስት ወይም ባል ወይም አካለ መጠን ያልደረሰ ልጅ ወይም እነዚህ ከሌሉ አካለ መጠን ያደረሰ ልጅ በባለይዞታው ተተክቶ የመጠቀም መብት ብቻ እንዲኖረው ተደንግጎ ነበር።[53]

በመቀጠል የፌዴራል መንግስት የገጠር መሬት አስተዳደር አዋጅ ታውጇል።[54] አዋጁ ለክልሎች ሕግ አወጣጥ እንደመመሪያ የሚያገለግሉ መርሆዎችን የያዘ እንጅ ዝርዝር ድንጋጌዎች አልነበረውም። ከመሬት አጠቃቀምና ውርስ ጋር በተያያዘ አዋጁ የመሬት ባለይዞታዎች መሬታቸውን ለግብርና ስራ የማዋል፣ የማከራየትና ለቤተሰብ አባላት የማውረስ መብት ያላቸው መሆኑን ያካተተ ነበር።[55] ቀጥሎ የወጣው የኢፌዴሪ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ከቀድሞው አዋጅ በሰፋ መልኩ ከመሬት አጠቃቀምና አስተዳደር ጋር የተያያዙ መብቶችንና ግዴታዎችን የሚመለከቱ ዝርዝር ድንጋጌዎችን ይዟል።[56] አዋጁ ድፍን በሆነ አገላለጽ የመሬት ባለይዞታዎች ለቤተሰብ አባላት በስጦታ ወይም በውርስ መሬታቸውን ሊያስተላልፉ የሚችሉ መሆኑን ይደነግጋል።[57]

የፌዴራል መንግስቱን ሕግ ተከትሎ የአማራ ብሔራዊ ክልል መንግስትም የገጠር መሬት አስተዳደርና አጠቃቀም ሕጎችን አውጥቷል።[58] የመጀመሪያው ሕግ አዋጅ ቁጥር 46/1992 ሲሆን

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[53]ዝኪከማሁ፣ አንቀጽ 5

[54]አዋጅ ቁጥር 89/1989፣ አዋጁ የመሬት ባለቤትነት መብት የመንግስትና የህዝብ ብቻ መሆኑንና መሬት የማይሸጥ የማይለወጥ የኢትዮጵያ ብሔሮች ብሔረሰቦና ህዝቦች የጋራ ንብረት መሆኑን የሚደነግገውን የኢፌዲሪ ህገ-መንግስት ተከትሎ የወጣ ነው። የአዋጁ መግቢያ እና አንቀጽ 4፤ እንዲሁም የኢፌዲሪ ህገ-መንግስት አንቀጽ 40(3) ይመለከቷል።

[55]አንቀጽ 2(3)፣ 5 እና 6

[56]አዋጅ ቁጥር 456/1997፣

[57]አንቀጽ 5(2) እና 8(5)

[58]ቀደም ሲል አዋጅ ቁጥር 46/1992፤ በኋላም ይህን አዋጅ ያሻሻለው አዋጅ ቁጥር 133/1998 እና ማስፈፀሚያ ደንቡ ቁጥር 51/1999 ናቸው። ሌሎች ክልሎችም የየራሳቸውን ሕግ አውጥተዋል። በመሰረቱ መሬትና የተፈጥሮ ሀብትን በተመለከተ ሕግ የማውጣት ስልጣን የፌደራል መንግስት ሲሆን ክልሎች የፌደራል መንግስት ባወጣው ሕግ መሰረት መሬትን የማስተዳደር ስልጣን አላቸው፤ የኢፌዴሪ ህገ መንግስት አንቀጽ 51(5) እና 52(2)(መ) ይመለከቷል። ሆኖም የፌደራል መንግስት የገጠር መሬትን በተመለከተ ስለ እያንዳንዱ ጉዳይ ዝርዝር ሕግ ከማውጣት ይልቅ ዋና ዋና መርሆዎችን ከደነገገ በኋላ ዝርዝር ሕግ ክልሎች እንዲያወጡ በህገ መንግስቱ አንቀጽ 50(9) መሰረት ውክልና ሰጥቷል፤ አዋጅ ቁጥር 456/1997 አንቀጽ 17 ን ይመለከቷል።

በዚህ አዋጅ መሠረት የገጠር መሬት ባለይዞታ መሬቱን የመጠቀም፣ የማከራየት፣ ለጧሪው አርሶ አደር የማውረስ፣ እንዲሁም ለቤተሰብ አባሉ[59] በስጦታ ወይም በውርስ የማስተላለፍ መብት ነበረው።[60] ከዚህ አዋጅ አንፃር ስጦታ ተቀባዩ መሬት ቢኖረውም ባይኖረውም የባለይዞታውን መሬት እያረሰ ባለይዞታውን ለሚጦር ሰው የገጠር መሬትን በስጦታ ማስተላለፍ ይቻል ነበር።[61] ውርስ በኑዛዜ ወይም ያለ ኑዛዜ ሊደረግ የሚችል ሲሆን የመሬቱ ባለይዞታ እንደስጦታ ሁሉ መሬት ላለውም ሆነ ለሌለው ጧሪው በኑዛዜ ሊያስተላልፍ ይችላል።[62] የገጠር መሬት ውርስ ያለኑዛዜ የሚተላለፈው ግን ለባለይዞታው የቤተሰብ አባል ብቻ ነበር።[63] በሌላ አገላለጽ ለመሬቱ ባለይዞታ ጥገኛ ያልሆነ ሰው (ለምሳሌ የራሱ መሬት ያለው ልጅ) ባለይዞታውን በመጦሩ በኑዛዜ ወይም በስጦታ ካላገኘ በስተቀር ያለ ኑዛዜ መሬት ሊወርስ አይችልም ማለት ነው።

አዋጅ ቁጥር 46/1992ን ያሻሻለው የአብክመ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 133/1998 ሲሆን ይህ አዋጅ ከቀድሞው በተሻለ ሁኔታ ከመሬት አስተዳደርና አጠቃቀም ጋር የተያያዙ ዝርዝር መብቶችንና ግዴታዎችን የሚደነግግ ነው። በዚህ አዋጅ መሰረት የመሬት ባለይዞታው ቢያንስ ለሶስት ተከታታይ አመታት በነፃ ለጦረው አርሶ አደር ልጁ፣ የልጅ ልጁ ወይም የቤተሰብ አባሉ መሬቱን በስጦታ ማስተላለፍ ይችላል።[64] ባለይዞታው አካለ መጠን ያልደረሰ ልጁን ወይም የቤተሰብ አባሉን የማይነቅል ከሆነ ይዞታውን ለማንኛውም አርሶ አደር በኑዛዜ ማስተላለፍ ይችላል።[65] ባለይዞታው ሳይናዘዝ የሞተ እንደሆነ ወይም ኑዛዜው በሕግ ተቀባይነት ሳያገኝ የቀረ

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[59]አንቀጽ 2(7) የቤተሰብ አባል ማለት በቤተሰብ አባልነት የተመዘገበና የራሱ ቋሚ መተዳደሪያ የሌለው የይዞታ ባለመብቱን መተዳደሪያ ገቢ በመጋራት የሚኖር ማንኛውም ሰው ነው።

[60]አንቀጽ 2(4)፣ 2(7)፣ 5(2)፣ 6(4) እና 6(5)፤ በመሰረቱ የአማራ ክልል መጀመሪያ ላይ የመሬት ሽግሽግ የተደረገበትን አዋጅ ቁጥር 16/1989ን አውጥቶ የነበረ መሆኑ ይታወቃል።

[61]አንቀጽ 6(5) እና 5(2)

[62]አንቀጽ 6(5) እና 5(2) በኑዛዜ ሊተላለፍለት የሚገባ ሰው ባለይዞታውን እያረሰ የሚጦር (አንቀጽ 6(5) ብቻ ነው።

[63]አንቀጽ 2(4)፣ 5(2) እና 2(7) ተያይዘው ሲነበቡ፤ በመሠረቱ የቤተሰብ አባል ሲባል በትርጉሙ መሠረት መስፈርቱን የሚያሟላ የባለይዞታው ልጅ ወይም ሌላ ጥገኛ የሆነን ሰው በሙሉ ያካትታል።

[64]አንቀጽ 17(1)

[65]አንቀጽ 16(1)(3)

እንደሆነ ይዞታው በግብርና ስራ ለሚተዳደር ወይም መተዳደር ለሚፈልግ የሟች ልጅ፣ ቤተሰብ ወይም ወላጆቹ በአዋጁ ማስፈፀሚያ ደንብ በሚወጣው ቅደም ተከተል መሠረት ይተላለፋል::[66]

2·2 ለትችት የቀረቡት ጉዳዮች የተጨመቀ ሀሳብ

2·2·1 ጉዳይ አንድ[67]

አቶ አደም የሱፍ በደቡብ ወሎ ዞን ኩታበር ወረዳ ውስጥ የእርሻ መሬት የነበራቸው ሲሆን በ1988 ዓ/ም ከዚህ አለም በሞተ ተለይተዋል:: ከመሞታቸው በፊት መሬታቸውን አብሮ ሲኖር የነበረው የልጅ ልጃቸው አቶ መሐመድ በላይ እና ልጃቸው ወ/ሮ ጣይቱ አደም ተካፍለው ይጠቀሙበት ነበር:: ሰውየው ከሞቱ በኋላም መሬቱ በእነዚህ ሰዎች ቁጥጥር የቆዬ ቢሆንም ከብዙ አመታት በኋላ በመካከላቸው አለመግባባት በመፈጠሩ የኩታበር ወረዳ ፍርድ ቤት በ2001 ዓ/ም ግራቀኙን አከራክሮ በቀበሌው ውስጥ የሟችን መሬት የሚወርስ ሌላ የቤተሰብ አባል የሌለ ቢሆንም ሟች በህይወት ሳለ ጀምረው መሬቱን ተካፍለው ሲጠቀሙ ስለነበር ለሁለት ሊካፈሉ ይገባል በማለት ወስኗል::[68]

ከዚህ በኋላ እሸቱ አደም እና ጌታቸው አደም የተባሉ የሟች ልጆች (የሰበር ተጠሪዎች) አባታችን ከሞተ በኋላ ወራሽነታችንን አረጋግጠን በእህታችን ወ/ሮ ጣይቱ አደም ስም ሆኖ በአንድነት

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[66] አንቀጽ 16(5)(6)፣ አዋጁን ለማስፈፀም የወጣው ደንብ ቁጥር 51/1999፣ አንቀጽ 11(7) የወራሾችን ቅደም ተከተል አንዱ ከሌለ ሌላው ወራሽ የሚጠራበትን ሁኔታ ይዘረዝራል። ይኸውም:-

ሀ) አካለ መጠን ያልደረሱ ልጆች፣ ልጅ ከሌለ የቤተሰብ አባላት

ለ) መሬት የሌላቸው አካለ መጠን ያደረሱ ልጆች ወይም የቤተሰብ አባላት

ሐ) መሬት ያላቸው ልጆች

መ) ወላጆች (የሟች የትዳር ጓደኛ ጋብቻ ካልመሰረተ/ች እና በቀበሌው መኖር ከቀጠለ/ች በሞት እስካልተለየ/ች ድረስ የመጠቀም መብቷ እንደተጠበቀ ሆኖ)

[67] *መሀመድ በላይ እና እነ እሸቱ አደም (2 ሰዎች)*፣ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ/ቁ 86089፣ ሐምሌ 05 ቀን 2005 ዓ/ም (ከዚህ በኋላ *የመሀመድ በላይ ጉዳይ* እየተባለ ይጠራል።)

[68] መ/ቁ 6875፣ የካቲት 24 ቀን 2001 ዓ/ም

የምንጠቀምበትን መሬት መሀመድ በላይ (የሰበር አመልካች) እንዲካፈል መወሰኑ የእኛን መብት የሚነዳ ስለሆነ ውሳኔው ሊሻር ይገበዋል በማለት በፍ/ሥ/ሥ/ሕ/ቁ 358 መሠረት መቃወሚያ አቅርበዋል፡፡ አመልካች ተቃዋሚዎች አካባቢውን ለቀው ለረጅም ዘመን አዲስ አበባ የሚኖሩ በመሆናቸው የመሬት ውርስ የመጠየቅ መብት የላቸውም በማለት ተከራክሯል፡፡ ተጠሪዎች በበኩላቸው አመልካች በደሴ ከተማ የሚኖር እና የአባታችንን መሬት ለመውረስ መብት የለውም ሲሉ ተከራክረዋል፡፡ የወረዳው ፍርድ ቤት ግራቀኙን አከራክሮ የቀድሞው ውሳኔ የሚሻርበት ምክንያት የለም በማለት ወስኗል፡፡[69] ተጠሪዎች በዚህ ውሳኔ ቅር በመሰኘት ለደቡብ ወሎ ዞን ከፍተኛ ፍርድ ቤት ይግባኝ ቢያቀርቡም ፍርድ ቤቱ የወረዳ ፍ/ቤቱን ውሳኔ ስህተት የለበትም በማለት አጽንቶታል፡፡[70]

ቀጥሎም ተጠሪዎች ለአብክመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰበር አቤቱታ በማቅረባቸው ችሎቱ ግራቀኙን አከራክሮ ሟች አደም የሱፍ የሞቱት በ1988 ዓ/ም ከመሆኑ አኳያ ሟች እንደሞቱ ውርሱ ስለሚከፈት ጉዳዩ መታየት የሚኖርበት በአዋጅ ቁጥር 31/1967 መሠረት ነው፡፡ በዚህ አዋጅ አንቀጽ 5 መሠረት የቤተሰብ አባል መሬት ሊወርስ ይችላል ተብሎ ያልተደነገገ ስለሆነ አመልካች ሟችን ሊውርስ አይችልም። ተጠሪዎች ግን የሟች ልጆች በመሆናቸው በወቅቱ በነበረው ሕግ መሠረት የሟችን መሬት የመውረስ መብት አላቸው በማለት የሥር ፍርድ ቤቶችን ውሳኔ ሽሮታል፡፡[71]

አመልካች በዚህ ውሳኔ ቅር በመሰኘት ለፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰበር አቤቱታ አቅርቧል፡፡ የቅሬታው ይዘት በአጭሩ ሟች በህይወት በነበረበት ጊዜ የቤተሰብ አባል በመሆን ተጠቃሚ የነበርኩ ሆኖ እያለ የክልሉ ሰበር ሰሚ ችሎት አግባብነት የሌለውን ሕግ በመጥቀስ መብቴን እንዳጣ ማድረጉ መሠረታዊ የህግ ስህተት ነው የሚል ነው፡፡ ተጠሪዎች ለዚህ

[69]ዝኪከማሁ፣ ሰኔ 15 ቀን 2002 ዓ/ም
[70]መ/ቁ 3236፣ ጥቅምት 10 ቀን 2003 ዓ/ም
[71]መ/ቁ 15654፣ ጥቅምት 06 ቀን 2005 ዓ/ም

ያቀረቡት መልስ አመልካች የራሱን የእርሻ መሬት ከ20 ዓመት በፊት ለልጁ ሰጥቶ ደሴ ከተማ ላይ በመንግስት ሥራ ተቀጥሮ የሚኖር ነው፡፡ በአዋጅ ቁጥር 133/1998 መሰረት አመልካች የሚች የልጅ ልጅ ሆኖ የአባታችንን መሬት ሊወርስ የሚችልበት አግባብ ስለሌለ የክልሉ ሰበር ሰሚ ችሎት ውሳኔ ስህተት የለበትም በማለት ተከራክረዋል፡፡

የሰበር ሰሚ ችሎቱም የክልሉ ሰበር ሰሚ ችሎት በሚያከራክረው የገጠር መሬት ይዞታ ላይ አመልካች መብት የለውም በማለት መወሰኑ ተገቢ ነው ወይስ አይደለም? የሚለውን ጭብጥ በመያዝ በመጀመሪያ በአዋጅ ቁጥር 31/1967 አንቀጽ 5 ላይ የቤተሰብ አባል የመውረስ መብት ያልተሰጠው ቢሆንም ቀጥሎ በወጡት የፌደራሉ የገጠር መሬት አዋጅ ቁጥር 89/1989 አንቀጽ 2(5)፣ አዋጅ ቁጥር 456/1997 አንቀጽ 8(5) እና በአብክመ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 133/1998 አንቀጽ 2(6) ለቤተሰብ አባል ተቀራራቢ ትርጉም የሚሰጡና ወራሽ የሚያደርጉ መሆናቸውን አትቷል። በመቀጠልም ለተያዘው ጉዳይ ተፈፃሚነት ያለውን ሕግ በተመለከተ ሲተነትን፡-

> *የክልሉ ሰበር ሰሚ ችሎት … ጉዳዩን በአዋጅ ቁጥር 31/1967 መሠረት የመረመረው የተጠሪዎች አባትና የአመልካች ሊያት በ1988 ዓ/ም የሞቱበትን ጊዜ መነሻ በማድረግ ቢሆንም … ከአዋጅ ቁጥር 31/1967 በኋላ በተለያዩ ጊዜያት የወጡት የገጠር መሬት አዋጆች ስለ ቤተሰብ አባል የሰጡትን ተቀራራቢና ተመሳሳይ ትርጓሜዎችን መሠረት ያደረገ አይደለም፡፡ በተለይ በክልሉ የገጠር መሬት አስተዳደርና አጠቃቀም መወሰኛ አዋጅ ቁጥር 133/1998 አንቀጽ 32(2) አዋጁን የሚቃረን ማንኛውም ህግ ደንብ መመሪያ ወይም ልማዳዊ አሠራር በአዋጁ በተሸፈኑ ጉዳዮች ላይ ተፈፃሚነት እንደማይኖረው የተደነገገ በመሆኑ የክልሉ ሰበር በአዋጁ አንቀጽ 16(5) አንድ የመሬት ባለይዞታ … ሳይናዘዝ የሞተ እንደሆነ መብቱ በግብርና ስራ ለሚተዳደር ወይም መተዳደር ለሚፈልግ የሚች ልጅ ወይም ቤተሰብ አዋጁን ለማስፈፀም በሚወጣው ደንብ በሚደነግገው ቅደም ተከተል መሠረት ይተላለፋል በሚል የደነገገውንና በዚሁ መነሻ አዋጁን ለማስፈፀም በወጣው*

