Review

Twists in the process of regime building in the Eastern Nile Basin

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Accepted 6 February, 2013

The competing needs and prejudicial consequences entailed by a unilateral exploitation of shared waters have created technical and juridical problems. Thus, the search for plausible criteria for defining the water right of states has ultimately resulted in the formulation of diverse legal doctrines, which failed to specify how much of a state sovereignty is going to be compromised. The researcher contends that the incompatibility of the sovereign needs with the legal doctrines, particularly in Africa, is due to the imposition of territorial states over the natural highways created by rivers. Therefore, without addressing the problems of the state system, it is impossible to come up with binding legal doctrine and the Nile Basin is not an exception to this rule. In short, this study’s premise towards the legal understanding of the distribution of the shared water resources of Africa and of course the Nile is pan-Africanist. As long as the African states undo the concept of the maladapted state system of Europe with notion of pan Africanist understanding, the controversies and arguments based on sovereign interest give birth for a new form of understanding.

Key words: Nile Basin, legal regime, legal doctrines, international water law.

INTRODUCTION

... [the] moving mass ... is characterized as something which yesterday had not arrived tomorrow may be in another state and in week's time a thousand miles away (Berber, 1959: 5).

Water right issues have been state centric for a long time (Elizabeth and Donna, 2009: 283). However, the static nature of the political territory, which is the designator of territorial sovereignty (Tvedt, in Doornbos et al., 1992) and the ever changing aspect of the 'living mass' that transcend international political boundaries have caused competing sovereign interests among co-basin states (Aron, 2008: 72; Tvedt, 1992: 80). Therefore, the competing needs and the concomitant relative scarcity of water have extracted extensive problem for socioeconomic development because the unilateral exploitation of shared water entails a prejudicial consequence on the co-basin connected in the river system (Daniel, 1999: 143).

The clash of sovereign interests attributed to conflicting dualities of the fixed land mass and the migratory nature of the 'living mass' of a state has resulted in the birth of legal doctrines and formal water law that could serve to regulate conflicting interests of riparian states over the utilization of international waters (Bonaya, 1985: 1). The primary focus of the earliest formal water law was confined on the navigational use of rivers due to the limited involvement of water in other economies (Aron, 2008: 73). However, the eventual diversification of the economic sectors has generated miscellaneous need for water especially in the post World War Two (WWII) period (Omer, 1984: 1).

The diversification of the use of international waters and the prejudicial consequences that could be entailed by a unilateral exploitation create both technical and juridical problems (Godana, 1985: 32). The situation has also created complex problems that cannot be addressed under the traditional water use arrangement and thereby called for the infringement of traditional rights by designing legal doctrines that regulate sovereign interests over the utilization of shared waters. As a result, sets of legal doctrines with certain prerogatives and duties flourished as a forerunner to the rise of formal
international water law.

RESEARCH METHODOLOGY AND SOURCES OF DATA

The process of regime formation and the challenge of institutionalizing the administration of the Nile River are exhaustively studied by notable scholars such as Owiro, John Waterbury F, Batstone, Garretson, Teclaff, Okidi, Godana and Carrol (Owiro, 2004; John, 1979; Wolfgang, 1965; Charles, 1982; Carrol, 1999; Godana, 1985). However, none of these studies comprehensively dealt with the legal conception dependency of Africa as concomitant effect of the transplantation of the nation state paradigm. Thus, so as to contribute to this marginalized frame work, predominantly qualitative data were collected from achieves, diplomatic documents, traveler accounts, letters, official document such as treaties and agreement, manuscript, public workshop, research reviews, conference papers, thesis works, annual official reports, scientific journals, newspaper reports and magazine articles. The analysis of the data using multi-dimensional historical causation method shows the *inter alia* of the realist project of colonial military encroachments and the concomitant institutionalization of nation state and as well the codification of monopolistic water Nile treaties to maintain the unjust history intact as main impediments for establishment of Nile water regime. Thus, the problems demand revising of the conception of the colonial state and the accompanying legal doctrines in lieu of adopting alternative quick-fix remedies without addressing the simmering cause bedeviled in the Nile water politics. In short, the democratization of the conception of the notion of nation state and its legal philosophy, with regard to the pre colonial socio-legal organization of African natives, could foster the move towards the realization of all inclusive and, efficacious regime in the eastern Nile Basin. Therefore, the recent optimistic head starts of the Nile Basin should foster these tenets though Egypt still remains nostalgic about it.

THEORETICAL DISCUSSION ON CUSTOMARY LEGAL DOCTRINES OF SHARED WATER USE

Water use doctrines in the early days were extension of national interest and guardians of the sovereign right of states. However, the prejudicial consequences of national water projects on the states in the river system necessitated a legal regulation of sovereign interest of states (Godana, 1985: 32). But, the articulation of the regulatory system has been demanding cessation of exercising absolute sovereignty over shared water resources (Omer, 1984: 1). Therefore, the search of consensual and plausible criteria for defining the water rights of riparian nations has ultimately resulted in the formulation of some legal doctrines. These include the doctrine of absolute territorial sovereignty, the doctrine of absolute territorial integrity, the doctrine of limited territorial sovereignty, the doctrine of limited territorial sovereignty, and the doctrine of community of property or optimal development of the river basin (Aron, 2008: 72-76). However, these doctrines of water use hold many shortcomings due to their incongruity with the dynamism of state behavior, water demand, and use (Wassara, 2006: 124).