> *ደንብ ቁጥር 51/1999 አንቀጽ 11(7) ...ሀ - መ በተዘረዘረው ቅደም ተከተል ለተመለከቱት የቅርብ ዘመዶች እንደሚተላለፍና በዚሁ ቅደም ተከተል መሠረትም በፊደል ሀ ለአካለ መጠን ያልደረሱ ልጆች፣ ልጅ ከሌለ ደግሞ የቤተሰብ አባላት.... በመጀመሪያ ደረጃ ሊወርሱ የሚገባ ስለመሆኑ የተቀመጠውን ያላገናዘበ ነው፡፡ በመሆኑም ... ለጉዳዩ አግባብነት የሚኖረው አዋጅ ቁጥር 31/1967 ሳይሆን በአሁኑ ጊዜ በክልሉ ተፈፃሚነት ያላቸው አዋጅ ቁጥር 133/1998 እና ይህንኑ አዋጅ ለማስፈፀም የወጣው ደንብ ቁጥር 51/1999 ናቸው ብሏል፡፡*[72]

በመቀጠል ችሎቱ ተጠሪዎች ከኃይለስላሴ ዘመነ መንግስት ጀምረው አዲስ አበባ የሚኖሩ መሆናቸው እና አመልካች ግን ሟች በህይወት በነበሩበት ጊዜ አብሯቸው ሲኖር ቆይቶ የሚያከራክረውን መሬት ሳይለቅ ደሴ ከተማ ግዮን ሆቴል በጊዜያዊነት ተቀጥሮ ሲሰራ የቆዬ መሆኑ በወረዳው ፍርድ ቤት የተረጋገጡ ፍሬ ነገሮች ናቸው ብሏል፡፡ ከዚህ አንፃር ምንም እንኳን የወረዳው ፍርድ ቤት ለአመልካች መሬቱን የወሰነው የሟች የቤተሰብ አባል ነው በማለት አለመሆኑ ተገቢ ባይሆንም[73] በውጤት ደረጃ ግን አመልካችን ተጠቃሚ የሚያደርግ ውሳኔ በመሆኑ ተቀባይነት ያለው ነው ብሏል፡፡ በመጨረሻም ችሎቱ የክልሉን ሰበር ሰሚ ችሎት ውሳኔ በመሻር አመልካች በሚያከራክረው መሬት ላይ ከወ/ሮ ጣይቱ አደም ጋር ተከራክሮ በደረሰው ድርሻ መጠን የባለይዞታነት ሙብት ያለው በመሆኑ ተጠሪዎች ያቀረቡት የፍርድ መቃወሚያ ተቀባይነት የለውም ተብሎ በኩታበር ወረዳ ፍርድ ቤት እና በደቡብ ወሎ ዞን ከፍተኛ ፍርድ ቤት መወሰኑ የሚነቀፍበት ምክንያት የለም ሲል ወስኗል፡፡

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[72] *የመሀመድ በላይ ጉዳይ፣ ማስታወሻ ቁጥር 67*

[73] ችሎቱ ከዚህ ድምዳሜ ላይ የደረሰው አመልካች ከሟች አያቱ ጋር እየኖረ ገቢ እየተጋራ በመኖር በኋላም መሬቱን ይዞ ደሴ ከተማ በጊዜያዊነት በመቀጠር በቤተሰብ አባልነት የያዘው ነው በማለት ነው።

2.2.2 ጉዳይ ሁለት[74]

ይህ ጉዳይ የሰበር አመልካች የሆነችው ፋሲካ ሰጠኝ በባህር ዳር ዙሪያ ወረዳ ፍርድ ቤት ከሳሽ በመሆን በሰበር ተጠሪ ላይ ባቀረበችው ክስ የተጀመረ ነው፡፡ የክሱ ይዘትም ባጭሩ ከሟች እናቴ ወ/ሮ አዛዥ ታዬ በውርስ የተላለፈልኝን አራት ቃዳ መሬት ተጠሪ በጉልበቱ ይዞ ለመልቀቅ ፈቃደኛ ስላልሆነ እንዲያስረክበኝ ይወሰንልኝ የሚል ነበር፡፡ ተጠሪ በበኩሉ ክስ የቀረበበት መሬት በ1984 ዓ/ም ከውትድርና ስመለስ ከሟች ሰጠኝ ገላ በሞተ ከዳ ተነስቶ የተሰጠኝና በ1989 ዓ/ም የመሬት ሽግሽግ ወቅት በስሜ የተቆጠረልኝ ስለሆነ ልለቅ አይገባም በማለት ተከራክሯል፡፡

የወረዳ ፍርድ ቤቱም አከራካሪው መሬት በ1989 ዓ/ም የመሬት ሽግሽግ ወቅት በአመልካች እናት ወ/ሮ አዛዥ ታዬ የተደለደለ መሆኑን በማረጋገጥ ተጠሪ መሬቱን ለአመልካች ሊያስረክብ ይገባል በማለት ወስኗል፡፡[75] ተጠሪ በዚህ ውሳኔ ቅር በመሰኘት ለምዕራብ ጎጃም ዞን ከፍተኛ ፍርድ ቤት ይግባኝ ቢያቀርብም ፍርድ ቤቱ የወረዳ ፍርድ ቤቱን ውሳኔ ምክንያቱን ብቻ በመቀየር አጽንቶታል፡፡[76]

ቀጥሎም ተጠሪ ለአብክመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰበር አቤቱታ በማቅረቡ ችሎቱ ግራቀኙን አስቀርቦ ክርክራቸውን ከሰማ በኋላ የአመልካች እናት የሞቱት በ1991 ዓ/ም በመሆኑ የመሬት ውርሱን ለመወሰን ተፈፃሚ የሚሆነው ሕግ በወቅቱ ስራ ላይ የነበረው አዋጅ ቁጥር 89/1989 ነው። በዚህ አዋጅ መሠረት የባለይዞታው የቤተሰብ አባል ካልሆነ በስተቀር ልጅ በመሆን ብቻ መውርስ ስለማይቻል አመልካች የሟች የቤተሰብ አባል ነኝ ብላ ስላልተከራከረች ቀድሞውንም ቢሆን ክስ የማቅረብ መብት የላትም በማለት የሥር ፍርድ ቤቶችን ውሳኔ በመሻር ወስኗል፡፡[77]

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[74] *ፋሲካ ሰጠኝ እና ገብሬ መስጦፋ፣* የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ/ቁ 96395፣ ሚያዚያ 24 ቀን 2006 ዓ/ም (ከዚህ በኋላ *የፋሲካ ሰጠኝ ጉዳይ* እየተባለ ይጠራል።)

[75] *መ/ቁ* 12054፣ ሰኔ 13 ቀን 2004 ዓ/ም

[76] *መ/ቁ* 51475፣ ህዳር 18 ቀን 2005 ዓ/ም

[77] *መ/ቁ* 27519፣ ታህሳስ 09 ቀን 2006 ዓ/ም

አመልካች ይህን ውሳኔ በመቃወም ለፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አቤቱታ በማቅረቧ ችሎቱ የከልሉ ሰበር ሰሚ ችሎት አከራካሪውን ጉዳይ ከአዋጅ ቁጥር 89/1989 አንፃር በመመልከት የአመልካችን ጥያቄ ውድቅ ማድረጉ አግባብ ነው ወይስ አይደለም? የሚለውን ጭብጥ ይዞ ክርክራቸውን መርምሯል፡፡ በዚህ መሰረት አዋጅ ቁጥር 89/1989 አጠቃላይ ይዘት ያላቸው መርሆዎችን ከመደንገግ ባለፈ ዝርዝር ጉዳዮችን አላካተተም፤ ይህ አዋጅም በአዋጅ ቁጥር 456/1997 በግልጽ የተሻረ ነው ብሏል። በተጨማሪም ከዚህ በፊት በመ/ቁ 86089 *(የመሀመድ በላይ ጉዳይ)* የመሬቱ ባለይዞታ አዋጅ ቁጥር 133/1998 ከመውጣቱ በፊት የሞተ ቢሆንም ከገጠር መሬት ውርስ ጥያቄ ጋር በተያያዘ በሚቀርቡ ጉዳዮች ላይ አዋጅ ቁጥር 133/98 እና ደንብ ቁጥር 51/99 ተፈፃሚነት የሚኖራቸው መሆኑን አስገዳጅ የሕግ ትርጉም የሰጠ መሆኑን አውስቷል። ቀጥሎም ምንም እንኳን ሟች ወ/ሮ አዛዥ ታዬ የክልሉ የገጠር መሬት አዋጅ ቁጥር 133/1998 ከመውጣቱ በፊት በ1991 ዓ/ም የሞቱ ቢሆንም ቀደም ሲል በተሰጠው አስገዳጅ ውሳኔ መሠረት ለዚህ ሰበር ክርክር መነሻ ለሆነው ጉዳይ አግባብነት የሚኖረው የተሻረው የፌዴራል መንግስቱ አዋጅ ቁጥር 89/1989 ሳይሆን አዲሱ የክልሉ የገጠር መሬት አዋጅ ቁጥር 133/1998 እና ደንብ ቁጥር 51/1999 በመሆኑ የክልሉ ሰበር ሰሚ ችሎት ተገቢነት የሌለውን አዋጅ በመጠቀም አመልካች ክስ የማቅረብ መብት የላትም በማለት መወሰኑ መሠረታዊ የሕግ ስህተት የተፈፀመበት ነው በማለት ውሳኔውን ሽሮ በአዋጁ እና ደንቡ መሠረት ግራቀኙን አከራክሮ ተገቢውን እንዲወስን ጉዳዩን መልሶለታል፡፡

3. የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰጠው አስገዳጅ ትርጓሜ ላይ የቀረበ ትችት

ከላይ ቀደም ሲል ጀምሮ በወጡት የገጠር መሬት ሕጎች መካከል ምን ያክል ልዩነት እንዳለ ተገንዝበናል። ከዚህ በመቀጠል በሰበር ሰሚ ችሎቱ አስገዳጅ ትርጓሜ እና ውሳኔዎች ላይ ያሉትን አተያየቶች (perspectives) እንመለከታለን፡፡

የመጀመሪያው የትርጓሜውንና የውሳኔዎቹን ይዘት በአዎንታዊ ጎናቸው ማየት ነው፡፡ ይኸውም ሕግ አውጭው በየወቅቱ የተለያየ ሕግ በማውጣቱ ምክንያት በመሬት ባለይዞታዎች ወይም ወራሾች

መካከል ልዩነት መፍጠር የለበትም፡፡ አዲስ ሕግ ሲወጣ ቀደም ሲል የነበረውን በመሻር ወይም በመሻሻል የሚታወጅ በመሆኑ የመሬቱ ባለይዞታ ሕጉ ከመውጣቱ በፊት የሞተ ቢሆንም ሕጉ ከተሻሻለ በኋላ የሚቀርብ ጉዳይ በአዲሱ ሕግ መሠረት መስተናገድ ይኖርበታል፡፡ ይህ አገላለጽ በራሱ ሁለት ገጽታዎች ይኖሩታል፡፡ በአንድ በኩል የዚህ ዓይነት ጉዳይ ሲቀርብ በዋናነት መታየት ያለበት ሟች የሞተበት ቀን (date of the deceased) ሳይሆን ክርክሩ የቀረበበት ቀን ስለሆነ የተሻሻለው ሕግ ወደ ኋላ ተመልሶ ተፈፃሚ ሆኗል ማለት አይቻልም በሚል መወሰድ ይቻላል፡፡

በሌላ በኩል ሟች የሞተበት ጊዜ ተወስዶ ሕጉ ወደኋላ ተመልሶ ተፈፃሚ ይሁን ቢባል እንኳን ጉዳዩ የቀረበው ሕጉ ከተሻሻለ በኋላ በመሆኑ የቀድሞው ሕግ የተሻረ ወይም የተሻሻለ በመሆኑ፣ እና ቀድሞ ከነበረው ሕግ ይልቅ የተሻሻለው ሕግ ወራሾችን የሚጠቅም በመሆኑ ውጤቱ ተቀባይነት ያለው ነው በሚል ማየት ይቻላል፡፡ ለምሳሌ አዋጅ ቁጥር 46/1992 ስራ ላይ በነበረበት ወቅት አባቱ የሞተበት የራሱ መሬት ያለው በመሆኑ ወራሽ ያልነበረ ልጅ ከጊዜ በኋላ አዋጅ ቁጥር 133/98 መሬቱን እንዲወርስ ስለሚያደርገው ክርክሩ በተሻሻለው አዋጅ መሠረት ሲታይ ተጠቃሚ ያደርገዋል፡፡ ከዚህ አንጻር ለትችት ምክንያት በሆኑት ሁለቱም ጉዳዮች የመሬቱ ባለይዞታዎች የሞቱት በቅደም ተከተል አዋጅ ቁጥር 31/67 እና 89/1989 ሥራ ላይ በነበሩበት ወቅት በመሆኑ መብት ያልነበራቸው ቢሆንም በአዋጅ ቁጥር 133/1998 ክርክሩ ሲታይ መብት ያገኙ በመሆኑ ተጠቃሚ ሆነዋል። ለትችት በቀረቡት በሁለቱም ጉዳዮች ሰበር ሰሚ ችሎቱ ከጀረባ ያለውን ምክንያት (the rational behind) በበቂ ሁኔታ ባያስቀምጥም አዲሱ አዋጅ እና ማስፈፀሚያ ደንቡ ወደ ኋላ ተመልሰው ተፈጻሚ እንዲሆኑ ያደረገው ከዚህ አዎንታዊ ጎን በመነሳት ነው ብሎ መገመት ይቻላል።

ሁለተኛው አተያየት ከሕግ አወጣጥ መርህ እና ከሰበር ሰሚ ችሎቱ ትርጓሜ አሉታዊ ጎኖች የሚነሳ ነው፡፡ በዚህ ረገድ የሰበር ሰሚ ችሎቱ አቋም ላይ በርካታ ትችቶችን ማንሳት ይቻላል።

ሀ. የሕግ አወጣጥ መርህን የሚጥስ ስለመሆኑ

ከላይ በክፍል አንድ እንደተመለከትነው በመርህ ደረጃ ሕጎች ተፈፃሚ የሚሆኑት ከታወጁበት ጊዜ አንስቶ ነው፡፡ ይሁን እንጅ በልዩ ሁኔታ በህገ-መንግስቱ ካልተከለከለ በስተቀር ሕግ አውጭው ወደኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ ሊያወጣ ይችላል፡፡ ሕግ አውጭው በልዩ ሁኔታ እንዲህ አይነት ሕግ የሚያወጣው በዘፈቀደ ሳይሆን አንድ የተለየ ዓላማን ለማሳካት ወይም የህዝብን ጥቅም ለማስጠበቅ ነው፡፡ ለምሳሌ በሀገራችን የሰበር ሰሚ ችሎቱ *በጎርፌ ወርቅነህ ጉዳይ*[78] የቤት ሽያጭ ውል በፅሑፍ ሆኖ በውል አዋዋይ ወይም በፍርድ ቤት ፊት ካልተደረገ የማይፀና ነው በማለት ለፍ/ህ/ቁ 1723 አስገዳጅ ትርጉም በመስጠት ወስኗል። በነበረው የተለመደ አሠራር ባንኮች ይህን ሁኔታ ሳያሟሉ በርካታ ብድር አበድረው ስለነበር ሕግ አውጭው በባንኮች ላይ ብሎም በሀገሪቱ ላይ የሚደርሰውን ኪሳራ ለማስቀረት የሰበር ሰሚ ችሎቱ አስገዳጅ ውሳኔ በባንኮችና በፋይናንስ ተቋማት ላይ ተፈፃሚ እንዳይሆን የሚያደርግ ሕግ በማውጣት ሕጉ ወደኋላ ተመልሶ ተፈፃሚ እንዲሆን አድርጓል፡፡[79] በልዩ ሁኔታ በሕግ አውጭው ካልተደነገገ በስተቀር ሁሉም ሕጎች ተፈፃሚ የሚሆኑት ከወጡበት ቀን ጀምሮ ለሚከናወኑ ተግባራትና ለሚከሰቱ ክስተቶች (acts and events occurring after the issuance of the law) ነው፡፡[80] ከዚህ አንፃር የሰበር ሰሚ ችሎቱ "የመሬቱ ባለይዞታ አዋጅ ቁጥር 133/1998 እና ማስፈጸሚያው ደንብ ቁጥር 51/1999 ከመውጣቱ በፊት የሞተ ቢሆን እንኳን የመሬት ውርስ ክርክሩ እልባት ማግኘት ያለበት ክስ በቀረበበት ወቅት ሥራ ላይ ባለው በዚህ አዋጅ እና ደንብ መሰረት ነው" ሲል ትርጉም መስጠቱ እነዚህን መርሆዎች ይቃረናል ማለት ይቻላል።

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[78] *ጎርፌ ወርቅነህ እና እነ አበራሽ ዱባርጌ (ሁለት ሰዎች)*፣ የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ/ቁ 21448፣ ሚያዝያ 30 ቀን 1999 ዓ/ም

[79] *የፍትሐ ብሔር ሕግ ማሻሻያ አዋጅ ቁጥር 639/2001*፣ አንቀጽ 3፣

[80] ይህን ሁኔታ በሀገራችን በታወጁ ሕጎች "የሚፀናበት ጊዜ" ተብለው በተቀመጡት ድንጋጌዎች ላይ መመልከት ይቻላል፡፡ አንዳንድ ጊዜ ሕግ አውጭው ሕጉን ሲያሻሽል በቀድሞው ሕግ የተጀመሩ ጉዳዮች በዚያው በተሻረው ሕግ እንዲያልቁ በማድረግ ሕጉ ከተሻሻለ በኋላ የሚቀርቡ ጉዳዮች ግን በአዲሱ ሕግ እልባት እንዲያገኙ በመፈለግ ግልጽ የመሸጋገሪያ ድንጋጌ ያስቀምጣል። ለምሳሌ የአሠሪና ሠራተኛ ጉዳይ አዋጅ ቁጥር 377/1996 አንቀጽ 188(4) "በማናቸውም የሥራ ክርክር ሰሚ አካላት በመታየት ላይ ያሉ የሥራ ክርክሮች ይህ አዋጅ ከመጽናቱ በፊት በነበረው ሕግ መሰረት በተጀመሩበት ሥርዓት ፍፃሜ ያገኛሉ" በማለት ይደነግጋል።

ለ. የውርስ መከፈትን ከሚደነግገው ሕግ ጋር የሚቃረን ስለመሆኑ

የሰበር ሰሚ ችሎቱ ለሁለቱም ጉዳዮች በቂ ምክንያት ሳይሰጥ ሕጉ ከመውጣቱ በፊት የሞቱ ባለይዞታዎችን ውርስ ጉዳይ በክልሉ ውስጥ አሁን በስራ ላይ ያሉት ሕጎች ተፈፃሚ እንዲሆኑ አድርጓል፡፡ ችሎቱ *በመሀመድ በላይ ጉዳይ* የሰጠው ምክንያት ከአዋጅ ቁጥር 31/1967 በኋላ የወጡት ሕጎች የቤተሰብ አባል የሚለውን በተቀራረበ ሁኔታ ትርጉም የሰጡ በመሆኑ፣ በስራ ላይ ባለው አዋጅ ቁጥር 133/98 አንቀጽ 32(2) መሰረት አዋጁን የሚቃረን ህግ፣ ደንብ፣ መመሪያ ወይም ልማዳዊ አሠራር በአዋጁ በተሸፈኑ ጉዳዮች ተፈፃሚነት የማይኖረው ስለሆነ ለተያዘው ጉዳይ ተፈፃሚ ሊሆን የሚገባው አዋጅ ቁጥር 133/98 እና ደንብ ቁጥር 51/99 በመሆኑ በደንቡ አንቀጽ 11(7)(ሀ) መሠረት ሟች አካለ መጠን ያላደረሰ ልጅ ከሌለው ውርሱ የሚተላለፈው ለቤተሰብ አባሉ ስለሆነ አመልካች ሟችን ሊወርስ ይገበዋል በሚል ነው።[81] በሌላ በኩል ችሎቱ *በፉሲካ ሰጠኝ ጉዳይ* የሰጠው ምክንያት አዋጅ ቁጥር 89/1989 በአዋጅ ቁጥር 456/1997 በግልጽ ከመሻሩም በላይ ዝርዝር ድንጋጌዎች የሌሉት በመሆኑ እና ከዚህ በፊት አስገዳጅ ትርጉም ያለው ውሳኔ በመሰጠቱ የአመልካች እናት በ1991 ዓ/ም ቢሞቱም ክርክሩ መታየት ያለበት በአዋጅ ቁጥር 133/98 እና ደንብ ቁጥር 51/99 መሰረት ነው በማለት ነው፡፡

በመሰረቱ አንድ ሰዉ ሲሞት በሞተበት ጊዜ በዋናው መኖሪያ ስፍራ ውርሱ ይከፈታል።[82] በሟች መሞት ምክንያት ቀሪ የማይሆኑት መብትና ግዴታዎቹም ወደ ወራሾቹ ይተላለፋሉ፡፡[83]

በዚህ መሰረት *በመሀመድ በላይ ጉዳይ* ሟች አቶ አደም የሱፍ የሞቱት በ1988 ዓ/ም ሲሆን *በፉሲካ ሰጠኝ ጉዳይ* ደግሞ ሟች ወ/ሮ አዛዥ ታዬ የሞቱት በ1991 ዓ/ም ከመሆኑ አኳያ ለወራሾቻቸው

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[81]በመሰረቱ ችሎቱ አመልካችን ወራሽ ያደረገበት ድንጋጌ ደንብ ቁጥር 51/1999 አንቀጽ 11(7)(ሀ) ነው። ሆኖም ይህ ድንጋጌ አከለ መጠን ያላደረሰ የቤተሰብ አባልን የሚመለከት ነው። አካለ መጠን ያደረሰ የቤተሰብ አባል ወራሽ ሊሆን የሚችለው በአቀጽ 11(7)(ለ) መሰረት ነው። በሌላ በኩል ችሎቱ አመልካች የቤተሰብ አባል መሆኑ ባልተረጋገጠበት ሁኔታ (ተጠሪዎች ከጥንት ጀምሮ አመልካች የራሱን መሬት ለልጁ ሰጥቶ ደሴ በመንግስት ሥራ ተቀጥሮ የሚሰራ ነው ብለው ከመከራከራቸው አንጻር) የቤተሰብ አባል እንደነበረ አድርጎ ድምዳሜ ላይ መድረሱ ተገቢ አይመስልም።

[82]የፍሐ ብሔር ሕግ፣ ቁጥር 826(1)

[83]ዝኒከማሁ፣ ቁጥር 826(2)፤ ለዚህም ነው ለምሳሌ የፍትሐ ብሔር ሕጉ ሲወጣ “ይህ ሕግ ከመጽናቱ በፊት የተጀመረው ውርስ የሚተላለፈውና ሂሳቡ የሚጣራው በቀድሞው ሕግ መሰረት ነው” ተብሎ በአንቀጽ 3354 ላይ በግልጽ የተደነገገው።

የሚያስተላልፉት በወቅቱ የነበራቸውን መብት ብቻ ነው። በሁለቱም ወቅት የነበሩት ሕጎች የመሬት ባለይዞታዎች በመሬቱ ላይ የነበራቸው የይዞታ መብት በውርስ መተላለፍ ጉዳይ የተገደበ መሆኑን ከላይ ተመልክተናል። ከጊዜ በኋላ ሰፊ መብት የሚሰጥ ሕግ ስለወጣ ብቻ ሟቾች በሞቱበት ጊዜ ውርሱ ሊተላለፍላቸው መብት ያልነበራቸው ሰዎች ሟቾች ከሞቱ ከአመታት በኋላ በወጣ ሕግ መሰረት የውርስ መብት ያገኛሉ ማለት ምክንያታዊ አይሆንም።

ሐ. በተሻሩ ሕጎች መሰረት የተገኙ መብቶችንና የተሰሩ ስራዎችን ዋጋ ማሳጣት

የሰበር ችሎቱ *በመሀመድ በላይ* ጉዳይ የሰጠው አንዱ ምክንያት አዋጅ ቁጥር 133/98 አንቀጽ 32(2) አዋጁን የሚቃረን ሕግ፣ ደንብ፣ መመሪያ ወይም ልማዳዊ አሠራር በአዋጁ በተሸፈኑ ጉዳዮች ተፈፃሚነት የማይኖረው መሆኑ ተደንግጓል በሚል ሲሆን *በፉሲካ ሰጠኝ* ጉዳይ የሰጠው አንዱ ምክንያት ደግሞ አዋጅ ቁጥር 89/89 በአዋጅ ቁጥር 456/97 በግልጽ ተሽሯል የሚል ነው። የቀድሞዎቹ ሕጎች የተሻሩ ናቸዉ የሚባሉት ከተሻሩበት ጊዜ በኋላ ለሚከሰቱ ክስተቶች እንዳያገለግሉ ለማድረግ እንጅ በስራ ላይ በነበሩበት ወቅት ያስገኙት መብት ቀሪ የሚሆን ወይም የሚለወጥ አይደለም። ሕጎቹ ከተሻሩ በኋላም ቀድሞ ያልነበረ አዲስ መብት ሊያስገኙ አይችሉም። ለዚህም ነው አዋጅ ቁጥር 133/1998 አንቀጽ 30 ይህ አዋጅ ከመውጣቱ በፊት ከመሬት ይዞታና ከመጠቀም መብት ጋር ተያይዘው በሌሎች ሕጎች የተቋቋሙ መብቶች እና ግዴታዎች ተፈጻሚነታቸው ይቀጥላል በማለት የደነገገው። የፍትሐ ብሔር ሕጋችን ስንመለከትም ግልጽ የሆነ ተቃራኒ ድንጋጌ ከሌለ በስተቀር ሕጉ ከመጽናቱ በፊት በተሻረው ሕግ መሰረት ተገኝተው የነበሩት ሕጋዊያን ሁኔታዎች አዲሱ ሕግ የተለየ አቋም ቢኖረው እንኳን የማይለወጡ መሆናቸውን ይደነግጋል።[84]

በሌላ በኩል አዋጅ ቁጥር 133/98 አንቀጽ 32(2) ይህን አዋጅ የሚቃረን ሕግ፣ ደንብ፣ መመሪያና ልማዳዊ አሰራር በአዋጁ በተሸፈኑ ጉዳዮች ላይ ተፈጻሚነት አይኖረውም የሚለው አገላለጽ ቀደም ብለው ለተከናወኑ ተግባራት አሁን በሥራ ላይ ያለው አዋጅ ወደኋላ ተመልሶ ተፈፃሚ ይሆናል

[84]ዝኪከማሁ፣ አንቀጽ 3348

የሚለውን ሀሳብ የሚያሳይ ሳይሆን በአሁኑ ጊዜ ለሚደረጉ ተግባራት ነው፡፡ ይኸውም ሕጉ ከወጣበት ጊዜ ጀምሮ የሚኖር አዋጁን የሚቃረን ሕግ፣ ደንብ፣ መመሪያና ልማዳዊ አሰራር በአዋጁ በተሸፈኑ ጉዳዮች ላይ ተፈጻሚነት አይኖረውም ለማለት ነው።

መ. የሰበር ሰሚ ችሎቱ አቋም ወጥ አለመሆን

በቁሰ ሰሜ በላይ ጉዳይ[85] የአመልካች እናት በ1991ዓ/ም በመሞታቸው ተፈፃሚነት ያለው ሕግ የትኛው ነው የሚለው ከወረዳ ፍርድ ቤት እስከ ሰበር ሰሚ ችሎቱ አከራካሪ በመሆኑ በመጨረሻ ጉዳዩን የተመለከተው ሰበር ሰሚ ችሎቱ ለጉዳዩ ተፈጻሚ መሆን ያለበት በወቅቱ ሥራ ላይ የነበረው አዋጅ ቁጥር 89/1989 መሆኑን በማመን የቋሪት ወረዳ ፍርድ ቤት በዚህ አዋጅ መሰረት ፍሬ ነገሩን አከራክሮና በማስረጃ አጣርቶ እንዲወስን የመለሰው መሆኑን ስንመለከት ለትችት ከቀረቡት ጉዳዮች አንጻር የሚቃረንና የችሎቱ አቋም ወጥ አለመሆኑን የሚያሳይ ነው፡፡ ምክንያቱም ለትችት ከቀረቡት ጉዳዮች በተለይ በፉሲካ ሰጠኝ ጉዳይ ሰበር ሰሚ ችሎቱ የስር ፍርድ ቤቶችን ዉሳኔ በመሻር በአዲሱ አዋጅና ደንብ መሰረት ክርክሩ እልባት እንዲያገኝ የመለሰው አዋጅ ቁጥር 89/1989 የተሻረ ሕግ ስለሆነ ተፈጻሚ ሊሆን አይገባም በማለት ነው፡፡

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[85] ቁሰ ሰሜ በላይ እና ፉሲካዉ ሻምበል፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ/ቁ 85863፣ ሚያዚያ 09/2005 ዓ/ም፤ አመልካች የሟች እናቴን መሬት ተጠሪ የያዙብኝ ስለሆነ ሊለቅልኝ ይገባል በማለት ክስ በማቅረቡ የቋሪት ወረዳ ፍ/ቤት በአዋጅ ቁጥር 133/1998 እና ደንብ ቁጥር 51/1999 መሰረት ጉዳዩን በማየት አመልካች መሬት የሌለው ልጅ እያለ ተጠሪ የልጅ ልጄ ሆኖ መሬቱን ሊወርስ ስለማይገባ ለአመልካች ሊያስረክብ ይገባል በማለት ወስኗል። ጉዳዩን በይግባኝ የተመለከተው የምዕራብ ጎጃም ዞን ከፍተኛ ፍርድ ቤት ሟች በሞቱበት ወቅት ሥራ ላይ የነበረው ሕግ አዋጅ ቁጥር 46/1992 ስለሆነ አመልካች የሟች የቤተሰብ አባል መሆኑን ሳያረጋግጥ ተጠሪን መጠየቅ አይችልም በማለት ሽሮታል። ጉዳዩ ለክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ሲቀርብለት ጉዳዩ መወሰን ያለበት ሟች በሞቱበት ወቅት ሥራ ላይ በነበረው አዋጅ ቁጥር 89/1989 ነው የሚል ትንታኔ በመስጠት በውጤት ደረጃ የከፍተኛ ፍርድ ቤቱን ውሳኔ አጽንቶታል። ጉዳዩን በመጨረሻ የተመለከተው የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ጉዳዩ መወሰን ያለበት በአዋጅ ቁጥር 89/1989 መሆኑን በማመን የሟች የቤተሰብ አባል ማን ነው የሚለው በአግባቡ ሳይጣራ መወሰኑ ተገቢ አይደለም በማለት በዚህ አዋጅ መሰረት አጣርቶ እንዲወስን መዝገቡን ለወረዳው ፍርድ ቤት መልሶለታል።

ሠ. ማህበራዊ እና ኢኮኖሚ ቀውስ የሚያስከትል መሆኑ

የቀድሞቹ የገጠር መሬት አዋጆች የገጠር መሬትን ሊወርሱ ስለሚችሉ ሰዎች የደነገጉት መብት ጠባብ ስለነበር መሬቶቹ የሞተ ከዳ ወይም ወራሽ የሌላቸዉ እየተባሉ (ልጅ በመሆን ብቻ ስለማይወረስ ልጅ ያላቸዉ ሚኾች ቢኖሩም) መሬት ለሌላቸዉ ወጣቶችና ለተለያዩ ተቋማት ተሰጥተዉ ምናልባትም አንዳንዶቹ ከፍተኛ ለዉጥና የማልማት ሥራ ተሰርቶባቸዉ ሊሆን ይችላል፡፡ አንዳንዶቹ ደግሞ በሚመለከተው አካል ሳይነሱ ሌሎች ወራሾች በመያዝ አልምተውባቸው ሊሆን ይችላል። አሁን ስራ ላይ ያለዉ ሕግ ወደኋላ ተመልሶ ተፈጻሚ ይሁን፣ ዱሮ መብት የሌለዉ ወራሽ አሁን ሊጠየቅ ይችላል የሚል አቋም ከተያዘ በመሬት ይዞታ ላይ አለመረጋጋትና ቀዉስ የሚያስከትል ይሆናል፡፡[86]

ለምሳሌ በ*ምሲጋናው ዘውዴ ጉዳይ*[87] አመልካች አባቱ በ1993 ዓ/ም የሞቱ መሆኑን ገልጾ ከሚች አባቴ መውረስ የሚገባኝን መሬት 1ኛ ተከሳሽ በመውሰድ ከ2ኛ እስከ 9ኛ ለተጠቀሱት ተከሳሾች የሰጠብኝ ስለሆነ መሬቱ እንዲመለስልኝ ይወሰንልኝ በማለት በተጠሪዎች ላይ ክስ አቅርቧል። 1ኛ ተከሳሽ በበኩሉ የከሳሽ አባት በሞቱበት ወቅት ከሳሽ የአባቱ የቤተሰብ አባል ባለመሆኑ መውረስ ስላልቻለ በ1997 ዓ/ም መሬቱ በሞተ ከዳ ተነስቶ እስከ 2001 ዓ/ም ቀበሌው እያከራየ ሲጠቀምበት ከቆየ በኋላ መሬት ለሌላቸው ወጣቶች (ከ2ኛ - 9ኛ ተከሳሾች) የተሰጣቸው ስለሆነ ክሱ ተቀባይነት የለውም በማለት ተከራክሯል። ሌሎች ተከሳሾችም በዚሁ አግባብ መልስ ሰጥተዋል። የወረዳ ፍርድ ቤቱ ግራቀኙን አከራክሮ የከሳሽ አባት በሞቱበት ወቅተ ወራሽ የሌለው መሬት ተብሎ ለወጣቶች የተሰጠ ስለሆነ ክሱ ተቀባይነት የለውም በማለት ብይን ሰጥቷል።[88] ከሳሽ ለምስራቅ ጎጃም ዞን ከፍተኛ ፍርድ ቤት ይግባኝ ቢያቀርብም ፍርድ ቤቱ ግራቀኙን አከራክሮ የወረዳ ፍርድ ቤቱን ብይን አጽንቶታል።[89] ቀጥሎም ከሳሽ ለክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰበር አቤቱታ