In accordance to the theory of absolute territorial sovereignty, usually referred to as Harmon doctrine, a state is naturally entitled to master its own territory and assume all measures deemed suitable to its national interest (Godana, 1985: 125). Accordingly, a state has unreserved right to make full utilization of all water resources flowing within its territory, irrespective of the effects beyond its territorial jurisdiction. But by the same token, it cannot claim the free flow of the water from upper basin states (ibid: 125). The proponents of this theory argue that an international watercourse situated on the territory of a certain state constitutes part of the domain of that state and for a state that has dominion over its territory, it has unrestricted right in abstracting the water within it. Thus, another state can acquire rights only with the agreement of the first state as matter of comity (ibid: 34). Hence, this doctrine is criticized for its disregard to the modern exigency of interdependency.

In contrast to the theory of absolute territorial sovereignty, the doctrine of absolute territorial integrity advocates the consolidation of "historic or established rights (Godana, 1985: 38; Wassara, 2006: 125). It argues that no riparian state can change the natural flow of a river to the disadvantage of the natural conditions of the territory of a neighboring state. It also renders a veritable power of prohibiting water projects in the upper riparian to the lower riparian states. The partisans of the doctrine assert that a state is liable for any action that alters the natural condition of its own territory to the disadvantage of the natural conditions of the territory of a neighboring state. Therefore, a state is not only forbidden to stop or to divert the natural flow of a river which runs from its own territory to a neighboring state but also to make use of the water of the river in a condition it causes harm. It is the usual argument raised by Egypt in the Nile politics (Tvedt, 1992: 80). Thus, from the aforementioned description we can understand that neither of these theories is complete enough in accommodating the divergent interests of both parties. Thus, to efface their limitation, the doctrine of limited territorial sovereignty emerged. This doctrine restricts state sovereignty and attempts to bind riparian states interest through water sharing using certain criteria such as prior appropriation, arable land size and population (Godana, 1985: 57). But this doctrine has the tendency of advocating prior appropriation and has no clear basis in rating the factors of water allocation. The last legal option that emerged to offset all the above mentioned limitations is the doctrine
of community of property or optimal development of the river basin (ibid: 48). This doctrine argues for a reasonable share or equitable use by all riparian states and integrated development of a river basin disregarding national boundaries (ibid). This doctrine is the most liberal theory for promoting cooperation yet it embodied contestable terms such as optimal, reasonable and equitable allocation. Moreover, the doctrine presupposes the existence of basin wide institutions that aim at efficient use of water in a basin under a common economic and geographic space (Wassara, 2006: 126).

The aforementioned doctrines can be put into categories based on the prospect of cooperation or conflict they loaded within them. Accordingly, the first two doctrines fall into the group of theories that emulate conflict (ibid: 126) and the remaining three into the category of theories promoting cooperation (ibid: 125). Accordingly, downstream riparian states reject the doctrine of absolute sovereignty and upstream states discard the doctrine of absolute territorial integrity (Godana, 1985: 16).

Therefore, in case of contestation, the riparian states opt the best legal theory which best justifies their interest as a bargaining tool for none of the doctrines succeeded in articulating how much of a state sovereignty is going to be compromised. Hence, the researcher argues that the incompatibility of the ‘sovereign rights’ of a state with the set of legal doctrines outlined here is directly linked with artificiality of states imposed on the natural highways created by rivers particularly in Africa. Thus, without addressing the problems of the Westphalia model of state system, the search for sounding doctrine is groundless because the philosophical basis of the legal doctrines themselves rooted in the colonial assumptions that completely outmoded the traditional water arrangements exercised by African society for ages as it is vividly stipulated in the work of Jonathan Lautze and Mark Giordano. Therefore, the imposition of the transplanted legal and institutional systems continues to haunt the post-colonial water relations among riparian states (Berkowitz et al., 2003: 1). This situation again calls for a balanced synthesis of the African traditional water use doctrines and European legal conception.

HISTORICAL DEVELOPMENT AND CONCEPTUAL BASIS OF INTERNATIONAL WATER LAW

The defunctness of the customary legal doctrines has generated initiatives among legal experts for the articulation of formal water laws. But the endeavors of developing formal rules that oversee the basis of utilization and apportionment of international rivers are of post world war one (WWI) phenomena (Aron, 2008: 73). The earliest comprehensive codifying attempt to develop formal rules governing the utilization of International Rivers was made by the International Law Association (ILA) that produced the Helsinki Rules (HRs) of 1966 in the capital of Finland (Wassara, 2006: 126).

The basic principle stipulated in the HRs in reference to the use of shared water was reasonable and equitable water sharing among the riparian states on the basis of certain factors such as topography of the basin, population size, climatic condition, size of the basin, prior utilization, present socio-economic needs, availability of other water resources and the cost of alternative means to satisfy the socioeconomic needs of the riparian states (Aron, 2008: 39). Thus, the most important component of the HRs was the principle of equitable water sharing that outmoded the principle of restricted sovereignty. However, the rules did not contain any clause that impose obligations on the riparian states that could cause appreciable harm by abusing the rights stipulated within it and therefore, it failed to be binding as such. In addition to the aforementioned limitation, the provisions that embody the concepts like “reasonable” and “equitable” sharing of the water resources caused controversy of meaning and interpretation (ibid: 33). Though the HRs failed to be binding, they have served as good input for the subsequent codification.


The rules stipulated in this international resolution for the non-navigational uses of international water courses were initially proposed by the International Law Commission upon the recommendation of the UNGA in 1971. The initial draft articles were presented by the commission to UNGA in 1994 but the General Assembly held the resolution up on the accomplishment of revisions on the first draft. Unlike the HLs, the articles of the International Law Commission incorporate wider issues and duties. The commission includes a provision for environmental issues and the obligation of states in the utilization of an international watercourse. Though the initial draft clearly showed its inclination for “equitable use” to “significant harm”, the final draft has tried to maintain a delicate balance between the two concepts but Aron argues that the convention has subordinated the no harm rule to the rule of equitable utilization (ibid: 84). For such end in the resolution, article five expressed the entitlements of a water course state within its territory to an equitable and reasonable use of an international water course (ibid: 82) and article six provided list of factors such as the population, climate, alternative water
supplies, hydrology, technology in use, development stage and economic needs of the riparian states in order to determine an equitable, reasonable and optimal utilization (UNGA, A/ACN.4/L. 493, 12 July 1994).

The applicability of this law is constrained by lack of international institutions, the slow process of convincing non signatories to be part of the resolution and the conflicting entitlements specified in it such as of equitable utilization (article five) and a claim of not causing significant harm to the prior user (article seven). These conventions are attempts to create supra national legal frameworks within which riparian countries relate to each other as regards to the utilization of shared water resources. However, their efficacy depends on the willingness of riparian states to accept and abide by them.

Therefore, though it is frequently hypothesized that legal and institutional frameworks can serve as sine quon non for regulating inter-riparian cooperation over the utilization of shared water resources yet the existing doctrines and conventions do not break the nostalgic love attached to exclusive national interest. The decentralized nature of the conventions is also another problem that challenges the realization of mutually acceptable legal and institutional frame work. This indicates the hard pressing need to peruse the head starts towards centralized administration of water issues by taking into account social equity, economic efficiency and ecological integrity. This process can prepare the ground for the establishment of a cooperative international system which will serve as a mechanism for efficient utilization of shared water resources.

THE WRANGLING FOR THE ESTABLISHMENT OF HEGMONIC LEGAL FRAMEWORK IN THE NILE BASIN

Anglo-Italian protocol (15 April, 1891)

This was the first colonialist protocol over the Nile issue signed on 15 April, 1891 camouflaged with the delineation of the colonial territorial claim and the respective sphere of influence of Great Britain and Italy in Eastern Africa (Swain, 1997: 676). In this protocol, article three was dedicated to indemnify the undisturbed flow of the Nile by restricting Italian’s endeavor for any dam or irrigation project over the Atbara River (Tesfay, 2001: 71; Godana, 1985: 104; Swain, 1997: 676) whose upper reaches fell within the newly acquired Italian possession of Eritrea (Owiro, 2004: 6). The article assures that the government of Italy undertakes hardly any irrigation or other works on the Atbara which might sensibly modify its flow into the Nile (Elías, 2009: 37). Ethiopia, a source country of the Atbara River, was not a co-signatory of this protocol. This indicates the initial practical move of the British to protect the Egyptian interests at any cost by guising it in territorial protocol concluded with another colonial power.

Anglo-Ethiopian Treaty (15 May, 1902)

John Harrington’s diplomatic emissary of London was dispatched to Addis Ababa to negotiate a treaty of boundary delimitation for establishing the border between Ethiopia and the Anglo-Egyptian Sudan in 1902 (Swain, 1997: 676; Mulugeta, 1987: 19). Thus, the agreement was signed on 15 May, 1902 in Addis Ababa between John Harrington of Great Britain representing the Anglo-Egyptian Sudan and Emperor Menilik II of Ethiopia (Owiro, 2004: 6). The Amharic version is presented thus:

The English translation of the Amharic agreement is presented thus:

His Majesty King of Kings of Ethiopia has entered into the commitment not to give permission to any work that fully arrests the flow of Blue Nile, Lake Tana and Sobat which empty to White Nile without prior agreement with the British Government.