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[86]ምናልባት ብቸኛዉ ይህን ችግር ሊያስቀር የሚችለዉ የይርጋ ክርክር ከተነሳ ብቻ ይሆናል፡፡

[87]በ*ምሲጋናው ዘውዴ እና የእነማይ ወረዳ አካባቢ ጥበቃ መሬት አስተዳደርና አጠቃቀም ጽ/ቤትና እነ የአለም ዘውዱ (9 ሰዎች)*፣ የእነማይ ወረዳ ፍርድ ቤት፣ መ/ቁ 111855፣ ህዳር 27 ቀን 2006 ዓ/ም

[88]በእርግጥ ፍ/ቤቱ ክሱን ውድቅ ለማድረግ ክሱ በይርጋ የታገደ መሆኑንም ጨምሮ ገልጿል።

[89]መ/ቁ 10751፣ ሰኔ 12 ቀን 2006 ዓ/ም

በማቅረቡ የሰበር አጣሪ ችሎቱ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመሀመድ በላይ ጉዳይ (በመ/ቁ 86089) ከሰጠው ትርጉም አኳያ የአመልካች ጥያቄ ውድቅ የተደረገበትን አግባብነት ለማጣራት ተጠሪዎችን ያስቀርባል በማለቱ ጉዳዩ በመታየት ላይ ይገኛል።[90] ሰበር ሰሚ ችሎቱ ያስቀርባል በተባለበት ነጥብ መሰረት የሥር ፍርድ ቤቶችን ውሳኔ ሽሮ አከራካሪው መሬት ለአመልካች ይገባል ብሎ የሚወስን ከሆነ መሬት አልባ ወጣቶች ተብለው መሬቱ በተሰጣቸው ከ2ኛ እስከ 9ኛ ተጠሪዎች ላይ የሚያስከትለው ቀውስ ቀላል አይሆንም።

ማጠቃለያ

ሕግ አውጭው ያወጣውን ሕግ አንድ የተለየ አላማ ወይም የህዝብ ጥቅም ለመጠበቅ ወደኋላ ተመልሶ ተፈጻሚ እንዲሆን በግልጽ ካልደነገገ በስተቀር የሕጉ ተፈጻሚነት ከወጣበት ጊዜ ጀምሮ መሆኑ ተቀባይነት ያገኘ መርህ ነው። የኮመን ሎው ተሞክሮ የሚያሳየው በልዩ ሁኔታ በሕግ አውጪው ወይም የሕግ ትርጉም በሚሰጠው የበላይ ፍርድ ቤት ካልተወሰነ በስተቀር መርሁ ሕጎች ወደኋላ ተመልሰው ተፈፃሚ ሊሆኑ አይችሉም የሚል ነው። ሕግ አውጪው ወይም የበላይ ፍርድ ቤቶች ግን አንድ ልዩ ዓላማ ለማሳካት ወደኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ ሊያወጡ ይችላሉ። በአንፃሩ በሲቪል ሎው ተሞክሮ በሕግ አውጭው ካልተደነገገ በስተቀር ሕጎች ወደኋላ ተመልሰው ተፈፃሚ ሊሆኑ አይችሉም የሚለው መርህ ከፍ ያለ ተቀባይነት ያለው ከመሆኑም በላይ ሕግ አውጭው በልዩ ሁኔታ ወደኋላ ተመልሶ ተፈፃሚ የሚሆን ሕግ ለማውጣትም ጥብቅ መስፈርት እንዲያሟላ (ለምሳሌ በጣም አስፈላጊ የህዝብ ጥቅም) የሚጠበቅበት መሆኑን መገንዘብ ይቻላል።

ሕጉ ከታወጀበት ጊዜ ጀምሮ ተፈፃሚ መሆን፣ ቀድሞ የሚታወቅ እና ግልጽነት ያለው መሆን የሕግ የበላይነት መገለጫዎች ተደርገው ይወሰዳሉ። ስለሆነም የሕጎች ወደኋላ ተመልሶ (retroactively) ተፈፃሚ መሆን የሕግ የበላይነት መርህን የሚጋፋ፣ በረጋ ሕግ መሠረት የሚመራ ህብረተሰብ ኑሮ ላይ መናጋትን የሚፈጥር፣ ሰዎች ተግባራቸውን በሚያከናውኑበት ወይም ሙቡት በሚያገኙበት የወቅቱ ሕግ ላይ መተማመን እንዳይኖራቸው የሚያደርግ እና ፍትህን የሚያዛባ ይሆናል።

[90]የሰ/መ/ቁ 41641፣ ህዳር 19 ቀን 2007 ዓ/ም

ከዚህ አንፃር የዚህ ጽሑፍ አዘጋጅ ለትችት በቀረቡት ሁለት ጉዳዮች ላይ ሰበር ሰሚ ችሎቱ የሰጠው አስገዳጅ ትርጉም ሌሎች ተመሳሳይ ጭብጥ በሚያስነሱ ጉዳዮች ላይ እንደገና መታየት ይኖርበታል የሚል እምነት አለው። የዚህ አስገዳጅ ትርጉም መኖር ከስ ከሚያቀርቡ ሰዎች መብት አንፃር ጥቅም ቢኖረውም ከሌላኛው ወራሽ ወይም ተከራካሪ ወገን አንፃር ሲታይ ጉዳቱ ያመዝናል። በጸሐፊው እምነት የሰበር ሰሚ ችሎቱ በቂ ምክንያት ያልተገለጸበት የሕግ ትርጉም የሕግ አወጣጥ መርህን የሚጥስ፣ የውርስ መከፈትን ከሚደነግገው ሕግ ጋር የሚቃረን፣ በተሻሩ ሕጎች መሰረት የተገኙ መብቶችንና የተሰሩ ስራዎችን ዋጋ የሚያሳጣ እና ማህበራዊና ኢኮኖሚ ቀውስ የሚያስከትል ነው። በመሆኑም ችሎቱ ይህን መሰል ጉዳይ ሲቀርብለት የሰጠውን አስገዳጅ ትርጉም እንደገና የማየት እድሉ እንደተጠበቀ ሆኖ በሕጎች የተፈጻሚነት ወሰን ላይ ተጨማሪ ጥናት ቢደረግ መልካም ነው።

NOTE

Captive Audience Scenarios in Ethiopia: Some Observations

With blessed nostrils do I again breathe mountain freedom? Freed at last is my nose from the smell of all human hubbubs![♦]

Wondwossen Wakene Frew[♣]

Abstract

Captive audience situations are conditions in which someone is exposed to speech that he does not want to listen to and speech that is contrary to his foundational beliefs. Captive auditory scenarios are pervasive; we encounter these in our daily routines. We find these situations in workplaces, taxis and buses, cafés, and on cell phones and TVs, to mention a few. Keeping aside their pervasiveness in our daily lives, captive audience situations entangle our basic freedoms like freedom of expression and freedom of religion and beliefs. Captive audience speeches have their own protagonists and detractors. While some argue that they are expressions and so demand basic protection, others hold that foundations of freedom of expression do not support them at all.This article depicts the concept of captive audience, analyzes the Ethiopian experience at the backdrop of comparative experience and concludes that captive audience situations are in the making in Ethiopia and the laws are not as such full-fledged enough to protect individuals. It then concludes that captive audience situations need to be clearly addressed on the face of religious extremism and intrusive and irresponsible expressions encountered on a daily basis.

♦ Friedrich Wilhelm Nietzsche, Thus Spake Zarathustra (1885), p.185]

♣ LL.B (AAU), LL.M (AAU), Assistant Professor of Law, School of Law, University of Gondar, Director, Legal Services Directorate, University of Gondar.

Introduction

One should not imagine a state of affairs behind bars when considering captive audience scenarios. One may turn out to be captive in one's own house or by phone. In this paper I will attempt to show these divergent perspectives in legal interplay. I will first try to define captive audience scenarios, then discuss the subject comparatively. Finally, I will consider the state of affairs in Ethiopia, relying on some personal observations of the matter and analyzing the legal status of such expressions under the Ethiopian legal system and other relevant laws.

2. Definitional Exercises

Attempts to define the concept of captive audience must take into account the precariousness of the concept. As I will reveal in the upcoming discussions, the captivity of the audience depends on the place of captivity. That is why we find its definition in business, law and politics, among other areas.

One authority defines a captive audience scenario as a situation where an unwilling audience is exposed to speeches. The audience is "captive" to the extent that the listener is helpless.[1] Another authority explains captive auditory scenarios as "subjecting a man, willy-nilly and day after day, to intellectual forced-feeding on trivial fare… to insist, by the effective gesture

[1] Strauss, M., Redefining the Captive Audience Doctrine, *Hastings Constitutional Law Quarterly*, Vol. 19, No. 85, 1991.

of coercion, that a man's right to dispose of his own faculties stops short of the interest of another in forcing him to endure paid-up banality…"[2]

It is clear that captive audience situations are conditions in which someone is exposed to speech that he does not want to listen to and speech that is contrary to his foundational beliefs.

Since captive audience scenarios exhibit a variety of facets, it is possible to imagine captive audience circumstances in workplaces where so-called captive audience meetings are held. Such an event is defined as "a meeting on company time during which a strong, one sided, anti-union message is presented."[3] Employees are strictly required to attend such meetings. At the end of the day, the meetings turn out to be places of captivity.

If we seek the essence of these definitions, the weight is on the forced nature of the state of affairs: that the audience has no chance to resist what is going on, no option but to listen, and cannot carry on their own processing of information. One may be tempted to suspect the company of coercion. I will analyze the legal effects in the coming discussions.

3. Setting the Scene

[2] Black, C. L., He Cannot Choose but Hear: The Plight of the Captive Auditor, *Columbia Law Review*, Vol. 53, No. 7, 1953, p. 962.
[3] The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States, Issue Brief, American Labor Federation, 2005, p. 4.

Captive auditory scenarios are pervasive; we encounter these in our daily routines. We find these situations in workplaces, taxis and buses, cafés, and on cell phones and TVs, to mention a few. Our captivity depends on the options we have to evade the circumstances. We may be forced to choose between enduring speeches and messages we do not want to attend to and quitting our jobs instead. It is an either/or situation in most cases. Let me consider captive auditory scenarios in several contexts.

3.1. Workplaces and Captive Auditory Scenarios

Workplaces are fertile grounds for captors in the sense that the captors have every opportunity to force employees to listen to their speeches. This happens on company time when the employee may be mandated to attend to his work while the employer uses this time to broadcast speeches that the employee does not want to listen to. It is predominantly the employer that plays the role of the captor. Sometimes employees also succeed in capturing fellow employees and the employer. In this case, an employee may use company time to express opinions to fellow employees even though the latter do not welcome the opinions. Here again, employees must choose between their job and their freedom not to listen to others.

Employers act as captors in two ways. In some instances, the employer engages in making anti-union speeches at morning assemblies and in trainings

and education sessions.[4] These assemblies and sessions are sanctioned; failure to attend them entails punishment. In other cases, employers 'deliver' their employees to others who want to make speeches, usually political and religious in nature.[5]

Employees may also venture to capture others. In *Ng v. Jacobs Engineering*,[6] an employee was found to be a captor for the following series of acts. As the facts of the case show, Edna Yuen Man Ng, an evangelical Christian, first held a Christmas lunchtime party in the company premises, inviting co-workers via company e-mails. At the party she played amplified religious hymns and invited a pastor to make religious speeches. She next prepared an Easter party and again invited co-workers via e-mail, promising free doughnuts. She later put Christian literatures along with the doughnuts in the company kitchen. Finally, she began an "e-mail ministry" by sending Christian messages to co-workers without the permission of the recipients. In response to offended co-workers who complained, management repeatedly urged Ng's compliance with the company's anti-harassment policy, but to no effect.

[4] Okuno, H., Captive Audience Speeches in Japan: Freedom of Speeches of Employers vs. Workers' Rights and Freedoms, *Comparative Labor Law and Policy Journal*, Vol. 29, No. 129, 2008, p. 135.
[5] Id. at 137.
[6] *Ng v. Jacobs Engineering*, WL 2942739, 2006.

Ng sued for religious discrimination, asserting that Jacobs Engineering Group had failed to accommodate her religious practices. The court disagreed: "If we were to require defendant to accommodate proselytizing in the workplace, as plaintiff suggests, it would violate its own policy and be subject to claims by other employees desiring to use company facilities to share their own religious beliefs." Impeding Jacobs' ability to enforce its anti-harassment policy was, said the court, sufficient undue burden to relieve it of a duty to accommodate Ng.

In this case, one might be tempted to note that there is an element of voluntariness and an option to attend the parties or not to. However, the employees were forced to read Ng's religious e-mails and that in and of itself was sufficient to constitute harassment.

3.2. Transportation and Captive Auditory Scenarios

In the U.S., buses and trains have turned out to be cells where passengers are held captive by advertising companies. I make mention of United States because the captors operate in an organized and systematic manner. Otherwise, captive auditory scenarios are even prevalent in Ethiopia. Someone explains how the system works:

> *The bus company is paid by entrepreneurs (a group of whom operates on a national scale) for allowing them to install FM receivers in (and loudspeakers inescapably throughout) its vehicles. The entrepreneurs line up an FM station, which broadcasts special programs to which the*

> *bus radios are fixed-tuned. The passengers listen to what the people at the station want them to hear, whether they like it or not. Some like it. Some do not. Some exceedingly do not.*[7]

Pollak v. Public Utilities Communication[8] is one instance where individuals brought an action against a bus company for the latter had allowed its buses to be places where news, music, commercials, and other matters were broadcast to the extent the advertising companies wanted and without taking into account the interests of the passengers.[9] Here the bus company promised to "deliver a guaranteed audience"[10] assuring advertisors, "If they can hear—they can hear your commercial!"[11]

The D.C. Federal District Court took the activities of the bus companies to be a violation of the captive audience doctrine, holding that subjecting passengers to company advertisements without their consent and where they have no option but to listen is wrong and unacceptable.

In Ethiopia, the matter is not well thought-out to this level. Transport companies do not conspire to deliver passengers to advertisement companies. However, we find people trapped listening to things they do not want to listen to, with no way to avoid speeches made in buses and taxis. For instance,

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[7] Black, C. L., He Cannot Choose but Hear: The Plight of the Captive Auditor, *Columbia Law Review*, Vol. 53, No. 7, 1953, p. 961.
[8] *Pollak v. Public Utilities Communication*, 191 F.2d 450 (D.C. Cir. 1951).
[9] Id.
[10] Id. at 7.
[11] Id. at 9.

people are forced to listen to religious hymns and preaching in taxis or cross-country buses, simply because they are there. Under such circumstances it may be only the driver who controls the speakers and only he who is interested in what is playing. Without regard for passengers' religious backgrounds and philosophical convictions, taxi drivers play music and religious hymns.

3.3. Public Places and Captive Auditory Scenarios

Assume that you are a Muslim and that just like any other religious person you do not want interference with your religion. This does not mean that you are intolerant of other religions. However, things become difficult when Christian religious hymns and preaching play you wherever you go—in cafés and shops and even in your own house. This truly happens in Ethiopia. You have a good chance of encountering religious hymns and preaching played in the café you want to go to, or a religious sermon amplified by megaphones near your workplace or house.

4. Captive Audiences, Freedom of Speech and Freedom from Speech

So far, I have tried to portray captive auditory scenarios in a generalized way. In this section, I will consider the legal status of captive auditory scenarios, principally in the Ethiopian setting, but also in comparison with other legal regimes.

Captive audience speeches require a reciprocal discussion as they usually engage two parties. On the one hand we have the speaker (the captor) and his right of freedom of expression. On the other hand we have the audience (the captive) and his interest in freedom *from* speech. I will first discuss the issue from the free speech angle, in order to determine whether captive audience speech is protected by this right.

4.1. Free Speech and its Justifications

Some of the justifications for free speech include individual autonomy, democracy, truth and self-development.[12] I will consider these in the same order. To this end, here are some of the arguments in favor of and against captive audience speech.

a. **Individual autonomy**: The gist of the argument is that individuals should be able to think for themselves and should not be subjected to others' will.[13] Since thought and language are interrelated, "a person cannot freely think if he cannot speak, and cannot freely think if others cannot speak, for it is in hearing the thoughts of others and being able to communicate with them that we develop our thoughts."[14] The point is that individuals cannot think unless they hear others speak because others'

[12] Lichtenberg, J., Foundations and Limits of Freedom of the Press, *Philosophy and Public Affairs*, Vol. 16, No. 4, 1987, p. 329-355.
[13] Scanlon, T., A Theory of Freedom of Expression, *Philosophy and Public Affairs*, Vol. 1, No. 1, 1972, p. 13.
[14] Lichtenberg, *supra* note 12 at 335.

speech is a source of information. If an individual wants to determine his fate, develop himself and become a full-fledged rational person, he must engage in communication with other human beings.