As in the Anglo-Italian protocol, the same article but in English version was designed to prohibit Ethiopia or anyone else not to run any water project which arrests the flow of the Blue Nile, Lake Tana or Sobat without obtaining consent from Britain and Sudan (Godana, 1985: 104; Elías, 2009: 75). Ethiopia has signed the agreement with the intention of securing the British support for averting the post Adwa Italian renewed colonial interest (Mulugeta, 1987: 19). The English version of this article reads as:

His Majesty the Emperor Menilik II, King of Kings of Ethiopia, engages himself towards the government of His Britannic Majesty not to construct or allow to be constructed any work across the Blue Nile, Lake Tana or the Sobat, which would arrest the flow of their waters except in agreement with His Britannic Majesty’s Government and the Government of Sudan (Ullendorff, 1967: 646; Daniel, 1999: 146; Godana, 1985: 104).

This accord has become one of the most contested agreements over the use of the Nile waters primarily owing to the substantial differences of the Amharic and English version. The agreement in article three contains important discrepancies between the two versions. The English version states that Emperor Menelik, “engages himself . . . not to construct or allow to be constructed, any work across the Blue Nile, Lake Tana or the Sobat (Ullendorff, 1967: 646). However, the Amharic version
renders high tone on the impossibility of arresting the flow of the waters without the consent of the government of Britain (ibid: 642).

Even the English version entitles Ethiopia to run water projects on the waters of Blue Nile, *Lake Tana or the Sobat* by concluding an agreement with Britain only as some sources noted or both Britain and Sudan. A more significant discrepancy is that the English version required Menelik to obtain the agreement of both the British and Sudanese government while the Amharic version refers to the British government only (ibid). The incongruity of the two versions has no morbid effect on Ethiopia as such for it does not ban the country from constructing dams across the Nile waters with agreement.

The core intension of this agreement was to limit Ethiopia’s right of concluding another water agreement with possible colonial contender. It has strong tone of fear of interference of other colonial powers but it underestimates the country’s capacity to build water projects across the Sobat, the Blue Nile, and Lake Tana by itself. The phrase ‘not to allow any work that fully arrests the flow of Blue Nile, *Lake Tana and Sobat*. . . without prior agreement with the British’ confirms the underestimation and fear of other powers interference. However, it was never ratified either by the British parliament or by the Ethiopian Crown Council so as to be a binding treaty (Daniel, 1999: 146).

Therefore, neither version can preclude Ethiopia from building any project with prior agreement (Gebre, 2003: 96). Besides, all tributaries to the Sobat and the Blue Nile are not subjected to any restriction. So, Ethiopia could construct dams across the Akobo and Baro, tributaries of Sobat and dams like the Grand Ethiopian Renaissance dam could be constructed across the Blue Nile without completely arresting the flow. Moreover, Egypt has no direct place in the 1902 agreement that would allow her to justifiably claim of having agreement with Ethiopia and a veto power of depriving Ethiopia from running water projects over Blue Nile, *Lake Tana and Sobat*. Thus, though Egypt and Sudan sustain its validity, Ethiopia has repealed it due to the aforementioned reasons (Omer, 1984: 5).

**The tripartite treaty**

Britain, France, and Italy have been hovering around Ethiopia for several years (Bahru, 2002: 85). On 13 December 1906, they signed in London a treaty targeting Ethiopia for colonial scheme (Bahru, 2002: 85; Swain, 1997: 676). The objective of such plan was to set a legal frame work and steps for the regulation of their sphere of influence following the anticipated succession problem as of Menelik II’s stroke (Bahru, 2002: 114 and 151). In article four[a] of this agreement, the three colonial powers agreed to act together to safeguard the interests of Great Britain and Egypt in the Nile Basin in regards to the regulation of the Nile river and its tributaries. The detail of the article reads as follow:

. . . parties would safeguard the interests of the United Kingdom and Egypt in the Nile basin, especially as regards the regulation of the water of that river and its tributaries. . . without prejudice to Italian interests (Owiro, 2004: 7).

**The Anglo-Italian secret agreement**

Another manifestation of the pro Egypt policy direction of Britain regarding the waters of the Nile was seen in the Anglo-Italian exchange of letters which led to the Secret Agreement of 1925 (Swain, 1997: 146; Bahru, 2002: 85; Owiro, 2004: 7; Godana, 1985: 105). Cognizant of Great Britain’s interest in Lake Tana, Italy made concessions to Great Britain and offered promise to help it for obtaining a concession from Ethiopia to construct a dam on Lake Tana (Daniel, 1999: 146). Britain also sought Italy’s support for its plan to construct a barrage at *Lake Tana*, together with the right to construct a motor road for the passage of stores and personnel (ibid). As a quid pro quo, Britain was to support Italy in its attempt to obtain from Ethiopia a concession to construct and run a railway from the frontier of Eritrea to the frontier of Italian Somalliland to project its economic influence (ibid: 147). The initiative was made by Britain as it is indicated here in:

I have the honor under His Majesty’s principal secretary of state for foreign affairs to request your Excellency’s support and assistance at Addis Ababa with the Abyssinian government in order to obtain from them a concession to His Majesty’s government to construct a barrage at *lake Tana* together with the right to construct and maintain a motor road for the passage of stores, personnel . . . from the frontier of Sudan to the barrage (Godana, 1985: 105).

As a result of the Anglo-Italian discussions, Great Britain accepted Italy’s offer and subsequent negotiations produced an agreement in the form of an exchange of notes. These notes included the following statement: "[Italy] recognizing the prior hydraulic rights of Egypt and the Sudan will not engage to construct on the headwaters of the Blue Nile . . . the White Nile . . . their tributaries and affluent, any work which might sensibly modify their flow into the main rivers (ibid). Ethiopia denounced the secret deal and brought the case before the League of Nations. Both the government of Britain and Italy gave justifications for their actions denying claims of menace up on Ethiopia's sovereignty. The Ethiopian plea to the League of Nations reads as:

The British government has already entered into negotiations with the Ethiopian government in regard to
its proposal, and we had imagined... whether that proposal was carried into effect or not... we would never have suspected that government regarding our Lake (Tilahun, 1979: 90).

**The 1929 Anglo-Egyptian Nile water agreement**

On 7 May 1929, an exchange of notes took place between the Egyptian Prime Minister (Mohammed Mahmoud Pasha) and the British High Commissioner (Lord Lloyd) who was acting on behalf of Sudan. This exchange became what is known as the 1929 Nile Water Agreement (Omer, 1984: 6). The agreement stipulated "no irrigation or power works are to be constructed or taken on the Nile or its tributaries, or on the lakes from which it flows in so far as all these are in Sudan or in countries under British administration, and entail prejudice to the interests of Egypt (Daniel, 1999: 48). By virtue of this agreement, Egypt recognized Sudan's right to water adequate enough for its own development, as long as Egypt's "natural and historic rights" were respected (Swain, 1997: 677). It also specifies a strict system of information management and scheduled flow of specific quantities of water to Egypt (Omer, 1984: 6).

According to this agreement, Egypt's share has been decided to be 48 billion cubic meters (bcm) in contrast to 4 bcm for Sudan and as well as the right to inspect and veto upstream water projects that would affect the volume and perennial flow of the river. Thus, this agreement was one of the basic tools used by Egypt so as to attain and project its hegemonic influence. However, it seems that fearing organized counter claims, 32 bcm had remained un-allotted because the treaty was concluded without the participation of the remaining riparian states (Swain, 1997: 677). Thus, this agreement was made mainly to secure the Nile water for Egypt by limiting the rights of Sudan and by rejecting the right of the remaining riparian states.

The agreement virtually ignored the right of the other upper riparian states and its inappropriateness is evident as it favors Egypt over the remaining riparian states (Collins, 1990: 157). Some scholars attribute the case with the weakness and indifference of the states themselves whereas a few others link it with the colonial domination of the area by Great Britain. However, either of them can justify the cause for the exclusion of Ethiopia, a non colonial state that had been regularly requesting engagement and as well renegotiation. In fact, the agreement could not have legal effect on Ethiopia because it was never a British colony.

Moreover, in the second Ethio-Italy war, while Italy allowed to transport its soldiers via Suez Canal, it was closed for Ethiopia to import weapons for legitimate self defense (Daniel, 1999:147). Thus, following the restoration of the monarchical rule of Emperor Haileselassie in 1941, Ethiopia relinquished both the 1902 and 1929 treaties on account of British recognition of the Italian "conquest" of Ethiopia (Swain, 1997: 677). Other riparian countries have also questioned the validity of the 1929 agreement and eventually repudiated it after attaining independence. Generally, this exchange of note only confines itself to the scramble of the river for single purpose (Omer, 1984: 6).

**The 1959 Nile waters agreement for full utilization and control**

This is the first agreement of the independent African states in regard to international water sharing. In the eve of its independence, Sudan requested to re-negotiate the 1929 agreement (Swain, 1997: 677) which entitled Egypt to enjoy vast right in the utilization of the Nile waters and quest for national sovereignty (ibid). Accordingly, the Anglo- Egyptian agreement of 1953 gave the Sudanese the right of self determination and they vote for independence rejecting unity with Egypt.

Following the inauguration of the republic of Sudan in 1956, its prime minister Ismail-al-Azhari immediately asked for the revision of the 1929 agreement (ibid: 679). This had coincided with the aspiration of Gamal Abdel Nasser for the construction of a massive dam at Aswan (ibid).

Disregarding the British Century Storage Scheme which called for the construction of upstream and small scale dams, in 1950, Egypt planned the Aswan High Dam Project to store the entire annual flow of the Nile waters. In 1952, they took unilateral action in proposing the Aswan High Dam. Their basic drive for such move was to secure water that could be in use for bargaining position in the hydro political wrangling in the post colonial claims (Girma, 2000: 2).

Egypt realized the importance of attaining guarantee from Sudan and international recognition to raise financial support before executing this project. In addition, fearing the consolidated challenges emanating from the independent Sudan, Egypt made aggressive diplomatic move targeting at the sharing of the Nile water while it was under the colonial yoke.