Does this justify captive audience speech? Inherent to individual autonomy is the choice individuals make to speak and to listen. After all, "**t**he essential thing is that to be free in any regard is to be able to choose what use one will make of that freedom, whatever someone else might think of the value of the chosen activity."[15] Captive audience speech does not present the audience with a choice. Ironically, captive audience speech deprives the audience of its autonomy and attacks the very foundation that helps the speaker (the captor) to speak. While the speaker relies on individual autonomy to protect his speech, the same deprives the audience from the right to make choices about what to listen to and thereby prevents the audience from engaging in free thought by forcing the speaker's ideas on the listeners.

b. **Democracy**: This argument holds that the people as ultimate decision makers need full information in order to make intelligent political choices.[16] In addition to its philosophical roots, the concept of democracy associated with freedom of expression is part of the Ethiopian constitutional fabric. Under Article 29(4), the Ethiopian constitution

[15] *Pollak, supra* note 8 at 966.
[16] Meiklejohn, A., *Political Freedom*, 1960.

implies that the free flow of information, ideas and opinions is necessary to the functioning of a democratic order and warrants the protection extended to the press. Although the principle of democracy justifies free speech, the democratic principle does not support captive audience speech. This is true because captive audience speeches deny the listener the right of access to full information and prohibit the listener from making intelligent political choices. In a captive audience scenario, the captive listener has no chance to express his views nor does he have the right to access other sources of information. Captive audience speech is a one-way traffic situation, and inherently monopolistic. Hence captive audience speech is clearly undemocratic.

c. **Truth**: Free speech is considered to be a vital means for the attainment of truth. This is also called the "marketplace of ideas"[17] principle. John Stuart Mill held,

> *… [T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is*

[17] Brazeal, G., How Much Does a Belief Cost? Revisiting the Marketplace of Ideas, *Southern California Interdisciplinary Law Journal*, Vol. 21, No. 1, 2011, p. 2-10.

> *almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.*[18]

Mill reasserted the need to let ideas come to the forefront, without anyone subjugating them. Rather, the quality of the expressions, their truthfulness, will let them prevail.

Although commendable in its expression of respect for the mental integrity of the audience, Mill's argument of the marketplace of ideas remains nonresponsive to speeches that are not intended simply to be communicated but rather to captivate the audience. Rather than promoting the free flow of information and fostering the pursuit for truth, captive audience speech rigs the marketplace of ideas. Captive audience speech favors whatever is agreeable to the speaker; it does not take truth into account at all. Indeed, "forced listening destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms."[19]

d. **Self-development**: The freedom and variety of situations are important ingredients of human self-development. Kant argued that "public use of man's reason" is essential for human enlightenment.[20] First, the individual benefits much in determining his/her fate based on what he/she acquires

[18] Mill, J. S., *On Liberty*, 1859, p. 19.
[19] *Pollak, supra* note 8 at 967.
[20] Lichtenberg, *supra* note 12 at 339.

> from speeches made by others. On the same plane, the individual contributes significantly to the development of others as he/she engages in speaking. For these reasons, freedom of expression is considered to add utility to the overall self-realization of the individual. But this depends on the will of those who want to benefit from this exercise. Though no one may be prohibited from speaking simply because their speech does not contribute anything, listeners should not be forced to listen to speeches they do not want to listen to.

Listeners must have the option to withdraw from communications they do not want to engage in. The speaker must not seize the forum and force his/her speech on others. By depriving the listener of a choice as to what he shall direct his attention to, captive audience speech takes from a sizeable segment of the public a distraction-free opportunity to seek information in conversation and literary media. In short, captive audience speech downplays individual efforts to engage in useful self-sponsored communications.

The issue of choice has gained judicial recognition in the U.S. In *Martin v. Struthers*, where the Supreme Court reversed the decision of a lower court and held void an ordinance that made it illegal to summon residents to distribute handbills. The appellant, Mr. Hayden C. Covington, espousing a religious cause in which he was interested, that of the Jehovah's Witnesses, went to the homes of strangers, knocking on doors and ringing doorbells in

order to distribute leaflets advertising a religious meeting. Even though the Court held that the city ordinance that made such kinds of door-to-door proselytizing and any other soliciting illegal is invalid on other constitutional grounds, the Court emphasized that "the inhabitants had a right to receive the handbills *if they so desired* [emphasis added]."[21]

4.2. Arguments in Favor of and Against Captive Audience Speech

Arguments in Defense of Captive Audience Speech

Captive audience speech is not without its defenders. Its proponents have proposed various arguments.

One of these arguments is psychological. It is asserted that listeners can shift their attention to other issues by simply ignoring speech they do not want to listen to.[22] Audiences may shift their attention to something else. However, it is quite difficult to credit this argument because listening is a unique physical activity. It is different from seeing, for instance, as one can easily redirect visual attention to avoid things one does not want to see but cannot so easily avoid things one does not want to listen to. Hearing is naturally unavoidable unless one relocates.

[21] *Martin v. Struthers*, 319 U.S. 141, 143 (1943).
[22] Columbia Law Review Association, Transit Broadcasting: The Problem of the Captive Audience, *Columbia Law Review*, Vol. 51, No. 1, 1951.

With regard to captive audiences in public transport, it was alleged (based on surveys, for example) that riders "like the stuff."[23] It is argued that various studies suggest captive audiences like what is going on in public transport. However, this research was conducted by the transport companies, and their reliability is dubious.

The third contention is based on the concept of liberty. Liberty is not absolute, and one way in which liberty is limited is in the course of captive audience speech.

Even though liberty is not absolute, limits and derogations from it require that certain elements of the law be fulfilled. The minimum precondition for limitation of a liberty is lawfulness. The legal standards that limit the law must be respected. Thus if captive audience speeches are not prescribed by law as legitimate limitations of liberty, they cannot be accepted as valid in this way.

Finally, defenders of captive audience speech assert that noise, whether verbal or non-verbal, is incidental to city life and that captive audience speech is just one more such noise.[24]

[23] *Pollak, supra* note 8 at 970.
[24] Id.

Arguments against Captive Audience Speech

Most of the arguments against captive audience speech are responses to the defenses raised above. The argument that listeners can shift their attention to other issues by simply ignoring speech they do not want to listen to can be challenged by asserting the difficulty of shifting our attention from things directed against our auditory sense compared to those targeted against our visual or nasal senses. It is easier to refuse to see than to refuse to listen. One author noted succinctly:

> *The sense of hearing, unlike other principal senses, cannot conveniently be suspended, or diverted from unwanted stimuli. If an individual does not wish to listen to a specific sound he can normally only stop the sound at its source or remove himself from its range.*[25]

As for the results of the survey indicating that most audiences like the "captivity," there may be logical explanations. First, the very credibility of the survey and the validity of the methodology employed are questionable. Second, even if the survey were valid, some interests should be preserved beyond the reach of the majority. In this sense, even the refusal of some to be held as captives must be accorded due respect.

With regard to the argument about liberty, those who challenge captive audience speech question the logic of qualifying liberty to save this sort of

[25] Columbia Law Review Association, *supra* note 22.

speech. Liberty must be qualified only in order to serve higher values.[26] Quite correctly, the curtailment of liberty must be warranted by the highest and most absolute common good.

The argument that captive audience speech is commonplace in city life can be refuted allegorically: "What would we think of a man who turned a hose on passers-by, and defended his action on the ground that people in those parts were often caught in the rain?"[27] In other words, those who argue in favor of captive audience speech hold that these speeches are commonplace and that those who do not want to listen to them can avoid them. They argue that those who listen implicitly want to listen to the speeches. But this is authoritarian and incorrect. Speakers cannot decide on the status and fate of their listeners. The audience must have the opportunity to decide whether to listen or not to listen to what is being said.

5. Captive Audiences and Freedom of Religion

Freedom of religion is one of our fundamental human rights and freedoms. That is why this right is guaranteed by almost all constitutions and in many important legal instruments. For instance, the Universal Declaration of Human Rights (UDHR) states that "[e]veryone has the right to freedom of… religion; this right includes freedom to change his religion or belief, and

[26] *Pollak, supra* note 8 at 970.
[27] Id. at 973.

freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[28]

The International Convention on Civil and Political Rights (ICCPR)[29] and the Ethiopian Constitution[30] restate this. As one can gather from the reading of these laws, freedom of religion consists of two basic parts, an internal and external forum. The internal forum embraces the very essence of professing a religion or not professing one at all.[31]

Religious manifestations and practices form the external forum.[32] Unlike the internal forum in which limiting the freedom is unjust and at times impossible, the external manifestation poses some difficulties as it sometimes conflicts with others' rights and freedoms. It is within the sphere of the external forum that one may talk about the limits on freedom of religion.[33]

[28] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, Paris, 10 December 1948, Article 18.
[29] International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations Treaty Series, Vol. 999, p. 171, Article 18.
[30] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Article 27(1).
[31] Lerner, N., The Nature and Minimum Standards of Freedom of Religion or Belief, *British Young University Law Review*, 2000, p. 905.
[32] Id.
[33] Krishnaswami, A., Study of Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2, U.N. Sales No. 60.XIV.2, 1960.

As with other human rights and freedoms, limiting freedom of religion must not be an easy undertaking. Conveying captive audiences into the realm of freedom of religion makes the task unwieldy for at least two reasons. First, we have the freedom of religion (i.e., the freedom to practice either in person or in community, that of teaching and preaching, among other things) of the captor. Second, there is the freedom of religion or of belief of the captive audience, without for the moment taking the captive's right to privacy and property into account.

Leaving a person with his/her religion to do whatever he/she likes is a disastrous risk to take. No one explains this position better than the African Court of Human Rights, disposing of a complaint filed against the Republic of South Africa by Mr. Garreth Anver Prince, who alleged that the Law Society refused to register him as an attorney based on his disclosure about the possession and use of cannabis inspired by his Rastafari religion. The Court held:

> *Although the freedom to manifest one's religion or belief cannot be realized if there are legal restrictions preventing a person from performing actions dictated by his or her convictions, it should be noted that such a freedom does not in itself include a general right to act in accordance with his/ her belief.*[34]

[34] *Prince v. South Africa*, *African Human Rights Law Review*, 2004, p. 105.

That is why we need limits on the freedom. It is even believed that "while the right to hold religious beliefs should be absolute, the right to act on those beliefs should not."[35]

The ICCPR speaks of such limits: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[36]

This limit implies different things. But, for the purpose of the discussion relevant to captive audience scenarios, I will discuss two of the implications. First, it is emphasized that only external manifestation of freedom of religion is susceptible to limitation. Second, the limits must be based on laws inspired by the protection of public safety, order, health, or morals, or the fundamental rights and freedoms of others.

In addition to this limit, freedom of religion must necessarily respect the basic rights of others not to be coerced.[37] The core of any freedom is freedom from coercion or intervention.[38] Freedom of religion

[35] Id.
[36] International Covenant on Civil and Political Rights, *supra* note 29, Article 18(3) and Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 30, Article 27(5). with some modifications.
[37] International Covenant on Civil and Political Rights, *supra* note 29, Article 18(2).
[38] Berlin, I., *Liberty*, 4th ed., Oxford University Press, New York, 2002.

embodies one's freedom to choose to believe or not to believe, as well as not to be coerced into the religions of others. The defining element of a captive auditory scenario is coercion. We cannot have a captive audience if the listener has consented to speech made to him.

In a similar fashion, the Ethiopian Constitution clearly recognizes freedom of religion along with one's choice to believe or not to believe and not to be coerced. The Constitution does not support religious speech that cannot be avoided, that does not give the listener any choice and generally coerces the audience.

Freedom of religion (on the part of the captor) and the rights and freedoms of others (the captive audience, perceptibly including their freedom of religion and belief) may conflict. This happens in the course of manifesting one's religion. It should be the case under such circumstances that freedom of religion implies "the negative counterpart of freedom of religion."[39] This right appears to include the negative freedom not to receive the communication. In other words, captive audience speech infringes on others' freedom of religion, in the

[39] *McCollum v. Board of Education*, 333 U.S. 203 (1948). In this case the United States Supreme Court deliberated on a case brought by Vashti McCollum in which she alleged that her son was ostracized in a school where religious sermons were conducted. The sermons were conducted weekly for 30 to 45 minutes, on school premises and during school hours. Her son did not attend the sermons as she and her son were atheists. The Court held that the use of public facilities for religious instruction of schoolchildren goes against the Establishment Clause of the First Amendment.

sense of freedom from coercion, especially when the content of the captive audience speech is religious. It could be held that freedom of religion includes one's ability to protect one's religious integrity by avoiding religious communications that are contrary to one's denomination and beliefs.

To clearly depict captive audiences in conjunction with freedom of religion, let me describe what happens in many Ethiopian cities. It is not uncommon to observe a religious sermon or hymn played in a taxi or on a very big loudspeaker mounted on a car situated at the corner of a street or across the streets of a city. On the other hand, one may be forced out of his/her house or out of his/her bed by a sermon conducted by a church or mosque located nearby. Most churches and mosques possess at least four megaphones, each mounted on the four corners of the establishment, and each with preaching and hymns broadcast almost every day and in a repeated fashion. In Ethiopia, any attempt to regulate these activities occurs through environmental protection laws that consider sounds beyond a certain limit to be environmental pollution. However, no visible effort has been exerted by the state to regulate these activities with the objective of protecting those exposed to unwanted speech with the strict parlance of captive audience situations. Overall, the Ethiopian practice must be understood in the context of the mounting impact of religious fundamentalism.

With regard to liberty and choices, captive audience speech provides little benefit. And any benefit is attained at a maximum cost and with difficulty. At times, victims are forced to choose between staying in their houses and listening to whatever is going on in a nearby church or mosque and leaving their houses and going elsewhere. These schemes deny victims of their right to privacy in addition to interfering with their liberties. Freedom of conscience is at issue as well, since victims cannot use their mental faculties at all or without diversion.

Holding audiences captives in their houses or recreation places denies victims of their right to due process as well. Victims are not given the right to be heard since only the captors decide what to do with respect to the fate of the captive audience and do not usually give notice to the victim.

There are also some who argue that captive audience speech denies individuals intellectual property rights because they cannot effectively use their mental faculties to make fruitful contributions to the world when they are under the influence of their captors.[40]

Conclusion

Captive auditory scenarios are increasing in Ethiopia. Current developments prove that the country is indeed less regulated in this regard. In addition to its

[40] Columbia Law Review Association, *supra* note 22.

impact on the rights and freedoms of individuals, these scenarios erode the values of democracy and tolerance.

The rise of fundamentalism in Ethiopia is also adversely affecting observance of the respect one owes to others. In my view, the issue goes beyond captive auditory scenarios and reflects the shifting power dynamics among the Ethiopian Orthodox Church, the Ethiopian Evangelical Church and Islam in Ethiopia.

In the absence of well-established jurisprudence in the area of captive auditory scenarios and the displacement of individual rights and freedoms in favor of group rights, it is difficult, though not impossible, to press charges and protect an individual whose rights and freedoms are not safeguarded by the rights of the majority.

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አመልካች ፡- 1. ጅ. አግሪ ፓክ ኃላፊነቱ የተወሰነ የግል ማህበር

2. አቶ ጌታሁን አስፋው ጠበቃ ግ/እግዛብሔር ሙናቸው ቀረቡ

ተጠሪ ፡- የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ሀዋሳ

መዝገብ መርምረን የሚከተለውን ፍርድ ሰጥተናል

ፍ ር ድ

ጉዳዩ የቀረበው አመልጀካቶች የደቡብ ብሄር ብሀረሰቦችና ህዝቦች ክልል የህዋሳ ከተማ ከፍተኛ ፍርድ ቤትና የክልሉ ጠቅላይ ፍርድ የሰጡት የጥፋተኝነትና የቅጣት ውሳኔ መሰረታዊ የህግ ስህተት የለበት ስለሆነ በሰበር ታይቶ እንዲታርምልን በማለት ያቀረቡትን የሰበር አቤቱታ አጣርቶ ለመወሰን ነው፡፡ ጉዳዩታክስ አለመክፈልን የሚመለከት ነው፡፡ በከፍተኛው ፍርድ ቤት ተጠሪ ከሳሽ አመልካቶች ተከሳሽ በመሆን ተከራክረዋል፡፡

1. የክርክሩ መነሻ ተጠሪ ያቀረበው የወንጀል ክስ ማመልከቻ ነው፡፡ ተጠሪ በስር አንደኛ ተከሳሽ የሆነው አንደኛው አመልካች በወንጀል ህግ አንቀጽ 34/1/እና በአዋጅ ቁጥር 255/94 አንቀጽ 26/1/ለ/2 አንቀጽ 56/1/2/ እና አንቀጽ 49 የተደነገገው በመተላለፍ የታክስ ከፍያነት መለያ ቁጥርና የተጨማሪ እሴት ታክስ ለመያ ቁጥር ተሰጥቶት እያለ ከመጋቢት ወር 1999 ዓ.ም እስክ ሰኔ 2001 ዓ.ም በሚያከናውነው

የንግድ እንቅስቃሴ ሽያጭ በየወሩ ተጨማሪ እሴት ታክስ በመሰበሰብ ለግብር አስገቢው መስሪያ ቤት ማሳውቅና መክፈል ሲገባው የንግድ ማህበሩ የማስታወቅ ግዴታውን ብቻ በመወጣት የሚፈለግበትን ታክስ ባለመክፈሉ በሶስተኛ ወገን በተሰጠ ጥቆማ መነሻ በተደረገው ማጣራት መክፈል የሚገባውን የተጨማሪ እሴት ታክስና አስተዳደራዊ መቀጫ ብር 9,065,777.59 /ዘጠኝ ሚሊዮን ስልሳ አምስት ሺሰባት መቶ ሰባ ሰባት ብር ከሃምሳ ሳንቲም/ያልከፈለ በመሆኑ የወንጀል ክስ ቀርቦበታል የሚል ነው፡፡