The bilateral negotiation between Egypt and Sudan which was primarily centered on the construction of a huge reservoir of Aswan High Dam with a storage capacity of 156 bcm per year has elapsed through three stages. In the first round of the negotiation which was held between September and December 1954, Egypt demanded for prioritizing existing needs and need of storage at Aswan with respective share of 62 bcm and 8 bcm for Egypt and Sudan. In response to the Sudan's objection of the construction of the Aswan High Dam, Egypt withheld its previous commitment of assisting Sudanese government to build a reservoir at Roseires (Swain, 1997: 679). Ultimately, Sudan declared unilaterally its rejection of the 1929 agreement (ibid). Due to these differences, negotiations interrupted inconclusively. The years from 1956-1958 marked the
apogee of the dispute (ibid). It is due to this deadlock that Egyptian army unit approached Sudan as a show off, disguising it with border clash (ibid). In spite of such confrontations, Sudan has constructed four dams and this has resulted in the development of about 18,000 km² of irrigated land that made Sudan the second most extensive user of the Nile after Egypt (Tesfay, 2001). The military show off redirected towards Egyptian sponsored military coup of 1958 under the leadership of General Ibrahim Abboud (Swain, 1997: 679) which facilitated the ground for the 1959 agreement on the full utilization of the waters of the Nile (ICE Case Studies, « Nile River Dispute » available online at:-american.edu/ted/ice/bluenile.htm:8-10 accessed on 18 April 2012). The 1959 Nile water agreement signed between Egypt and Sudan following the military coup empowered the pro Egypt leadership of General Ibrahim Abboud (http://www trasboundarywaters.orst.edu/projects/casestudies/nile_agreement.html:8 accessed on 18 April 2012). This coup was designed to ward off the post independence Sudanese renewed claim over the Nile and to prepare a fertile ground for the bilateral agreement of 1959. The agreement was designed to allocate the river exclusively between Egypt and Sudan (Tafesse, 2000) with the total exclusion of other Nile riparian states. This agreement settled the controversy on the quantity of average annual Nile flow and agreed to be about 84 bcm measured at Aswan High Dam. The agreement allowed the entire average annual flow of the Nile to be shared between Sudan and Egypt each sharing 18.5 and 55.5 bcm, respectively (Omer, 1984: 147-49).

Annual water loss due to evaporation and other factors was agreed to be about 10 bcm. They also agreed to deduct this loss from the Nile yield before shares are assigned. Furthermore, they agreed that the cost and benefit to be divided equally between them when Sudan in agreement with Egypt, construct projects that would enhance the Nile flow by preventing evaporation losses in the Sudd swamps of the White Nile.

According to this agreement, if claims come from the remaining riparian countries over the Nile water resource, both Sudan and Egypt agreed to handle the claims together. If the claim prevails and decision reached to re-share the Nile water with another riparian state, they agreed to count the allocated amount from both shares equally measured at Aswan. The insertion of this clause in the agreement shows that both states were aware of the misappropriation of the rights of the remaining riparian states which were inactive by the time.

The agreement granted Egypt the right to construct the Aswan High Dam that can store the entire annual Nile River flow of a year. It approved the Sudan to construct the Roseries Dam on the Blue Nile and, to develop other irrigation and hydroelectric power generation until it fully utilizes its Nile share. Moreover, a Permanent Joint Technical Commission was also designed to ensure the technical cooperation between them. Thus, the agreement pioneered framing of the concept of institutionalization of water sharing in the Nile Basin in spite of its exclusiveness. The agreement also endorsed its precursor and completely ignored the rights of the remaining countries in the basin (Figure 1). Though Ethiopia contributes 85% of the total Nile flow, the agreement has entitled it for nothing (Kifyalewu, 1999: 150).

For this reason, the Ethiopian Government declared unilaterally to develop water resources within its territorial jurisdiction as it is indicated here under in the statement made by Emperor Haileselassse on 2 November 1957:

We have already explained that plans are under construction to utilize our rivers as an essential step in the development of agriculture and industry, it is of paramount importance to Ethiopia, a problem of the first order that the waters of the Nile be made to serve the life and needs of our people now living and those who will follow us in centuries to come... it is Ethiopian's sacred duty to develop the great watershed which she possesses in the interests of her own rapidly expanding population and economy. To fulfill this task, we have arranged for the problem to be studied in all its aspects by experts in the field (Ethiopian Observer, 1958: 93).

However, in order to cool down the urge of Ethiopian government towards the exploitation of the Nile waters, Egypt has deflected the mindset of the Ethiopian populace towards the attainment of autocephalous status of the church by indigenizing its seat in the same year.

Though the two states, Sudan and Egypt, were parties to the 1959 agreement, mutual tension has occurred because many Sudanese felt dissatisfied with the sharing process of the Nile water (Wassara, 2006: 140). But, Egypt consistently elucidated about the gains of the Sudan in 1959 agreement than its predecessor noting the rise of Sudan's share by 45%.

The Ethio-Sudanese agreement over the Nile

The Ethio-Sudanese relation was characterized by many years of cold diplomacy. However, in 1991, Ethiopia and Sudan issued a joint peace and friendship declaration in Khartoum. In this declaration, Ethiopia and Sudan agreed on the equitable entitlement to the uses of the Nile waters without causing appreciable harm to one another. Both sides agreed to work together to establish a Nile Basin Organization.

Egypt did not hide her worry about any form of understanding between Sudan and Ethiopia and hence, it erupts as they signed agreements for cooperative exploitation of the Nile (ibid). Though similar agreement has been signed between Ethiopia and Egypt, suspicion continued to havoc Egypt (Wassara, 2006: 140). In particular, the unsuccessful operation of Addis on the life of Mubarak in 1995 brought the three countries into a tense exchange of threats (Wassara, 2006: 140).
The Ethio-Egyptian framework agreement

On several occasions, Ethiopia attempted to induce Egypt to cooperate in sharing the water resources of the Nile equitably but Egypt was constantly against collaborative efforts. Following the withdrawal of Britain in the post WWII periods from the horn of Africa, Egypt claimed Eritrea to be under the Trusteeship of the Arab
nations. When Egypt’s outright claim to Eritrea failed, Gamal Abdel Nasser launched a Scheme for the unity of the Nile Valley that was aimed at bringing Ethiopia, Eritrea, the Sudan, Somaliland, Somalia, Uganda and Kenya under Egypt’s control but it remained in vain. Aftermath of the revolution with some limited agreement with the newly independent Sudan, Egypt went ahead with the design and the actual construction of the Aswan high dam using the assistance from both the westerners and USSR. Ethiopia, as a counter reaction went ahead dealing with the United States Engineering firm, Balton Hennesey, to conduct a comprehensive first survey over the Blue Nile.

Hence, the first preliminary survey for possible water projects in the Blue Nile and Sobat basin worked out from 1958-1964 with the assistance of US Bureau of Reclamation which included studies consisting of stream flow, soils, hydro-electric power potential, land use, marketing, communications, dams and irrigation potentials. Generally, in the history of the two countries, it has been observed that the Egyptians aim to keep Ethiopia under constant pressure, so that the latter would not threaten the continued flow of the Nile waters. In the 1970s, Egyptian President Sadat threatened war over Ethiopia against the construction of dam over Lake Tanna on Blue Nile and Ethiopian Mengistu Hailemian exchanged threats over the apportionment of Nile waters.

However, after the down fall of the Derge regime, the new government signed the framework for general cooperation between Ethiopia and Egypt on 1 July 1993, in Cairo. As it is clearly stipulated in this agreement, the two countries come into consensus to respect the 1997 UN Convention. Moreover, cooperative efforts to enhance the volume of water via conservation, periodic consultation were dealt with. In short, this agreement was pillared on the necessity of forging regional cooperation to issue regional solution for the problems in regard to shared resources. Thus, 1993 agreement could be considered as a sign of positive rapprochement which opened the way for optimistic dialogue to efface the fogy cloud hiding from view the diplomatic horizon between them since 1960s. Though it has symbolic value, the agreement was neither binding nor has it settled all the disputes between the two countries though in the agreement, five of the eight articles (4, 5, 6, 7, and 8) directly addressed the Nile river issues.

THE EFFICACY OF LEGAL REGIMES OF THE NILE RIVER AND THE INTERNATIONAL WATER LAW IN THE NILE BASIN

In Africa, an interested observer would have been disappointed to note on one hand the greater number of international drainage basins and their potential for socio-economic development of the states sharing them, and on the other hand the dearth of effort at international regulation of these immense resources especially on the basis of basin wise approach (Godana, 1985: 10). The colonial period came to host a gradual development of formal treaties and regulations as well as of informal working arrangements and administrative measures that constituted the legal regime of the Nile drainage system (Owiro, 2004: 6). Accordingly, in countries which were under colonial conquest, riparian agreements are often inherited from the colonial past induced by external institutions. Thus, in Africa, colonial powers shaped the history of trans-boundary water law. Moreover, it was the advent of colonialism that imposed the nation-state and the strict observance of national boundaries on the political map of the continent, and therefore, as well as the water regimes that emerged as a spinoff. From the vantage point of the twenty first century, it is hard to imagine how Europeans colonized the mind and produced intellectual dependency using their own mode of thinking and knowledge system in formulating legal doctrines and social organizations in the HOA.

Thus, out of their cartographic exercise, they introduce the concept of nation state as well as codified laws that govern interstate relations. This indicates that the substance and enunciation of treaties over shared water resources were also rooted in the colonial fabrics. Even in the post colonial period, due to the absence of absolute agency, the ghosts of colonialism continues to haunt the march back to the pre colonial past whereby the society moves without strict confinement as the rivers do. The most vivid instance for such a case is a wandering tribe whose authority structure is completely disassociated from a fixed loyalty to a particular piece of land as we witness it among wondering Somali pastoralist and in the ‘no man’s land’ of refugees (Abdalla, 1995: 117-122).