2. የአንደኛ ተካሳሽ ዋና ስራ አስኪያጅ የሆነው ሁለተኛው ተካሳሽ/ሁለተኛ ተጠሪ/ በአዋጅ ቁጥር 285/94 አንቀጽ 26/1/ለ/2/ አንቀጽ 56/1/2 እና አንቀጽ 49 የተደነገገውን በመተላለፍ አንደኛው ተከሳሽ/አንደኛ አመልካች/ የአክስዩን ባለድርሻና ባለንብረት እንዲሁም በመመስራቻ ጽሁፍ የተሾመ ስራ አስኪያጅ ሆኖ እያለ ከላይ መጠኑ የተገለጸውን ተጨማሪ እሴት ታክስ ሰብስቦ ለግብር አስገቢው መስሪያ ቤት የመክፈል ግዴታውንና ኃላፊነቱን ባለመወጣት የወንጀል ክስ ቀርቦበታል የሚል ይዘት የለው ነው፡፡
3. አንደኛ ተከሳሽ በኝጅል ህግ አንቀጽ 34/1/እና በአዋጅ ቁጥር 286/94 አንቀጽ 53 ንዑስ አንቀጽ 1፣2 እና 3እንቀጽ 102 እና አንቀጽ 96 ተደነገገውን በመተላለፍ ከዕቃ ግዥዎች በቅድሚ ክፍያ ተቀንሶና ተሰብስቦ ለግብር አስገቢው መስሪያ ቤት ማስገባት የነበረበትን ብር 374,818.81 /ሶስት መቶ ሰባ አራት ሽህ ስምንት መቶ አስራ ስምንት ብር ከሰማኒያ አንድ ሳንቲም /ያልከፈለ በመሆኑ የወንጀል ክስ ቀርቦበታል፡፡
4. ሁለተኛ ተከሳሽ ከላይ በተራ ቁጥር 3 የተደነገጉትን ድንጋጌዎች በመተላለፍ የአንደኛው ተከሳሽ ዋና ስራ አስኪያጅ ሆኖ ሲሰራ በቅድመ

ክፍያ ቀንሶና ሰብስቦ መክፈል የሚገባውን መጠኑ በሶስተኛው ክስ የተገለጸውን ገንዘብ የልከፈለ በመሆኑ የወንጅል ክስ ቀርቦበታል የሚል ይዘት ያላቸው አራት የወንጀል ክሶችን አቅርቧል፡፡ አመልካች በተከሳሽነት ቀርበው የወንጅሉን ድርጊት አልፈጸምንም ጥፍተኛ አይደለንም በማለት ተከራክረዋል፡፡

5. ተጠሪ ክሱን የሚያስረዱልን ምስክሮች አሉ በማለት ሶስት ምስክሮችን በማቅረብ አስምቷል፡፡

   የመጀመሪያው ምስክር አንደኛ ተከሳሽ ተጨማሪ እሴት ታክስና የደሞወዝ ግብር ገቢ በህግ አግባብ እያሰበሰበና ኤከፈለ አይደለም የሚል ጥቆማ ድርሰን፡፡ የደሞወዝ ግብር ገቢ ለክልሉ ገቢዎች ባለስልጣን እንዲያውቀው አድርገን የተጨማሪ እሴት ታክሱን በኦዲት እንዲጣራ ተደርጎ በአንደኛው የክስ ማመልከቻ መጠኑ የተጠቀሰው ተጨማሪ እሴት ታክስ አንደኛው ተከሳሽ እንዳልከፈለ ተረጋግጧል፡፡ ከዚያ በ=ላ አንደኛ ተከሳሽ ለአቤቱታ አጣሪ ኮሚቲ አመልከተው ጥያቄው ውድቅ ተደርጎበታል፡፡ አንደኛ ተከሳሽ ሁለት ፐርሰንት ከተከፋይ ሂሳብ ተቀናሽ እያደረገ ለግብር አስገቢ መስሪያ ቤት ያልከፈል መሆኑንና በሶስተኛው ክስ መጠኑቴተገለጸውን ገንዘብ እንዳልከፈለ በኦዲት ተረጋግጧል፡፡ ተጠሪ የግብር ገንዘቡን ለማስከፈል እንቅስቃሴ ቢያደረግም አንደኛ ተከሳሽ ከዳሽን ባንክ ለወሰደው ብድር ባንኩ መደባውን በመሸጡና በባንኩ እዳ የተረፈ ገንዘብ የሌለ መሆኑ ስለተነገረን ሌሎች ንብረቶች በማፈላለግ ላይ እንገኛለን በማለት እንደመሰከሩ የስር ፍርድ ቤት በውሳኔው በግልጽ አስፍሮታል፡፡

6. ሁለተኛዋ የተጠሪ ምስክር አንደኛ ተከሳሽ የተጨማሪ እሴት ታክስ ማሳወቂያ ቅጽ መሰረት በየወቅቱ ለተጠሪ ያሳወቀ መሆኑን ተረድተናል፡፡ ነገር ግን አመልካች ተጨማሪ እሴት ታክስ ክፍሎ

አያወቅም፡፡ የድርጅቱን /አንደኛ/ ተከሳሽን ኦዲት ሠርቻለሁ፡፡ ኦዲት ስንሰራ እኛ ድርጅቱ በሳምንት አንድ ቀን ማለትም እሁድ ቀን ምርት እንደማያመርትና በወር አራት ቀናት እንደማያመርት በመቀነስ በወር ሃያ ስድስት ቀናት እንደሚያርትና በመያዝ ሂሳቡን ሰርተናል፡፡ አንደኛ ተከሳሽ በወር ሃያ ስድስት ቀናት የማምርት አቅሙን ተጠቅሞ የሚያመርተውን በተጨማሪ እሴት ታክስ ማሳቀዊያ ቅጽ አላሰወቀም የዊዝ ሆልድግ ታክሱም አለበት በማለት እንደመሰከረች ከስር ፍ/በት ውሳኔ ተረድተናል፡፡

7. ሶስተኛው የተጠሪ ምስክር የአንደኛ ተከሳሽ ሂሳብ ኦዲት ሲደረግ አንደኛው ተከሳሽ የተሟላ መረጃ ይዞ አለመገኘቱንና የቀን ግምቱን መነሻ በማድረግ የግብሩን መጠን የሰሩ መሆኑን፣ የድርጅቱን ትክክለኛ የሽያጭ መጠን ለማሳወቅ የተሟላ ሪከርድ የሌለ መሆኑንና አስቸጋሪ እንደሆነ፣ ቀን ግምት በመወሰድ በወንጀል ክሱ የተገለጹት የተጨማሪ እሴት ታክስና የቅደመ ተከፍይ ተቀናሽ /ዊዝሆልድግ/ታክስ የሚፈለግበት መሆኑን በመግለጽ ሪፖርት አቅርበናል የሚል ይዘት ያለው የምስክርነት ቃል እንደሰጠ ከስር ፍ/ቤት ውሳኔ ይዘት ተረድተናል፡፡

8. አመልካቶች የመከላከያ ማስረጃ እንዲቀርቡ የስር ፍ/ቤት ብይን ስጥቶ ሁለተኛው ተጠሪ የመከላከያ የምስክርነት ቃሉን የሰጠ ሲሆን ፣በቂ እውቀትና ክህሎት ያለው የሰለጠነ የሰው ሀይል ባለማግኘታችን የምርት ብልሽትና ብክነት ተከስቷል፡፡ ከመጋቢት 1999 እስክ 2001 መብራት ይቆራረጥ የነበረ በመሆኑ ድርጅቱ በአንድ ፈረቃ ብቻ ለማምርት ከመገደዱም በላይ ለቀናትና ለወራት ጭምር የምርት ስራ የቆመበት ሁኔታ ነበር፡፡ ለዚሁም ከኢትዮጵያ ኤልክትሪክ ሀይል ኮርፖሬሽን የተጻፈልን የጽህፍ ማስረጃ አለ፡፡ በዚህ ጊዜ ውስጥ ከወር ሃያ ስድስት

ቀናት በሶስት ፈረቃ እንደሚያመርት በመግመት የተሰራው የኦዲት ስራ እውነታውን የሚያሳይ አይደለም በማለት የምስክርነት ቃሉን ሰጠ ሲሆን ሌሎች የአመልክቶች ሁለት ምስክሮችም ከመጋቢት ወር 1999 ዓ.ም እስከ 2001 ዓ.ም በመብራት መቋረጥ ምክንያት የምርት ስራ ተቋርጧል የሚለውትንና ሁኔታ በዝርዝር የመሰከሩ መሆኑን ከስር ፍርድ ቤት ውሳዳኔ ተረድተናል፡፡

9. ጉዳዩን በመጀመሪያ ያየው የሃዋሳ ከተማ ከፍተኛ ፍርድ ቤት በተጠሪ በኩልና በአመልካቶች በኩል የቀረቡበትን ማስረጃዎች ከመረመረ በሁላ አንደኛ ተከስ /አንደኛ አመልካች/ተጠሪ ባቀረበው በአንደኛውና በሶስተኛው ወንጅል ክሶች ውስጥ የጠቀሳቸውን የህግ ድንጋጌዎች በመተላለፍ፤ በተጠሪ ክስ የተገለጹትን የወንጅል ድርጊቶች የፈጸመ ጥፍተኛ ነው በማለት የጥፍተኝነት ውሳነተ ሰጥቷል ፡፡ ሁለተኛው ተከሳሽ /ሁለተኛ አመልካች/ ተጠሪ በሁለተኛውና በአራተኛው ወንጀል ክስ የጠቀሳቸውን የህግ ድንጋጌዎች በመተላለፍ በክሱ የተገለጹትን የወንጀል ድርጊቶች የፈጸመ ጥፍተኛ ነው በማለት የጥፋተኛነት ውሳኔ ሰጥቷል ፡፡ ቅጣቱን በተመለከተ አንደኛው አመልካች በብር አርባ ሺ ብር/ብር 40.000/ መቀጮ እንዲከፈል ሁለተኛው አመልካች ከሀምሌ 12 ቀን 2004 ዓ.ም ጀምሮ በሚታሰብ አምስት አመት ጽኑ እስራት እንዲቀጣ በማለት ውሳኔ ሰጥቷል፡፡ አመልካቶች በዚህሁ ውሳኔ ቅር በመሰኘት ይግበኝ ለክልሉ ጠቅላይ ፍርድ ቤት አቅርቧል፡፡ ክልሉ ጠቅላይ ፍርድ ቤት አመልካቶችን ይግበኝ በወ/ሥ/ሥ/ሕ/ቁጥር 195/1/ መሰረት ሰርዚታል፡፡

10. አመልካቾች ጥቅምት 9 ቀን 2005 ዓ.ም በተጻፈ የሰበር አቤቱታ ተጠሪ በወንጀል ክሱ የተቀሳቸው የአዋጅ ቁጥር 285/94 እና የአዋጅ ቁጥር 285/94 ድንጋጌዎች የታክሱ ስወራ ወንጀል ሚፈጸሙ ሰዎችን በወንጀል

ታላፊ እንዲሆንና እንዲቀጡ ለማድረግ ታስበው የታወጁ ናቸው፡፡ አመልካቶች በወቅቱ ለግብር ሰብሳቢው መስሪያ ቤት የማሳውቅ ግዴታችንን የምንወጣ መሆኑን ተጠሪ ባቀረበው ወንጀል ክስና አቅርቦ ባሰማቸው ምስክሮች ተረጋግጧል፡፡ የተጠሪ ኦዲተሮች በወቅቱ የነበረውን በኤሌክትሪክ ሀይል እጥረትምክንያት ምርት የሚቋረጥባቸውን ጊዜዎች ሳያገናዝቡ ድርጅቱ በሶስት ፈረቃ ሃያ ስድስት ቀናት እንደሚያመርት የህሊና ግምት በመያዝ ሰሩት ሂሳብና ያቀረቡት ሪፖርት በግምት ላይ የተመሰረተና የተመረተውን እርግጠኛ ምርትና ተደረገውን ግብይት መሰረት ያደረገ ባለመሆኑ በዚህ ማስረጃ መነሻ የወንጅል ክስ መቅረቡም ሆነ ጥፍጠኛ ተብለን መቀጣታችን መሰረታዊ ህግ ስህተት ያለበትም ስለሆን በሰበር ታይቶ እንዲታረምልኝ በዊዝሆልዲንግ ታክስ ጥሰት ቢፈጸም እንኳን የወንጀል ተጠያቂነትና ቅጣት የሚያስከትል መሆኑ በአዋጅ ቁጥር 286/94 ያልተደነገገ በመሆኑ አመልካቶ ያቀረበው ሶስተኛውና አራተኛው የወንጅል ክስ የህጋዊነት መርህን የሚጥስና መሰረታዊ የህግ ስህተት ያለበት ስለሆነ የበታች ፍርድ ቤቶች የሰጡት የጥፍተኝነትና የቅጣት ውሳኔ በመሻር እንዲያሰናብተን በማለት አመልክተዋል፡፡

11. ተጠሪ በበኩሉ የካቲት 26 ቀን 2005 ዓ.ም በተጸፈ መልስ አመልካቶች አዋጅ 285/94፣ በአዋጁ ቁጥር 286/94 እና በሚኒስተሮች ምክር ቤት ደንብ ቁጥር 78/94 የተጣለባቸው የተጨማሪ እሴት ታክስና የዊዝሆልዲንግ ታክስ የመክፈል ግዴታቸውን ያልተወጡ መሆኑ በማስረጃ ተረጋግጧል፡፡ አመልካቶች ማሳውቅ ግደዴታቸውን መወጣታቸው መክፈል የሚገባቸው ታክስ ባለመክፈላቸው የሚደርስባቸውን የወንጀል ተጠያቂነት የሚያስቀርላቸው አይደለም፡፡ ግብር አስገቢው መ/ቤት ግብር ውሳኔ በግምት እንዲወስን የሚፈቅድለት

ህግ ድንጋጌዎች አለ፡፡ ስለዚህ በግመት የተወሰነው የግብር ዉሳኔ በወንጀል ጉዳይ እንደማስረጃ መቅረቡን በመቃወም አመልካቶች ያቀረቡት ክርክር የህግ መሰረት የሌለው ነው፡፡ በአጠቃላይ በበታች ፍርድ ቤቶች የተሰጠው የጥፍተኝነትና የቅጣት ውሳኔ መሰረታዊ የህግ ስህተት የለበትም በማለት ተከራክሯል፡፡

አመልካቶች መጋቢት 16 ቀን 2005 ዓ.ም የተጻፈ የመልስ መልስ አቅርበዋል፡፡

12. ከሥር የክርክሩ አመጣጥና በዚህ ሰበር ችሎት ግራ ቀኙ ያቀረቡት የጽህፍ ክርክር ከላይ የተገለጸው ሲሆን እኛም የበታች ፍርድ ቤቶች በአመልካቶች ላይ የሰጡትን የጥፍተኝነት ና የቅጣት ውሳኔ አግባብነት ያላቸው የህግ ድንጋጌዎች መሰረት ያደረገ ነው ወይስ አይደለም የሚለውን ጭብጥ በመያዝ ጉዳዩን መርምረናል፡፡
13. ከላይ የተያዘውን ጭብጥ ለመወሰን በመጀመሪያ ተጠሪ በአመልካቾች ላይ ያቀረበው የወንጀል ላይ ያቀረበው የወንጀል ክስና ክሱን የወንጀል መሰረታዊ ይዘት ያለው መሆኑን መመርመር አስፈላጊ ነው፡፡ የአዋጅ ቁጥር 285/96 ድንጋጌዎች በመተላለፍ በሚፈጸሙ ወንጀሎች የወንጅለኛ መቅጫ ህጉን በመተላለፍ የሚፈጸሙ በመሆኑ ክሱ የሚመሰረተው የሚታየውና በይግባኝ የሚቀርበው በወንጅል መቅጫ ሥነ ሥርዓት ህግ መሰረት እንደሆነ በአንቀጽ 48 የሚደነግግ ሲሆን የአዋጅ ቁጥር 286/94 አንቀጽ 94 ተመሳሳይ ይዘት ያለው እንደሆነ እንረዳለን፡፡ ይህም በመሆኑ ተጠሪ በአመልካቾች ላይ ያቀረበው የወንጀል ክስ በወንጀለኛ ህግ ሥነ ሥርዓት ህግ ቁጥር 111 እና 112 መሰረት የተዘጋጀን አመልካቾች በወንጀል ሕግ አንቀጽ 23 ንዑስ አንቀጽ 2 መሰረት የህግ የሞራልና የግዙፍ ተግባር ሁኔታ በተሟላበት

ሁኔታ አዋጅ ቁጥር 285/94 አንቀጽ 49፣ በአዋጅ ቁጥር 286/94 አንቀጽ 96 የተመለከተውን ድንጋጌ በመተላለፍ በተለይ የህግ ጥሰት በመፈጸም ታክስ ያለመክፈል ወንጀል የፈጸመ መሆኑን የሚያሳይ የወንጀል ክስ ይዘትና ባህሪ ያለው ሊሆን ይገባዋል፡፡

14. የአዋጅ ቁጥር 285/94 አንቀጽ 49 እና የአዋጅ ቁጥር 286/94 አንቀጽ 96 ድንጋጌዎች ህግን በመጣስ ታክስን አለመክፈል ወይም በእንግሊዝው " Tax Evasion" የሚል ርዕስ ያላቸው ሲሆን ይዘታቸው ተመሳሳይነት ያለው ነው፡፡የድንጋጌዎቹ ይዘት ቃል በቃል ሲነበብ ህግን በመጣስ የሰበሰበውን ግብር ያላሰወቀ ወ ይዘት ቃል በቃል ሲነበብ ህግን በመጣስ የሰበሰበውን ግብር ያላሰወቀ ወይም የሚፈለግበትን ግብር ያልከፈለ ወይም መንግስትን ለማጭበርበር በማሰብ የማይገበ ውን ተመላሽ ታክስ የጠየቀ ማናቸውም ስው ወንጅለው እንዲ ፈጸም ይቆጠራል በመሆኑም በዚህ አዋጅ ክፍል አስራ አንድ መሰረት ከሚጣልበት መቀጮ በተጨማሪ ጥፍተኛ መሆኑ በፍርድ ሲረጋገጥ ከአምስት ዓመት በማያንስ እስራት ይቀጣል የሚል ይዘት ያለው ነው፡፡

15. አመልክቶች ግብር የማሳውቅ ግድታቸውን የፈጸሙ መሆኑን ተጠሪ በአመልካቶች ላይ ባቀረባቸው የወንጀል ክሶች በግልጽ ያሰፈረው ጉዳይ ነው፡፡ ከዚህ በተጨማሪ የአንድኛ አመልካቾችን ሂሳብ ለማጣራት የተመደቡት የተጠሪ ምስክሮች አመልካቾችን በየወቅቱ በሂሳብ በግብር ማሳወቂያ ቅጹችን በመሙላት ለግብር አስገቢው መስሪያ ቤት ያሳውቁ እንደ ነበር ገልጸዋል፡፡ ከዚህ አንጻር ሲታይ አመልካቶች በአዋጅ ቁጥር 285/94 አንቀጽ 49 እና በአዋጅ ቁጥር 286/94 አንቀጽ 96 በተደነገገው መሰረት ግብር የማሳውቅ ግዴታቸውን በመተለላፍ ታክስ ባለመክፈል የፈጸሙት ግዙፍ የወንጀል ተግባር የሌለ

መሆኑን ተጠሪ ባቀረበው የወንጀል ክስና ማስረጃ የተረጋገጠ ሆኖ አግኝተነዋል፡፡

16. አመልካቶች በአዋጅ ቁጥር 285/96 አንቀጽ 49 እና በአዋጅ ቁጥር 286/94 አንቀጽ 96 በተደነገገው መሰረት መንግስትን ለማጭበ በማሰብ የማይገባቸውን የታክስ ተመላሽ በመጠየቅ ግዙፍ የወንጀል ተግባር ፈጸሙ መሆናቸውን ተተሪ በአመልካቶች ላይ ያቀረባቸው የወንጀል ክሶች አይገልጽም፡፡ ተጠሪ በአመልካቶች ላይ ያቀረቧቸው ምስክሮችም አመልካቶች የማይገባቸውን የታክስ ተማላሽ በመጠየቅ መንግስትን የማጭበርበር ስራ ስለመስራታቸው የሰጡት የምስክርነት ቃል የለም፡፡

17. ተጠሪ አመልካቶች የአዋጅ ቁጥር 285/94 አንቀጽ 49 እና የአዋጅ ቁጥር 286/94 አንቀጽ 96 በመተላለፍ የወንጅል ድርጊት ፈጽመዋል በማለት ክስከ ያቀረበው አመልካቶች ከመጋቢት ወር 1999 ዓ.ም እስክ ሰኔ 30 ቀን 2001 ዓ.ም ድረስ በግምት የተወነሰነባቸው ብር 9,065,577.59 ተጨማሪ እሴት ታክስ ከነመቀመጫውና ብር 374,818.81 ዊዝ ሆልዲንግ ታክስ በወቅቱ አልከፈሉም በማለት ነው፡፡ እዚህ ላይ መታየት ያለበት አመልካቶች አንደኛ አመልካች ያመረተውን የምርት መጠንና ያከናወኑትን ግብይት ከግብይቱ የሰበሰቡትን ገቢ በየወቅቱ ለግብር አስገቢው መስሪያ ቤት ያቀርቡ የነበር መሆኑ በተጠሪ ክስና ማስረጃ የተገለፀና የተረጋገጠ በሆነበት ሁኔታና አመልካቶች በየወቅቱ ባቀረቡት የግብር ማሳወቂያ ቅጽ በመጀመሪያ አንደኛ ተከሳሽ ፅቃዎችን ሲያስገባ የከፈለው የተጨማሪ እሴት ታክስና አንደኛ ተከሳሽ የፋብሪካ የምርጥ ውጤቱን ሲሸጥ የሰበሰበውን ተጨማሪ እሴት ታክስ ተቀናንሰው ባላንሱ ዜሮ መሆኑንና ለመንግስት የሚከፍሉት የግብር ገንዘብ የሌለ መሆኑን በየወሩ መጨረሻ ሲያሳውቁ መኖራቸው በተረጋገተበት ሁኔታ የሚከፍሉት የግብር ገንዘብ የሌለ መሆኑን በየወሩ

መጨረሻ ሲያሳወቁ መኖራቸው በተረጋገጠበት ሁኔታ አዲተሮች ሂሳቡን አዲት ሲያደርጉ ፍጠሪካው በሙሉ አቅሙ ማለትም በሶስት ፈረቃ በወር ሃያ ስድስት ቀናት ሊያመርት ይችላል የሚለውን የህሊና ግምት በመያዝ የወሰኑት ግብበር ባለመከፈላቸው በወንጅል ቀረበባቸው ክስ እና የተሰጠባቸው የጥፍተኝነት ና የቅጣት ውሳኔ በአዋጅ ቁጥር 285/94 አንቀጽ 49 እና በአዋጅ ቁጥር 286/94 አንቀጽ 96 እና አንቀጽ 162 መስፈርት የማያኳላ መሆኑን ነው፡፡

18. በአዋጅ ቁጥር 285/94 አንቀጽ 49 እና በአዋጅ ቁጥር 286/94 አንቀጽ 96 ግብር አለመክፈል የወንጀል ተግባር ተደርጎ የተደነገገው ግብር ክፍዩ ለግብር አስገቢው መስሪያ ቤት ባሳወቀና ባልከፈለው ግብርና ግብር አስገቢው መስሪያ ቤት ግብር ከፋዩ የያዛቸውን የሂሳብ ሰነዶችና ማስረጃዎች በተለያየ ምክንያት በመጣል በግምት በወሰነው ግብር መካከል ልዩነት ሲፈተር ግብር ክፋዩን በወንጅል ለመጠቅና ለመቅጣት በማሰብ አይደለም፡፡ ይልቁንም መክፈል የሚገባውን የግብር ገንዘብ ላለመክፈል በማሰብና ግብር አስገቢው መስሪያ ቤትም ንብረቶችን በመያዝና በመሸጥ የግብር ገንዘቡን ገቢ እንዳያደርግ ለማድረግና ግብር ከመክፈል ኃላፊነቱ ለማምለጥ ንብረቶችን የማሻሸና የመሰወር እና ሌሎች ተመሳሳይነት ያላቸው ህገ ወጥ ተግባራት በመፈፀም ግብር ያልከፈለ ግብር ከፋይን ተጠያቂ ለማድረግ እንደሆነ ይኸ ሰበር ችሎት በተመሳሳይ ጉዳይ በሰበር መዝገብ ቁጥር 53544 በቀን 11/10/02 ዓ.ም አስገዳጅ የህግ ትርጉም ሰጥቶበታል፡፡

19. ከዚህ አንጻር ሲታይ አመልካቶች በየወቅቱ ግብር የመስጠት ግዴታቸውን ሲወጡ ቆይተዋል፡፡ አመልካቶች በየወቅቱ ባቀረቡት የሂሳብ ሪፖርት ለመንግስት የሚከፈል ገንዘብ የሌለ መሆኑን ያሳወቁ መሆኑ ተረጋግጧል፡፡ ግብር አስገቢው መስሪያ ቤት በወንጅል ክሱ

የተጠቀሰው የተጨማሪ እሴት ታክስ እና ዊዝሆልንዲንግ ታክስ ገንዘብ ከአንደኛው አመልካች የሚፈለግ መሆኑን በመወሰን የግብር ውሳኔ ማስታወቂያ ከሰጣቸው በኃላ አመልካቶች በህጉ መሰረት አቤቱታ አቅርበዋል፡፡ ከዚህ በ=ላ አመልካቶች በግብር አስገቢው መስሪያ ቤት ተወሰነውን ግብር ያልከፈሉት የአንደኛው አመልካች ንብረት በዳሽን ባንክ ዕዳ ምክንያት በመሸጡና የባንክ ዕዳ ተከፍሎ ቀሪ ገንዘብ ባለመኖሩ መሆኑን አንደኛው የተጠሪ ምስክር በስር ፍ/ቤት ባሰመዘገበው የምስክርንት ቃል እንደተገለጸ ተረድተናል፡፡

20. ማናቸውም ሰው የፍታብሄር ዕዳ ለመክፈል ባለመቻሉ ምክንያት በወንጅል ጥፍተኛ ተብሎ እንደማይቀጣ በሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ስምምነት አንቀጸ 11 ተደንግጓል ፡፡ ከዚህ አንጻር ሲታይ የአዋጅ ቁጥር 285/94 አንቀጽ 49 እና የአዋጅ ቁጥር 286/94 አንቀጽ 96 ድንጋጌዎችም ከህግ መንግስቱ አንቀጽ 13/2/ እና ከላይ ከጠቀስነው ዓለም አቀፍ ድንጋጌ ጋር በማጣጣም ሁኔታ መተርጎምና ተፈጻሚ መሆን ያለባቸው መሆኑን ይህ ሰበር ችሎት በመዝገብ ቁጥር 53544 አስገዳጅ የህግ ትርጉም የሰጠበት ስለሆነ፣ አመልካቶች ግብር አስገቢው መስሪያ ቤት በግምት ወሰነውን የግብር ገንዘብ ለመክፈል ባለመቻላቸው ምክንያትወ በወንጀል ተጠያቂነት ጥፍተኛ ሊባሉ የሚችሉበት የህግ መሰረት የለም፡፡ በመሆኑም በህጉ የተደነገጉት መስፈርቶች ሳይሟሉና በወንጀል ህግ አንቀጽ 23 ንዑስ አንቀጽ 2 የተደነገገው የሀሳብና የግዙፍ ተግባር ሁኔታዎች ባልተሟሉበት ሁኔታ የሀዋሳ ከተማ ከፍተኛ ፍርድ ቤትና የክልሉ ጠቅላይ ፍ/ቤት አመልካቶች ህግን በመተላላፍ ግብር ያለመክፈል ወንጀል ፈጽመዋል በማለት ሰጡት የጥፍተኝነትና የቅጣት ውሳኔ መሰረታዊ የህግ ስህተት ያለበት ነው በማለት ወስነናል፡፡

ው ሳ ኔ

1. በደቡብ ብሔር ብሔረሰቦችና ህዝቦች ክልል የሐዋሳ ከተማ ከፍተኛ ፍርድ ቤት በወንጀል መዝገብ ቁጥር 11768 ሰጠው ፍርድ እና ክልሉ ጠቅላይ ፍርድ ቤት በመዝገብ ቁጥር 57769 ሠጠው ትዕዛዝ በወ/መ/ሥ/ሥ/ህግ ቁጥር 195 ንዑስ አንቀጽ 2/1/ ሀ መሰረት ተሽሯል፡፡
2. የበታች ፍርድ ቤቶች ሰጡት የጥፍተኝነትና የቅጣት ውሳኔ ጠሻረ በመሆኑ አንደኛው አመልካች ብር 40.000/ አርባ ሺ ብር/ መቀጮ ከመክፈል በነጻ ተሰናብቷል፡፡ አንደኛው አመልካች መቀጮውን ክፍሎ ከሆነ ይመለስለት፡፡
3. የበታች ፍረድ ቤቶች የሰጡት የጥፍተኝነት ና የቅጣት ውሳኔ የተሻረ በመሆኑ ሁለተኛው አመልካች ከእስር እንዲለቀቅ በክፍሉ ማረሚያ ቤት መፍቻ ይጻፍ፡፡

መዝገቡ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰ/መ/ቁ. 59025

ግንቦት 19 ቀን 2003 ዓ.ም

ዳኞች፡- ተገኔ ጌታህ

ሐጎስ ወልዱ

አልማው ወሌ

ነጋ ዱፍሳ

አዳነ ንጉሴ

አመልካች፡- የኢትዮጵያ አእምሯዊ ንብረቶች ጽ/ቤት -ነ/ፈጅ አጥናፉ ደምሴ ቀረቡ

ተጠሪ፡- አቶ ጥበበ አየለ - ጠበቃ ታገል ጌታሁን ቀረቡ፡፡

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ጉዳዩ በአመልካች መስሪያ ቤት በአዋጅ ቁጥር 501/98 መሠረት በሚሰጡት ውሳኔዎች ቅሬታ ያለበት ወገን አቤቱታውን ሊያቀርብ የሚገባበትን ፍርድ ቤት የሚመለከት ነው፡፡ ክርክሩ የተጀመረው በፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት ሲሆን ከሳሽ የነበሩት ተጠሪ ናቸው፡፡ የአሁኑ ተጠሪ በአመልካች መስሪያ ቤት ላይ የመሰረቱት የክስ ይዘት ባጭሩ፡- RISING የሚለውን የንግድ ምልክት እንዲመዘገብልኝ አመልክቼ ማመልከቻዬን ያላግባብ ያልተቀበለኝ ስለሆነ የንግድ ምልክቱን እንዲመዘገብልኝ ይወሰንልኝ በማለት ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ የአሁኑ አመልካች በተከሳሽነቱ ቀርቦ በሰጠው መልስም ፍርድ ቤቱ ጉዳዩን በመጀመሪያ ደረጃ ስልጣኑ ማየት እንደማይችል ገልፆ ክሱ ውድቅ ሊሆን ይገባል ሲል ተከራክሯል፡፡ ክሱ የቀረበለት ፍ/ቤትም የአመልካችን የመጀመሪያ ደረጃ መቃወሚያ ነጥብን ውድቅ አድርጐል፤ በፍሬ ጉዳዩ ላይም

ተጠሪ የንግድ መልዕክቱ እንዲመዘገብላቸው ሲል ወስኗል፡፡ የስር ፍርድ ቤት የአመልካችን የመጀመሪያ ደረጃ መቃወሚያ ውድቅ ያደረገው አመልካች መስሪያ ቤት በፍርድ ቤት ሊከሰስ እንደሚችል አዋጅ ቁጥር 501/98 ይደነግጋል በሚል ምክንያት ነው፡፡ በዚህ ውሳኔ አመልካች ባለመስማማት ይግባኙን ለፌደራሉ ከፍተኛ ፍርድ ቤት ቢያቀርብም ግራ ቀኙ ከተከራከሩ በ=ላ የሥር ፍርድ ቤት ውሳኔ ፀንቷል፡፡ የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ ውሳኔ በመቃወም ለማስለወጥ ነው፡፡ የአመልካች የሰበር አቤቱታ መሠረታዊ ይዘትም የአመልካች መስሪያ ቤት በጉዳዩ ላይ ውሳኔ የመስጠት ስልጣኑ በአዋጅ ቁጥር 501/98 አንቀጽ 17 ስር የተደነገገ ሆኖ በውሳኔው ላይ ቅሬታ ያለው ወገን ደግሞ ይግባኙን ማቅረብ ያለበት ለፌደራሉ ከፍተኛ ፍርድ ቤት ስለመሆኑ የአዋጅ ቁጥር 501/98 አንቀፅ 49 ድንጋጌ በአዋጅ ቁጥር 25/1988 ለፌደራሉ ከፍተኛ ፍርድ ቤት ከተሰጠው የይግባኝ ስልጣን ድንጋጌዎች ጋር አጣምሮ በማንበብ መረዳት የሚቻልና በጉዳዩ ላይ በስራ ላይ የነበሩትና ሌሎች ተዛማጅ ሕጎችም ሆነ ያለው አሰራር አመልካች መስሪያ ቤት የሚሰጠው ውሳኔ በይግባኝ ለፌዴራሉ ከፍተኛ ፍርድ ቤት ይቀርብ የነበረ አሁንም እየቀረበ ያለ መሆኑን በግልጽ የሚያሳዩ ሁነው እያለ ጉዳዩን የፌራሉ መጀመሪያ ደረጃ ፍርድ ቤት በመጀመሪያ ደረጃ ስልጣኑ ቀጥታ ክስ መመልከቱ ተገቢነት የለውም በማለት መከራከሩን የሚያሳይ ነው፡፡ ኤቱታው ተመርምሮም በስር ፍርድ ቤት የቀረበውን የንግድ ምልክት ምዝገባ ጥያቄ ተቀብሎ የተጠሪን የንግድ ምልክት እንዲመዘግብ የተሰጠው ውሳኔ እንዲሁም የፌደራሉ መጀመሪያ ደረጃ ፍርድ ቤት ጉዳዩን በቀጥታ ክስ አስተናግዶ ፍርድ የሰጠበትን አግባብ ከአዋጅ ቁጥር 320/1995፣ 501/98 እና 25/1988 አንፃር ለመመርመር ሲባል ለሰበር ችሎት እንዲቀርብ የተደረገ ሲሆን ለተጠሪ ጥሪ ተደርጎላቸው ቀርበው የጽሁፍ መልሳቸውን ሰጥተዋል፡፡ ተጠሪ በጽሁፍ መልሳቸው በተመሳሳይ ጉዳይ በመ/ቁጥር 56938 በሰበር ችሎት የአመልካች የሰበር ቅሬታ