The artificiality of the states can be further consolidated with the transnational character of rivers that serve for the rise and flourishment of pre-colonial states especially in Africa. A case in point is ancient Egypt which is usually referred to as the gift of the Nile since the time of Herodotus. Accordingly, there was time when there was no Egypt but Nile. Contrary to the colonial arbitrary dismemberment process which gave little or no regard for the pre-existing cultural, linguistic, historical, ethnic identities and geographical consideration in setting the borders of their respective spheres of influence (Ottaway, 1982: 20; Othman, 1974: 203), nation states were prescribed to the peoples of Africa as a manifestation of modernity as their colonizing masters. The hydrological nature of shared rivers does not permit the geographic or the political boundaries of sovereign nation modeled after the Westphalia State (Girma, 2000: 8). Hence, trans-boundary water treaties emerged in the colonial geography that determined the specific internationalization of Africa’s Rivers contrary to the installation of nation state (Jonathan and Mark, 2006: 89).

Moreover, the application of the indigenous
agreements to govern Africa's trans-boundary waters has also coincided with early stage of the colonization of the continent.

As it is noted by Godana, the establishment of colonial rule over most of the Nile basin in the last decades of the 19th century posed a challenge for the process of regime formation and the institutionalization and administration of the Nile River, and called for the regulation of water rights through treaty instruments.

Thus, during the colonial period, Britain, the colonial master of the region, effectively controlled the Nile through its military might and basically dictated the state of affairs in regard to the Nile Basin Regimes. In short, from 1884 onwards, the utilization of the Nile water came under the dominion of the British “protectorate.” All upper riparian states with the exception of Ethiopia and Congo were part of this protectorate. It is important to note that when the legal regime in the Nile was enforced during the colonial period, the British made a series of concessions favoring Egypt at the expense of other riparian states. To this effect, the British concluded various agreements on behalf of the colonies under its control to secure the unfettered flow of water to Egypt. Thus, most of the Nile water agreements concluded during and after the colonial era first under the auspices of Britain and latter via Egypt took cognizance of mainly Egyptian concern for ensuring the River’s perpetual flow (Swain, 1997: 676).

Ultimately, the whole process of regime formation ended with the unilateral appropriation by Egypt. The pro-Egyptian water policy of Britain was primarily motivated with its desire to protect the security of the communication line across the Suez Canal that connects its colonial empire by keeping the Egyptian government pliant to them. Moreover, securing the production and export of cotton for its industries in England was pivotal in making them strong advocates of Egyptian dominance over the Nile matters. It was for this rationale that Britain concluded five basic agreements between 1891 and 1925 with other colonial powers and African states in regard to the utilization of Nile by favoring Egypt (Owiro, 2004: 6). In all these treaties, the British had the common objective of securing recognition of the principle that no upper-basin state had the right to interfere with the flow of the Nile, in particular to the detriment of Egyptian interest. Envisioning legal manipulation through trickery treaties in the long run, these agreements were concluded but were mostly camouflaged in some other legal imperatives such as territorial delimitation as they are discussed here above.

Generally, this research work indicates that in spite of the fact that the Nile basin hosted immense treaties that were concluded during the colonial era, these agreements were challenged primarily on the ground of the doctrine of clean state and cardinal principle of res inter alios acta which states that an agreement made between two parties cannot have a binding effect on a third party without its consent. In addition to these principles, the absence of inclusiveness and problems linked with transferred sovereignty of new sovereigns that appeared in the political map of the content through secession in the post colonial period has served as a potent framework to challenge the colonial Nile Regimes (Girma, 2000: 2; Godana, 1985: 15).

CONCLUSIONS

The co-basin states of the Nile failed to establish a regime that could effectuate optimum and inclusive utilization of the Nile water. Colonialism made the riparian states easy prey of the colonial impositions. In the wake of decolonization, however, these states faced critical challenges and they called for the institutionalization of the administration of the Nile water in spite of the indifference of Egypt and Sudan. The upstream countries, including Kenya, Uganda and Tanzania, have expressed their concern over the colonial agreements, arguing that the agreements have been designed to give Egypt unfair control over the use of the river’s water. But Egypt has declared access to the Nile water a national security agenda over which it is ready to go to war. Thus, with the end of British colonial rule in the area, Egypt claimed the whole of the Nile waters for its exclusive benefit by maintaining the unfair Nile water abstraction intact. Hence, in the Nile basin, there is no single legal agreement which acknowledges the rights of all co-riparian states to equitable water or benefit sharing. This indicates that the 1997 International Water Convention has not yet got recognition even among the protagonists of the Nile politics. Burundi had opposed the convention since its inception. Ethiopia, Tanzania, Egypt, and Rwanda were among the twenty seven abstentions. Only Kenya and Sudan renders their support since its inception. In fact, this divided reaction to the convention is partly triggered by the internal inconsistency of the prerogatives stipulated in the convention itself as it is indicated in articles three and five. Apart from all these factors, the nature of the state system which is colonial construct and territory centric is the single main cause that hinders the institutionalization of the use of the Nile water along with intellectual dependency on the transplanted legal conceptions.

REFERENCES


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