ለሰበር ችሎቱ አያስቀርብም ተብሎ መዘጋቱን፣ በአዋጅ ቁጥር 501/98 አንቀጽ 17/2 ስር ይግባኝ የሚለው ቃል መቀመጡ በፍትሐብሔር ስነ-ስርዓት ሕጉ የተቀመጠውን የይግባኝ ቃል ትርጉም በመያዝ ሳይሆን ቅሬታ በሚል ቃል መንፈስ ነው የሚሉትንና ሌሎች ነጥቦችን በማንሳትና በዋቢነትም አግባብነት አላቸው ያሏቸውን ሕጎችና ድንጋጌዎችን በመጥቀስ በጉዳዩ ላይ በተሰጠው ውሳኔ የሕግ ስህተት የለም በማለት ተከራክረዋል። አመልካች በበኩሉ የሰበር አቤቱታውን በማጠናከር የመልስ መልሱን አቅርቧል።

የጉዳዩ አመጣጥ አጠር ባለመልኩ ከላይ የተገለፀው ሲሆን ይህ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታው መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ ጉዳዩን በሚከተለው መልኩ መርምሮታል። እንደመረመረውም የችሎቱን ምላሽ የሚያስፈልገው አቢይ ነጥብ የፌደራሉ መጀመሪያ ደረጃ ፍርድ ቤት ጉዳዩን የማየት የስረ ነገር ስልጣን አለው? ወይስ የለውም የሚለው ሆኖ አግኝቶታል።

በመሠረቱ አመልካች በአዋጅ ቁጥር 320/1995 አንቀጽ 6/1 መሠረት የንግድ ምልክት ምዝገባ ምስክር ወረቀት ማመልከቻዎችን በመቀበል አግባብ ባለው የአእምሯዊ ንብረት ሕግ መሠረት ምርመራ በማካሄድ ውሳኔ የመስጠትና በንግድ ምልክት ምዝገባና ጥበቃ አዋጅ ቁጥር 50/98 አንቀጽ 36 መሰረት በተመዘገበ የንግድ ምልክት ላይ የሚነሱ ክርክሮችን በማየት ፈራሽ የማድረግ ስልጣን የተሰጠው መሆኑን የተጠቀሱት ድንጋጌዎች በግልፅ ያስገነዝባሉ። የአዋጅ ቁጥር 501/98 አንቀጽ 17/1 ድንጋጌ ሲታይም የአመልካች መስሪያ ቤት ስለንግድ ምልክቱ ምዝገባ በሰጠው የመጨረሻ ውሳኔ ላይ ቅሬታ ያለው ማንኛውም ሰው ቅሬታውን ስልጣን ባለው ፍርድ ቤት ማቅረብ እንደሚችል አስቀምጧል። የአዋጁ አንቀጽ 49 ሲታይ ደግሞ ስልጣን ያለው ፍርድ ቤትን ያሳያል። በዚህ ድንጋጌ መሠረት በአዋጁና አዋጁን ለማስፈጸም በአዋጁ አንቀጽ

47 መሠረት በሚኒስትሮች ምክር ቤት በሚወጣው ደንብ የተመለከቱ ጉዳዮችን በሚመለከት የሚነሱ ክርክሮችንና ተዛማጅ ጉዳዮችን የማየት ስልጣን የሚኖራቸው የፌዴራል ፍርድ ቤቶች ናቸው በሚል የሚደነግግ ነው፡፡ እንግዲህ በሕጉ ረገድ ያለው የውሳኔ አሰጣጥና የይግባኝ አቀራረብ ሥርዓት ከላይ የተጠቀሰው ሲሆን ሕጉ አመልካች መስሪያ ቤት በሚሰጠው የመጨረሻ ውሳኔ ላይ ቅሬታ ያለው ወገን ስልጣን ላለው ፍርድ ቤት ይግባኝ የማቅረብ መብት (The right to Appeal) እንዳለው በግልፅ ከማስቀመጡ ውጪ ይግባኙ በፌዴራሉ ፍርድ ቤቶች በየትኛው እርከን ለሚገኝ ፍርድ ቤት እንደሚቀርብ ግልጽና አሻሚነት በሌለው አነጋገር አያስቀምጥም፡፡ እንዲህ በሆነ ጊዜ ሕጉን መተርጎም ተገቢ ይሆናል፡፡

የአዋጅ ቁጥር 501/98 አንቀጽ 17/1 ድንጋጌ ርእሱ ሲታይ አማርኛው “ይግባኝ የማቅረብ መብት” በሚል የተቀመጠ ሲሆን የእንግሊዝኛው ቅጂ ደግሞ “The right to Appeal” በሚል የተቀመጠ ነው፡፡ እንግዲህ ሕጉ በይዘቱና በቅርጹ ይህን የሚመስል ከሆነ ይግባኝ የሚለው የሕጉ አገላለፅ ለየትኛው ፍርድ ቤት ነው ጉዳዩ መቅረብ ያለበት የሚለውን ጥያቄ ይፈታ ዘንድ የይግባኝ ትርጉሙንና የአቀራረብ ሥርዓቱን በአጠቃላይ ማየቱን፣ የአመልካች መስሪያ ቤትን ለማቋቋም የወጣውን ሕግና ለመስሪያ ቤቱ ስልጣን የሚሰጡ ሌሎች ተዛማጅነት ያላቸው ሕጎች የሚያስቀምጡትን የይግባኝ አቀራረብ ሥርዓት መመልከቱና ግንዛቤ መወሰዱ ተገቢ ይሆናል፡፡

ታዋቂው የ”Black’s Law Dictionary” ይግባኝ የሚለውን ቃል ሲተረጎም A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, especially, the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal. በሚል ያስቀምጣል፡፡ ከዚሁ መገንዘብ የሚቻለው ይግባኝ በበታች አካል የተሰጠ

አንድ ፍርድን ወይም ውሳኔን በመቃወም ለበላይ ፍርድ ቤት አቤቱታ በማቅረብ የስር ፍርዱ /ውሳኔ/ እንደገና የሚታይበትን ወይም እንዲጣራ የሚደረግበትን ወይም ሊለወጥ የሚችልበትን ሥርዓት የሚያመላክት መሆኑን ነው፡፡ በፍ/ብ/ሥ/ሥ/ሕ/ቁ/ 320/1/ የተመለከተው ድንጋጌ ሲታይም በፍትሐብሔር ወይም በሌሎች ህጎች ውስጥ በሌላ ሁኔታ እንዲፈፀም የሚያዝ ድንጋጌ ከሌለ በቀር ከሳሽ ወይም ተከሳሽ በፍትሐብሄር ፍርድ ቤት በተወሰነበት የመጨረሻ ፍርድ ላይ ይግባኝ ለማለት የሚችሉ መሆኑን ይደነግጋል፡፡ በዚህ ድንጋጌ መሠረት የይግባኝ ትርጉም በመጀመሪያ ደረጃ ፍርድ ቤት ተከራካሪ የነበረና በተሰጠው ፍርድ ቅር የተሰኘ ወገን ይህንኑ ቅሬታውን ለበላይ ወይም ለይግባኝ ሰሚ ፍ/ቤት አቅርቦ የበታች ፍ/ቤት የሰጠውን ፍርድ እንዲሻሻል፣ እንዲለዉጥ ወይም በጠቅላላው ውድቅ እንዲሆንና ዳኝነቱ ለእሱ እንዲሰጠው ለመጠየቅ የሚያስችል ሥርዓት ነው፡፡ በፌዴራል ፍርድ ቤቶች አዋጅ ቁጥር 25/1988 ደግሞ የይግባኝ ስልጣን ያላቸው ፍርድ ቤቶች ተመልክተዋል፡፡ በሌላ በኩል አዋጅ ቁጥር 501/98 አንቀጽ 17/1/ ድንጋጌ ስለንግድ ምልክት ምዝገባ ፅ/ቤቱ በሰጠው የመጨረሻ ውሳኔ ላይ ቅሬታ ያለው ማንኛውም ሰው ቅሬታውን ስልጣን ላለው ፍ/ቤት ማቅረብ ይችላል ብሎ ሲያስቀምጥ “የመጨረሻ ውሳኔ” የሚለው ሐረግ አቀራረፁና ይዘቱ የሚያሳየው በጉዳዩ ላይ ይግባኝ የሚቀርብበት መሆኑን እንጂ ቀጥታ ክስ የሚቀርብበት አለመሆኑን መገንዘብ የሚቻል መሆኑን ነው፡፡ እንዲሁም አመልካች የተቋቋመው አእምሯዊ ንብረትን የሚገዙ ብሔራዊ ህጎችን የሚያስፈፅም ወይም ተፈፃሚነታቸውን የሚከታተል እንዲሁም አስፈላጊውን አቅም በመገንባት ቀልጣፋና ውጤታማ አገልግሎት የሚሰጥ መንግስታዊ አካል ማቋቋሙ በማስፈለጉ መሆኑን አዋጅ ቁጥር 320/95 በመግቢያው ያስቀመጠው ጉዳይ ሲሆን የዚሁ አዋጅ አንቀጽ 2 ደግሞ “አእምሮአዊ ንብረት” እና “ፓተንት” የሚሉትን ቃላት ትርጉም አስቀምጧል፡፡ በዚህም መሠረት አእምሯዊ ንብረት

ማለት የሰው ልጅ አእምሮ ውጤት በሆኑ የፈጠራ ሥራዎች ላይ ያለ ሕጋዊ መብት ሲሆን ፓተንትን፣ የንግድ ምልክትን፣ የምስክር ወረቀትንና ኮፒ ራይትን እንደሚጨምር በአዋጁ አንቀፅ 2/1/ ድንጋጌ የተቀመጠ ሲሆን ፓተንት ማለት ደግሞ የፈጠራን ስራን ለማስጠበቅ የሚሰጥ መብት ሲሆን በፈጠራ በአነስተኛ ፈጠራና በኢንዱስትሪያዊ ንድፍ በአዋጅ ቁጥር 123/87 መሰረት በፈጠራ በአነስተኛ በኢንዱስትሪ ንድፍ የሚሰጠውን የአስገቢ ፓተንት የግልጋሎት ሞዴል ምስክር ወረቀትና የኢንዱስትራያዊ ንድፍ የምዝገባ የምስክር ወረቀትን እንደሚጨምር በአንቀጽ 2/2/ ስር በግልፅ ሰፍሮ እናገኛለን፡፡ ይህ መስሪያ ቤት ከሚያስፈፅማቸው ሕጎች መካከል አንዱ አዋጅ ቁጥር 410/1996 ሲሆን በዚህ አዋጅ አንቀጽ 2/9/ እና 15/ ድንጋጌዎች ሲታዩም በአዋጁ በሚገዙ ጉዳዮች ላይ የሚነሱ ቅሬታዎችን የመመልከት ስልጣን የፌዴራል ከፍተኛ ፍ/ቤት ስልጣን ስለመሆኑ በግልፅ ያሳያሉ፡፡ በሌላ በኩል የፈጠራ፣ የአነስተኛ ፈጠራና የኢንዱስትሪያል ንድፍ አዋጅ ቁጥር 123/1987 ስር የይግባኝ ስልጣኑ የማዕከላዊ ከፍተኛ ፍ/ቤት ስልጣን ስለመሆኑ አንቀጽ 2/1፣ እና 54 ድንጋጌዎች በአንድ ላይ ሲነበቡ የሚያሳዩት ጉዳይ መሆኑን መገንዘብ የሚቻል ሆኖ አግኝተናል፡፡ እነዚህ ሕጎች በአመልካች መስሪያ ቤት ይፈጸማሉ ተብለው ከተጠቀሱት ሕጎች መካከል ሲሆኑ አመልካች መስሪያ ቤት በሚሰጠው ውሳኔ ይግባኙ የሚቀርበው በግልፅ ለፌደራል ከፍተኛ ፍርድ ቤት መሆኑን ያሳያሉ፡፡ ከላይ እንደተገለጸው አመልካች መስሪያ ቤትን ያቋቋመው አዋጅ ቁጥር 320/1995 መስሪያ ቤቱን ለማቋቋም ያስፈለገበትን ሲገልፅ አእምሯዊ ንብረትን የሚገዙ ብሔራዊ ሕጎችን የሚያስፈፅም ወይም ተፈፃሚነታቸውን የሚከታተል አካል ማቋቋም በማስፈለጉ መሆኑን በግልፅ ያሰፈረ ሲሆን ይህ ምክንያት አመልካች መስሪያ ቤት ተመሳሳይ አዕምሯዊ ንብረት ጉዳዮችን ለማስተናገድ ስልጣን የተሰጠው አካል ከመሆኑ ተዳምሮ ሲታይ ፅ/ቤቱ የሚሰጣቸው ውሳኔዎች በተለያዩ ፍ/ቤቶች ይታያሉ፣ ወይም በተወሰኑት ይግባኝ በተወሰኑት ደግሞ

ቀጥታ ክስ ይቀርብባቸዋል ብሎ መደምደም የአመልካች መስሪያ ቤትን የሚያስፈጽማቸው ህጎች አውደ ንባብ (Contextual interpretation) የሚያስገነዝበን ጉዳይ ነው፡፡ በመሆኑም አመልካች መ/ቤት በህጉ በተሰጠው ስልጣን መሰረት በሚሰጣቸው ውሳኔዎች ቅሬታ ያለው ወገን በህግ የተሰጠው መብት ይግባኝ ማቅረብ እንጂ ቀጥታ ክስ መመስረት አይደለም፡፡ በህጉ የተዘረጋው ስርዓት ይግባኝ ከሆነ በፌደራል ፍ/ቤቶች አዋጅ ቁጥር 25/1988 እና አግባብነት ባላቸው የፍተሐብሔር ስነ-ስርዓት ህግ ድንጋጌዎች መሰረት በጉዳዩ ላይ የይግባኝ ስልጣን ያለው ፌደራል ከፍተኛ ፍ/ቤት ነው፡፡ የተጠሪ ጠበቃ በሰ/መ/ቁጥር 56938 በቀረበዉ ተመሳሳይ ጉዳይ በሰበር ችሎቱ አጣሪ ችሎት በበታች ፍ/ቤቶች የተሰጠው ውሳኔ መሠረታዊ የሆነ የህግ ስህተት የለበትም ተብሎ መወሰኑ ገልፀው ይህ ጉዳይም በተመሳሳይ መልኩ ሊስተናገድ እንደሚገባው ያቀረቡትን ክርክር ስንመለከተውም ሦስቱ ዳኞች የሚሰጡት የሰበር ትዕዛዝ /ውሳኔ/ አስገዳጅነት የሌለው መሆኑን አዋጅ ቁጥር 454/97 አንቀጽ 2/1/ ድንጋጌ በግልጽ የሚያሳይ በመሆኑ ይህ ችሎት የሚቀበለው አይሆንም፡፡ በመሆኑም በሰ/መ/ቁጥር 56938 የተሰጠው ትዕዛዝ ይህን ጉዳይ በተመሳሳይ መንገድ ለመወሰን የሚያስገድድ ባለመሆኑ በዚህ ረገድ የቀረበውን የተጠሪ ጠበቃ ክርክርን አልፈነዋል፡፡

ሲጠቃለልም የአዋጅ ቁጥር 501/98 አንቀጽ 6፣17፣36፣ እና 49 ድንጋጌዎች ጣምራ ንባብ ከይግባኝ ትርጉምና አመልካች መስሪያ ቤት ከተቋቋመበት አላማና አመልካች መስሪያ ቤት የሚያስፈጽማቸው ከአዋጅ ቁጥር 501/98 ውጭ ያሉት ሌሎች ተዛማጅነት ያላቸው ህጎች ከዘረጉት የይግባኝ አቀራረብ ስርዓት አንፃር ሲታይ በንግድ ምልክት ምዝገባ ጉዳይ ላይ አመልካች መ/ቤት በሚሰጠው ውሳኔ ቅሬታ ያለው ወገን ያለው መብት በይግባኝ ስርዓት የማስከበር እንጂ በቀጥታ ክስ የሚስተናገድ አለመሆኑን፣ ይግባኙ መቅረብ ያለበት ደግሞ

ለፌደራል ከፍተኛ ፍ/ቤት መሆኑን የሚያስረዳ ሁኖ አግኝተነዋል፡፡ በመሆኑም የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ጉዳዩን በቀጥታ ክስ ለማየት አይችልም ተብሎ በአመልካች በኩል የቀረበውን የመጀመሪያ ደረጃ መቃወሚያ አዋጅ ቁጥር 501/98 አመልካች መ/ቤት ሊከሰስ እንደሚችል ይደነግጋል በሚል በደፈናው ውድቅ ማድረጉና የፌደራል ከፍተኛ ፍ/ቤትም ይህንኑ ሳያርም ማለፉ መሰረታዊ የሆነ የህግ ስህተት ያለበት ሆኖ አግኝተናል፡፡ በዚህም መሠረት ተከታዩን ወስነናል፡፡

ው ሳ ኔ

1. በፌደራሉ መጀመሪያ ደረጃ ፍ/ቤት በመ/ቁጥር 153240 በ134/2002 ዓ.ም ተሰጥቶ በፌዴራል ከፍተኛ ፍ/ቤት በመ/ቁጥር 89864 በ03/10/2002 ዓ.ም የፀናው ውሳኔ በፍ/ብ/ስ/ስ/ህ/ቁ/348/1/ መሠረት ተሽሯል፡፡